

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

1. S. A. R. S. Dissanayake alias Gaminige Kolla
 2. Baduwala Wahampurage Podinona
 3. Kalanchidewage Suresh Nandana
- Presently at Remand Prison, Welikada.**

ACCUSED-APPELLANT

C.A 95/2011
H.C. Avissawella 58/2006

Vs.

Ho. Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
N. S. Rajapaksa J.

COUNSEL: Shanaka Ranasinghe P.C. with Dilum Jayasekera
For the 1st & 2nd Accused-Appellants

Anil Silva P.C. with C. Soyza for the 3rd Accused-Appellant

Dappula de Livera A.S.G., for the Complainant-Respondent

ARGUED ON: 07.05.2014

DECIDED ON: 19.06.2014

GOONERATNE J.

The three Accused-Appellants were indicted in the High Court of Avissawella on 3 counts. The 1st count is on attempted murder of one Kusumawathie and the 2nd and 3rd counts are charge of murder of Hettiarachchige Susantha and Hettiarachchige Swarna on 26.10.2003. Accused party and the deceased party are close relatives, living in houses in close proximity to each other, which stands on undivided property. The incident appears to have occurred due to a long standing land dispute. Case of the prosecution is based on circumstantial evidence as regards the murder charge and direct evidence for the attempted murder charge. In brief the case of the prosecution is as follows.

All three Accused had come towards witness No. 1 Kusumawathie when she was coming to her house. The 1st Accused attacked her with a sword

and the other two Accused attacked her when she fell on the ground with the attack given to her with the sword by the 1st Accused. It is in evidence that when the injured witness No. 1 first saw all three Accused, the distance was about 10 feet. However the prosecution version was that all three Accused-appellants attacked her and she had been dragged to a nearby ella. Having taken her to the nearby ella, within about 5 minutes she heard her daughter the deceased shouting and calling for help to save her 'මාම බඩට ගන්න' It is the version of the prosecution that witness No. 1 was unconscious from the time she was dragged to the 'ella' by the Accused party and had been at that spot for about an hour and it was raining heavily. When she regained conscious the injured attempted to see about the other deceased her son and as she could not walk she had crawled and she came near the house of another witness 'Jayasinghe'. It is only at that point witness No. 1 saw the body of her son but could not locate her daughter's body. Near the sons body she also could see sons umbrella.

The learned President's Counsel for the 1st & 2nd Accused-Appellant, submitted inter alia the following:

- (a) Absence of evidence to prove the charge of murder. Unsafe to convict based only on circumstantial evidence which has not been corroborated by other independent evidence. Inference of guilt cannot be drawn merely on daughter's utterances – 'අමමේ අමමේ' Rely on the dicta in H.K.K. Habakkula Vs. A.G 2010 BLR 105 (requirements for conviction based on circumstantial evidence) emphasis on (a) of head note.
- (b) The Government Analyst's report had been submitted but not listed, and prosecution deliberately did not lead that evidence, since it is unfavourable to the prosecution.
- (c) Medical evidence does not support the charge of murder.
- (d) Misdirections of learned High Court Judge at P8 393 & 395 of judgment. i.e that the injuries found on both deceased persons had been caused by the same weapon and an inference could be drawn on same, based on medical evidence (කාටරන අනුමිතියකට එලඹිය හැක) and the reference made about non production of Government Analyst's report.

Learned President's Counsel for the 3rd Accused-Appellant inter alia contended that there is no evidence or material to implicate the 3rd Accused of a charge of murder. He further argued that the prosecution has not proved the required murderous intention of the 3rd Accused. Mere presence at the scene would not suffice.

The learned Addl. Solicitor General indicated to this court in his submissions that the incident occurred on a Sunday at about 6.00 p.m and

there was adverse weather condition at the time of the incident. He also disclosed that the 3rd Accused-Appellant was the fiancée of the 2nd Accused daughter. The distance between the two houses of the deceased party and the Accused party was about 7/10 feet and all three Accused came armed. The 1st Accused had a sword and the 2nd and 3rd Accused armed with clubs. Learned Add. Solicitor-General highlight the following from the evidence led at the trial. The following items of evidence not challenged.

