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

1. Somi Ranasinghe
2. Karunasiri Ranasinghe
3. Nihal Dissanayake alias Hinnimahattaya

Accused-Appellants

Vs

CA 186-187/2007
HC Matara 119/2003

The Attorney General.

Respondent

Before : Sisira J de Abrew J &
PWDC Jayatilake J

Counsel : ASM Perera PC for the 1st accused appellant.
Indika Mallawaarchchi for the 2nd accused appellant
Anil Silva PC for the 3rd accused appellant
Yasantha Kodagoda DSG for the Respondent.

Argued on : 4th,5th and 6th of November 2013
Decided on : 11.12.2013

Sisira J de Abrew J.

The three accused appellants in this case were convicted of the murder of a man named Upalie Nishantha and were sentenced to death. Being aggrieved by the said convictions and the sentences they have appealed to this court. Facts of this case may be briefly summarized as follows.

Piyadasa the father of the deceased person was running a boutique in Denagama in the police area in Hakmana. His house was situated behind the boutique. The distance between the boutique and the house was about 4 to 5 feet. On 20.3.98 around 5.00 p.m. the 1st and the 2nd accused appellant and the wife of the 2nd accused appellant came to the boutique of Piyadasa and scolded Piyadasa. Scolding went on for about five minutes. The 1st accused appellant during the scolding addressed Piyadasa in the following language: "I will kill you and your son." At this time the 2nd accused appellant was having a knife in his trouser pocket. Around 5.30 p.m. to 6.00 p.m. Upalie Nishantha the son of Piyadasa came and stopped his tractor with a load of bricks and went inside the house. But Piyadasa did not tell him what happened about 30 minutes ago. At this time 1st, 2nd and 3rd accused appellants came and entered the garden of Piyadasa and thereafter went near the door of the house. The 3rd accused appellant then addressed Upalie Nishantha in the following language. "Malli, Malli (brother, brother) come here." Just then Piyadasa heard cries of his son. Then Piyadasa saw the 1st and the 2nd accused appellants stabbing his son who was being pressed against the earth mound. Thereafter his son came running towards the front area of the house. Then the 1st accused appellant stabbed him again. The 1st accused appellant lifted the injured person (Upalie Nishantha) with his knife which was still stuck in the body of the injured person. When Upalie Nishantha was running towards the front area of the house, the 3rd accused appellant attacked him with a piece of a club and it struck his leg. As a result of this attack, he fell on the ground. Then the 1st and the 2nd accused appellants stabbed him again. At this time Piyadasa who was watching the incident, through the rear area of the boutique, came to the front area of the house. At the time of the incident Piyadasa's wife and the daughter were not at home as they had gone to a nearby communicating centre to take a telephone call. Piyadasa who was watching the entire incident took his tractor and informed his

wife and the daughter about the incident. On his way back, car driven by the 1st accused appellant came from the opposite direction and the 1st accused appellant raising his hand showed his knife to him. He then stopped his tractor on the road and in fear ran away. He says he ran away because his son had already been stabbed. He took his son to Walasmulla hospital and thereafter lodged a complaint at Hakmana Police station. This is the summary of Piyadasa's evidence.

Learned President's Counsel for the 1st accused appellant drawing our attention to the contradiction marked in evidence contended that Piyadasa was not a reliable witness. I now advert to this contention. Piyadasa's evidence was that after his son went inside the house, 1st,2nd and 3rd accused appellants went to the front area of the house and his son did not engage in any exchange of words with the accused appellants. But in his statement made to the police he had stated the following words. "At this time Somi Ranasinge from his house was scolding. My son who was in front of the boutique asked Ranasinghe reasons for the scolding." He denied this statement. This statement was marked as VI.

In his statement made to the police he had stated the following words. "Later my son said you have been scolding us for the last ten years. You have broken the shoulder bone of my father". This statement was marked as V2 since he denied it. In his statement made to the police he made the following words. "My son had a piece of club in his hand. At this time Hinmahathaya alias Nihal came and told to throw away the piece of club." This statement was marked as V3 since he denied it. Contradiction marked V4 is similar to V2.

Piyadasa's evidence was that 3rd accused appellant requested his son to come out. But this had not been stated in his evidence given at the inquest. This was marked as an omission. His evidence was that he heard the cries of his son. But this had not been stated in his statement made to the police and in his evidence at the inquest. This was marked as an omission. In his statement made to the police

he had stated the following words. "I saw them scolding the son near the new house." This was marked as V6 as he denied it. V7 was to the effect that his son threw the piece of a club. In his evidence at the inquest he had stated that he saw the 1st accused appellant, the 2nd accused appellant, Patimahattaya children of the sister of Somi Ranasinghe and the 2nd accused appellant's wife going towards the house. This was marked as V8 since he denied it. V9 and V10 were to the effect that 1st accused appellant had dragged the deceased person to the rear side of the house. This was marked as a contradiction since he denied it.

Piyadasa in his evidence stated that after the stabbing he saw the 2nd accused appellant leaving the place breaking the fence. In his statement made to the police he had stated the following words. "When I was coming to the road I saw Somi Ranasinghe, Karunasiri Ranasinghe and Hinnimahattaya leaving the place." This statement was marked as V11 since he denied it. V12 was to the effect that the knife being thrown after the stabbing.

