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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/59/2011 ABC
H/C Ratnapura case No. 169/07

1. Ananda Appan Vishvanadan alias Alli
2. Rajaratnam Weeramani
3. Madasami Loganadan

ACCUSED

And,

1. Ananda Appan Vishvanadan alias Alli
2. Rajaratnam Weeramani
3. Madasami Loganadan

ACCUSED-APPELLANTS

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**
S. Devika de. L Tennakoon J

Counsel: Ranjith Fernando for the 1st accused
Indika Mallawarachchi for the 2nd and 3rd accused
Wasantha Bandara PC ASG for the State

Argued on: **18.12.2015, 29.01.2016, 16.03.2016**
Written Submissions on: **21.07.2016, 16.01.217**
Judgment on: 07.04.2017

Order

Vijith K. Malalgoda PC J

The three accused in the instant appeal along with another person were indicted before the High Court of Ratnapura for having committed the death of Madawan Sadanandan on or about 09.02.2003.

When the indictments were served on them before the High Court of Ratnapura on 03.03.2008 the accused elected to be tried before the High Court Judge without a jury. At the conclusion of the trial the 1st, 2nd and the 3rd accused were found guilty of the said charge and were sentences to death and the 4th accused on the indictment, namely Muthumala Kanagaraj was acquitted by the Learned High Court Judge.

Being dissatisfied with the said conviction and sentence, the 1st, 2nd and3rd accused have filed the present appeal before this court.

As revealed before us, there was no eye witness to the main incident which ended up with the death of the deceased person but the prosecution had relied on the evidence of one Muruges Ravindan who witnessed to an incident that has taken place few minutes prior to the main incident between the deceased person and the 4 accused.

Other than the said evidence, prosecution had relied on several items of circumstantial evidence to establish the case in hand including a dying deposition made by the deceased to his wife Weeranan Irulai.

As observed by this court the 1st accused-appellant had taken up a defence of sudden fight and the other three accused including the 4th accused who was acquitted after trial had denied any knowledge with regard to the incident and had taken up the defence of an alibi.

During the argument before us the learned counsel who appeared for the 1st accused-appellant had restricted his appeal to two grounds of appeal namely,

a) Learned Trial Judge erred in law on the principles relating to burden of proof
b) Without prejudice to the above, the evidence led at the trial warrants a conviction for lessor culpability

The learned counsel who appeared for the 2nd and 3rd accused-appellants whilst relying on the above two grounds of appeal, further relied on a 3rd ground of appeal namely,

c) Learned Trial Judge erred in law on the principle relating to burden of proof specially on the defence of alibi

As revealed from the evidence led at the High Court Trial, the first incident between the 4 accused and the deceased had croped up when the deceased passed the place where the 4 accused were gathered with witness Ravindran.

According to the evidence of witness Revindran he had met the deceased person around 8.00 am and walked towards the Kovil in order to go for work. On that day they were to cut fire wood and therefore the deceased carried a knife with him. When they reached the Kovil the witness had seen all 4 accused seated near the Kovil and after seeing them, the 4 accused questioned them as follows;

Page 33

ප්‍ර: ඉඳගෙන ඉඳලා තමුන් දැක්කාට පසුව ඔවුන් මොනවාහරි කලාද?

පි: ඔවුන් ඇහුවා ලොක්කෙක්ද කියලා

ප්‍ර: කවුද එහෙම සද්දගෙන් ලොක්කෙක්ද කියලා ඇහුවේ?

පි: හතරදෙනාම ඇතුවා

ප්‍ර: එහෙම ඇසුවිට සදානන්දන් මොකද කලේ?

පි: එයා කිව්වා අපි වැඩට යනවා කියලා

At that moment all four accused had suddenly attacked the deceased with whatever the weapons they had in their hands. 1st accused had a knife with him. 2nd accused and 3rd accused had clubs with them. 4th accused did not have a weapon with him but the witness had seen the 4th accused assaulting the deceased with hands. The moment the deceased was attacked by the four accused, the deceased ran toward his line room chased by the 4 accused. Witness too had ran to his house which is little away in a different estate.