- (1) 1st Accused-Appellant set upon Kusumawathie (1W) and attacked her with a sword.
- (2) No contradictions or omissions marked in Kusumawathie's evidence.
- (3) By the attack on Kusumawathie she became disabled with cut injuries.
- (4) Dragged 50 feet from the place of attack.
- (5) The moving of body 50 feet away from the place of attack, for which all 3 Accused responsible (all three Accused entertain a common murderous intention by their participatory presence)
- (6) Kusumawathie unconscious for about 5 minutes. She heard the cries of the daughter from the direction of the kitchen. Daughter had shouted and it was a desperate call of distress.
- (7) Both bodies found at the foot path
- (8) The evidence of Pgs. 83/84 of the brief from Kusumawathie not challenged. Utterances of hatred/malice/animosity demonstrated by witness at pg.84.

The learned Addl. Solicitor General referring to the dock statement did not hesitate to submit that same consists of diabolical lies.

This court had the opportunity of hearing submissions from three President's Counsel. All three counsel no doubt had wide experience in the field of criminal law. Nevertheless the case proceeded on direct evidence as far as the attempted murder charge is concerned and circumstantial evidence to support the charge of two counts of murder. Further there is evidence of motive that surfaced from the main prosecution witness Kusumawathie who was the injured person at this incident, and also from the 2nd Accused-Appellant by her dock statement in court. The material placed before court suggest a longstanding land dispute and the deceased and the Accused party were living in houses on the same land situated in very close proximity, to each other. The distance between the two houses as transpired in evidence would be less than 10 feet.

The incident itself occurred in the evening may be between 5 – 6 p.m., on a day which had bad weather, but sufficient light to identify persons. The property no doubt is private property where only both the deceased and the Accused parties had their houses adjacent to each other, and there is no evidence of any other residing on the land in dispute.

This court having considered the judgment of the learned High court Judge and the evidence led at the trial observes that there is no doubt that the trial Judge had given her mind to the several aspects of the law and the factual position. Witness No. 1 Kusumawathie's un-contradicted evidence at the initial stage of her evidence indicates that her son and daughter were not in the house with her on the day of the incident. The daughter was attending lectures in the Kelaniya University and the son had gone for work on the day of the incident. Her husband was unwell and hospitalized. She has expressed the view that she was hoping to take a bath after the arrival of the children, and had gone to the nearby 'ella' 50/60 feet away from the house to collect the soap and the clothes. She had to pass the house of the 1st & 2nd Accused and on her return from the 'ella' the 1st Accused was near the door step of their house, came armed with a sword and attacked witness Kusumawathie, with the sword. She was attacked twice and the sword struck her hand and with the second blow she fell. Thereafter she was attacked with the sword and clubs which struck her head and legs. She testifies that all three Accused persons came together. 2nd Accused had a club and all three of them attacked her. It was also questioned in evidence as to whether the 3rd Accused did

anything and the witness replied stating she cannot remember but all three attacked her. I would note the evidence on point as follows. 3rd Accused armed with a club.

ප්‍ර: අතට දෙවරක් ගැසුවා?

පලවෙනි වතාවට ගැසූ පාරට වුණ තුවාලය මොකක්ද?

උ: අතට වැදුනා. හරියටම කියන්න බැහැ. දෙවෙනි පාර ගැසූ විට මාව වැටුනා.

ප්‍ර: 1 වන විත්තිකරු මොනවා හරි කිව්වද?

උ: මොකවත් කිව්වේ නැහැ

ප්‍ර: කොහොමද වැටුණේ?

උ: මුහුණින් අතට වැටුනා

ප්‍ර: කොහොමද ඉන්පසු ගැහුවේ?