I have considered the contradiction and omission marked at the trial. In my view they do not shake the credibility of the witnesses. It is the duty of the court to reject contradictions if they do not shake the credibility of the witnesses. This view is supported by the judicial decision in State of Uttar Predesh Vs MK Anthony [1984] SCJ 236. Indian Supreme Court in that case held thus: "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 or 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 tender 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 or there from the 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. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

When witnesses give evidence long after the incident of the case, contradictions do occur as they forget or tempt to forget the events that they saw or heard. This view is supported by the judicial decision in Wickramasuriya Vs Dedoleena and others [1986] 2 SLR 95 wherein His Lordship Justice Jayasuriya held thus: "This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are led long after the events spoken to by witnesses. A judge must expect such contradictions to exist in the testimony. The issue is whether the contradictions go to the root of the case or relate to the core of a party's case."

At one stage Piyadasa said that he saw the last stabbing. Learned PC for the 1st accused appellant harping on this evidence, tried to contend that he had not seen the entire incident. But Piyadasa at page 130 of the brief clearly told that he saw the other stabbing too.

Soon after the incident Piyadasa went to Hakmana Police station and lodged a complaint. IP Kapila Senevirathne OIC Hakmana says that he received

the complaint of Piyadasa around 8.00 p.m. on the same day. Thus his evidence satisfies the test of promptness. What is the importance of making a prompt complaint? Then there is no time for additional matters to creep into the mind of the witness. As Piyadasa made a prompt statement to the police there was no time for him to add additional matters to his statement. Soon after the incident he told his wife and daughter that the 1st and 2nd accused appellants finished his son. In court Piyadasa demonstrated the manner in which the 1st accused appellant stabbed and raised his son with the knife which was stuck in the body of his son. Piyadasa says that the 3rd accused appellant threw a piece of a club at his son and it struck his son's leg. When I consider all these matters, I am unable to agree with the contention of learned President's Counsel that Piyadasa had not seen the incident.

According to IP Kapila Seneviratne there were blood stains in the compound of the house of Piyadasa. He also found a club in this compound. According to the doctor the deceased person had sustained 20 stab injuries, 8cut injuries and 7 contusions. The learned trial Judge after observing the demeanour and deportment of Piyadasa came to the conclusion that he was a truthful witness.

Court of Appeal will not, unless it is manifestly wrong, lightly disturb the findings in a trial court with regard to the acceptance or rejection of a testimony of a witness when the trial judge had come to such conclusion after observing the demeanour and deportment of the witness. This is because that the trial Judge has a priceless advantage to observe the demeanour and deportment of the witness which the Court of Appeal does not have. This view is supported by the following judicial decisions. In Alwis Vs Piyasena Fernando [1993] 1 SLR 119 His Lordship GPS de Silva CJ held thus: "It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In Fraad Vs Brown & Co Ltd 20 NLR 282 Privy Council held thus: "It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is

overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance."

Learned President's Counsel for the 3rd accused appellant contended that the 3rd accused appellant did not share common murderous intention with the 1st and the 2nd accused appellants. He contended that the 3rd accused was only a mediator. Following items of evidence have been led against the 3rd accused appellant by the prosecution.

1. The 3rd accused appellant came in front of the boutique of Piyadasa and went towards his house.
2. The 3rd accused appellant addressed the deceased person in the following language: "Malli, Malli (Brother, brother) come here."
3. When the deceased person was running towards the front area of the house, the 3rd accused appellant threw a piece of a club which struck the leg of the deceased person
4. As a result of the said act the deceased person fell on the ground. Even after this act the 1st and the 2nd accused appellants stabbed the deceased person and the 3rd accused appellant continued to be present with them.

In favour of him following items should be considered.

1. He is a relation of the deceased person. It has to be noted here that the deceased person was related to the 1st and the 2nd accused appellants and the 3rd accused appellant is also related to the 1st and the 2nd accused appellants.
2. There was no enmity between the deceased person and the 3rd accused appellant.

3. There was an omission in Piyadasa's evidence with regard to the 3rd accused appellant calling the deceased person (Malli, Malli come here).
4. V3- that the 3rd accused appellant requested the deceased person to throw the club.
5. The 3rd accused appellant did not bring a club. He picked up a club from the compound.

I must mention here that common intention can be formed on the spur of the moment. This view is supported by the judicial decision in Queen Vs Mahatun 61 NLR 540 wherein His Lordship Basnayake CJ held thus: "To establish the existence of a common intention it is not essential to prove that a criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment".

In Somaratne Vs The Attorney General [1986] 1 SLR 217 at 221 Moonemalle J held thus: "Where the evidence before the trial Judge was circumstantial, then it was the duty to pay heed to the principle that the inference of common intention should not be reached unless it is a necessary inference an only inference an inference from which there is no escape."

It is necessary to consider whether the 3rd accused appellant shared common murderous intention with the 1st and the 2nd accused appellants. When I consider the evidence led at the trial, I hold that the 3rd accused appellant shared common murderous intention with the 1st and the 2nd accused appellants. I therefore reject the contention of learned President's Counsel that the 3rd accused did not share common murderous intention with 1st and the 2nd accused appellants.

The appellants have pleaded defence of alibi. The learned trial Judge had rejected it. When I consider the evidence led at the trial, I hold that the above conclusion reached by the learned trial Judge is correct.

I have considered the evidence led at the trial and I see no reason to interfere with the conclusion reached by the learned trial Judge. For the above reasons I affirm the conviction and the death sentence and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal.

PWDC Jayatilake J

I agree.

Judge of the Court of Appeal.