The next witness the prosecution relied upon was the wife of the deceased Weeranan Irulai. According to the evidence of Irulai, at the time she left her house for work on the day in question, her husband Sadanandan was getting ready to go for some work with one Ravindran. On that day she was engaged in plucking tea leaves 50 feet away from her line room and when she was engaged in plucking tea leaves, she heard cries of a man and identified it as the voice of her husband.

After hearing the cries of her husband, she ran towards the direction from which she heard the cries and saw her husband fallen between her line room and the Kovil near some bushes. When she went and inquired, the deceased informed her that Alli cut him and Ukkun and Weeramani attacked him with clubs. When she went up to the deceased she saw Alli, Ukkun, Weeramani and another by name Kanagaraj standing close by and out of them Alli had a knife with him and Ukkun and Weeramani had clubs with them. Witness identified Alli as the 1st accused Ukkun as the 3rd accused and Weeramani as the 2nd accused. The other person present was identified as the 4th accused before the High Court Trial.

During the argument before us, the counsel who represented all accused-appellants challenged the evidence given by Ravindran on the basis that he made the statement 10 days after the incident and therefore it is not safe to act on the evidence of Ravindran. However as observed by us, witness

Ravindran does not speak of causing grievous injuries on the deceased but only refers to attacking the hands and giving a slap on the face prior to the deceased person taking to his heals. (Proceedings at pages 34-39)

According to the Medical evidence placed by Dr. A.G. Manjula who conducted the Post Mortem Inquiry, he had observed 12 cut injuries and 2 contusions on the body of the deceased.

When considering the evidence of witness Ravindran along with the medical evidence referred to above it is clear that the injuries inflicted on the deceased has not taken place in front of the Kovil in the presence of witness Ravindran but those injuries had been inflicted on him at a subsequent occasion. In the said circumstances it is clear that the evidence of witness Ravindran only explains as to how the incident between the deceased and the accused-appellants have started, but the rest of the things happened on that day is not established through his evidence but, the dying deposition made to the wife of the deceased explains those events before the trial court.

As further revealed before us, the wife of the deceased Weeranan Irulai had made a prompt statement to the police and the said position was confirmed during her cross examination. The fact that the 1st to 3rd accused were present in the vicinity, too was confirmed in her evidence but the witness under cross examination had admitted that she could not refer to the presence of the 4th accused in her police statement.

Witness Ravindran had explained the reason for delay in making the statement as follows,

Page 42

ප්‍ර: ඒ කටඋත්තරය දුන්නේ මේ සිද්ධිය වී කොච්චර විතර දවසකට පසුවද?

උ: දවස් 10ට විතර පසුව

ප්‍ර: එසේ තමන් මේ කටඋත්තරය දෙන්න ප්‍රමාදවුනේ කුමන හේතුවක් නිසාද?

උ: මෙයාලා ගහයි කියා බයේ ගියේ නැහැ

ප්‍ර: කවුරු ගහයි කියලද ඔබ බයවෙලා හිටියේ?

උ: මේ අය හතරදෙනාම

Page 59

ප්‍ර: තමා කිව්වා පොලිසියට ගියේ දවස් 10කට විතර පස්සේ කියලා

උ: ඔව්

ප්‍ර: දවස් 10කට කලින් පොලිසියට නොගියේ බයට කිව්වා

උ: ඔව්

ප්‍ර: ඊට පස්සේ පොලිසියට යන්න තීරණය කලේ ඇයි?

උ: ප්‍රභාකරන් ඇවිත් එක්ක ගියා

ප්‍ර: මම තමුන්ට යෝජනාකරනවා සාක්ෂිකරු, තමුන් දැක්කේ නැති දෙයක් පිලිබඳව සාක්ෂි දෙන්නේ කියලා

උ: දැකපු දේ

ප්‍ර: ඒ වගේම මම තමාට යෝජනාකරනවා දින 10කට පස්සේ තමුන් වෙන අයගේ ඉගැනුම් බහට බොරු සාක්ෂියක් පොලිසියට දුන්නේ කියලා