උ: ඔලවට ගැහුවා කකුලට ගැහුවා. කඩු වලින්, පොලුවලින් ගැහුවා.

2 වෙනි විත්තිකාරිය පොඩිතෝනා කොයි වෙලාවේද ආවේ

උ: තුන්දෙනාම එකවරට ආවා. සමීර කඩුව අරගෙන ආවා. ඒ සමග අනෙක් දෙන්නා ආවා

ප්‍ර: 2 වන විත්තිකාරිය පොල්ලකින් පහර දුන්නා කිව්වා?

උ: ඔව්

ප්‍ර: 3 වන විත්තිකරු මොකද කලේ?

උ: මතක නැහැ. තුන්දෙනාම ආවා. ගැහුවා

ප්‍ර: 3 වන විත්තිකරු අත මොනවද තිබුණේ?

උ: පොල්ලක් තිබුනා

“ප්‍ර: සිතිය ආවට පස්සේ මොකද කලේ?”

උ: පුතා එයි කියා බලන්න යන්න තමයි නැගිටින්න හැදුවේ. නැගිටින්න බැහැ. ඔලුව බිම වැටෙනවා. ඔලුව කෙලින් කරන්න බැහැ ඔලුව බිම වැටෙනවා. ඊන් පසු ඉඳගෙන පස්සෙන් පස්සට ආවා”.

ප්‍ර: ඉන් පසු මොකද කලේ?

උ: පුතා ඇවිත් නැහැ කියලා බලන්න පස්සෙන් පස්සට අත බිම තිය තියා ගියා. ඔලුව පාත් වෙනවා. ටික ටික ආපසු ආවා. මම පාරට වනතෙක්,”

ප්‍ර: දුවට සිදුවුණ දේ සම්බන්ධයෙන් සාක්ෂිකාරිය ඇසින් දුටුවේ නැ?

උ: මගේ දුවත් යන්න ඇති කියලා මම හිතුවා

ප්‍ර: පුතාට වෙච්ච දේ සම්බන්ධයෙන් සාක්ෂිකාරිය ඇසින් දුටුවේ නැ?

උ: මම පාරට යනකොට මැරිලා වැටිලා ඉන්නවා දැන්නා.

ප්‍ර: ඔබතුමාගෙන් මෙම තුවාල වල නිරීක්ෂණ අනුව දිග තියුණු බර ආයුධයක් කඩුවක් වැනි දෙයකින් මෙවැනි දෙයක් ඇති කළ හැකිද?

උ: ඔව් විය හැකියි. ඉහත කී ලක්ෂණ අනුව මුවහත් තලයක් තියෙනවා. දිගත් තියෙනවා, ඒ වගේම බරයි. පිතියක් එක්ක සන්සන්ධනය කරන විට බර වැඩියි.

Thereafter the evidence reveal that all three of them dragged the witness near the ‘ella’ and left her at that point. It is also in evidence that within 5 minutes of being placed near the ‘ella’ she heard the voice of her daughter shouting and the voice heard from the direction of the kitchen. It

was a call of distress from the daughter..... 'අමමේ අමමේ' It is also in evidence that the witness was unconscious after the attack for about 1 ½ hours. When she regained conscious she attempted to see as to what had happened to her son. She was disabled at that moment and as such dragged herself or crawled a short distance and the witness saw the bag containing books in the garden which the daughter took with her in the morning and the water bottle when she left the house. The front door was open. There had been blood stains on the wall of the kitchen. The witness with much difficulty came near the road and she saw the deceased body of her son. She also saw his umbrella near the body. In evidence witness states there was no other person that she could see at the scene of the crime (88/89 & 90). The evidence recorded in these pages of the brief gives details of the surroundings and the other houses situated in the vicinity and of wit No. 3, and up to the time she was taken to the hospital by persons who came to the scene (neighbours).

The other important evidence led by the prosecution from Kusumawathie is as regards the productions i.e sword, cloths of deceased party etc. All those items were identified by the witness. The sword which was used to attack her had been produced and identified. Witness No. 1 had also testified as regards the land dispute between the deceased party and the

Accused party. The trial Judge has also considered the question put to the witness in cross-examination. The explanation by the witness that the sword had got corroded after some time. At the time of incident the sword had a shine, but over the years it had got corroded. The trial Judge observes that there had been two contradictions and omissions marked based on Kusumawathie's evidence.

The other evidence inter alia considered by the trial Judge is the medical evidence. At pgs. 360 to 371 of the judgment required medical evidence had been stated and analysed by the trial Judge which refer to the opinion of the medical officer, who examined the two dead bodies. There is reference to several injuries caused to the deceased persons, and an opinion expressed as regards the weapon used in the commission of the offense. The Doctor concerned without any hesitation expressed the view that by weapon (P1) (which was the sword recovered based on Section 27 statement of the Evidence Ordinance) that such a sword or weapon could have caused the injuries on both deceased persons, Trial Judge arrives at a decision that the medical officer could be considered as having the requirements of the expert as per Section 45 of the Evidence Ordinance. Trial Judge had added the eligibility of the Doctor concerned to express an opinion, as an expert. The trial

Judge has taken extra care on this aspect. Several injuries on both bodies are described in medical parlance. It describe the type of weapon which could cause such injuries. In all probability a sword as (P1) could cause injuries on both dead bodies and death occurred instantaneously. The defence had cross-examined the medical officer but nothing in favour of the Accused persons had been elicited from the medical officers. It is the evidence of the medical officer that the injuries detected on the dead bodies of the two deceased persons could have been caused in the manner and by the weapon described by the eye-witness. As such this court as well as the trial court could safely conclude that the medical officer's evidence lends assurance and support to the evidence of the eye-witness to make it safe to act upon it. Nor can I state that the version of the eye-witness cannot be relied upon, to find all 3 Accused persons guilty. The required murderous intention had also been correctly analysed by the trial Judge, by reference to items of evidence and circumstances. Items of direct evidence taken collectively fortify circumstantial evidence to establish the two counts of murder. Important items of evidence connecting the attack and assault on witness No. 1 remains unchallenged.

The trial Judge has also considered the dock statements made by all three Accused persons, and state that it cannot create any doubt in the prosecution story. As such trial Judge observes that the evidence of the Accused persons cannot be relied upon. I also find that the trial Judge has considered the matter as regards the non production of the Government Analyst's Report. It is a matter for the prosecution to decide the type of evidence to be placed in court. To prove a charge of murder or attempted murder it is not essential to produce the Government Analyst's Report. I need not repeat the trial Judge's observations at pg. 48 of the brief which is an acceptable position.

The evidence led at the trial was consistent with the guilt of the Accused party. The material placed before the trial court is totally consistent with the guilt of the Accused and proves and establish circumstances which guilt safely confirm of all three Accused. To add to this the motive described above fortify the prosecution case. Nor can we find material of the witness falsely implicating the Accused. Eye witness' version leads us to conclude that the circumstantial evidence relied upon by the prosecution cannot be faulted or doubted, in the context and circumstances of the incident of murder. In the King Vs. Gunarathna, in a case of circumstantial

evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be circumstances only of suspicion.

The direct evidence support the charge of attempted murder. We are not inclined to intervene and interfere with the judgment of the learned High Court Judge. The circumstantial evidence which surface from the testimony of the main witness, taken in its entirety and collectively establish the guilt of all the Accused on the murder charge as well.

In all the facts and circumstances of this case we see no basis to interfere with the findings of the learned trial Judge. As such we affirm the conviction and sentence. This appeal stands dismissed.

Appeal dismissed.



JUDGE OF THE COURT OF APPEAL

N. S. Rajapaksa J.

I agree.



JUDGE OF THE COURT OF APPEAL