උ: නැහැ

අධිකරණයෙන්

ප්‍ර: ඇයි තමුන් දින 10ක් පරක්කු වුනේ පොලිසියට කටඋත්තර දෙන්න

උ: බයේ

In this regard this court is further mindful of the following answer given by witness Ravindran when he was cross examined with regard to his age as follow,

ප්‍ර: මේ සිද්ධිය වෙනකොට තමාගේ වයස කීයද?
උ: අවුරුදු 15යි

As revealed above, witness Ravindran who was only 15 years of age when the incident had taken place, was frightened to make a statement due to fear and in the said circumstances we see no reason to reject the evidence of witness Ravindran for the delay in making the statement. This position was discussed in the case of ***Ajith Samakoon Vs, Republic 2004 (2) Sri LR 209 at 220*** as follows,

"Just because the statement of a witness is belated the court is not entitled to reject such statement if the reasons for the delay adduced by the witness are justifiable and probable. The trial judge is entitled to act on the evidence of the witness who had made a belated statement."

As observed above, the evidence of witness Ravindran had explained as to how the incident between the deceased and the accused had commenced and the said statement had corroborated the circumstantial evidence placed before court with regard to the death of deceased Sadanandan.

In the dying deposition said to have made by the deceased to his wife, there is reference to 1st accused-appellant attacking the deceased with a knife and 2nd and 3rd accused-appellants attacking with clubs. Witness Ravindran had confirmed the fact that the 1st accused had a knife and the 2nd and 3rd accused having clubs when the incident commenced in front of the Kovil. Medical evidence too had confirmed this position since Dr. A.G. Manjula had observed both cut injuries as well as contusions on the body of the deceased. In the said circumstance we see no reason to interfear with the findings of the learned Trial Judge when he concluded that it is safe to act on the dying deposition made by the deceased to his wife which was corroborated by independent evidence.

Even though the counsel who appeared for the accused-appellants have challenged the evidence of witness Ravindran since it was made 10 days after the incident, both counsel heavily relied on the same evidence and attempted to take an advantage of the following pices of evidence given by him to show the availability of elements leading to a lessor culpability on the basis of a sudden fight.

Page 50

ප්‍ර: එතකොට මැරිච්ච අයයි, මේ අයයි අතර යම්කිසි බහින්බස් වීමක් වුනාද?

උ: ගහගන්න වෙලාවෙදි රණ්ඩුවක් වුනා, දිව්වාට පසුව මම දන්නේ නැහැ

ප්‍ර: ගහගන්න වෙලාවෙදි රණ්ඩුවක් වුනා කියන්නේ, මැරිච්ච තැනැත්තයි පහරදුන් අයයි අතර බහින්බස් වීමක්ද මොකක්ද වුනේ?

උ: නතරදෙනාම ගහගත්ත"

Based on the above answers given by witness Ravindran, counsel for the accused-appellants argued that the learned Trial judge had failed to consider the possibility of a sudden fight which will lead to a lessor culpability on the accused-appellants.

However it is important to consider the evidence of witness Ravindran in its proper perspective rather than taking portions of his evidence taking them out of context. As observed by this court the position taken by witness Ravindran before the trial court was that the entire incident taken place in front Kovil has not even taken two minutes. This position is clear from the following portions of his evidence.

Page 34

ප්‍ර: එහෙම වැඩට යනවා කියලා සඳහන්කල විට මේ විත්තිකරුවන් මොනවද කලේ?

උ: ටක්ගාල ගැහුවා

Page 36

ප්‍ර: එහෙම ගහනකොට සදානන්දන්ට මොකද වුනේ?

උ: හතරදෙනාම ගහනකොට සදානන්දන් බේරිලා දිවුවා

.....

Page 37

ප්‍ර: එහෙම ගහන වෙලාවේ සදානන්දන්ට මොකක්ද වුනේ?

උ: එයා ටක්ගාල බේරිලා දිවුවා

ප්‍ර: කොයිපැත්තටද බේරිලා දිවුවේ?

උ: ආපු පාර පැත්තට

Page 39

ප්‍ර: ඒ වෙලාවේ මේ විත්තිකරුවන් මොකක්ද කලේ?

උ: ඒ ගොල්ලන් පස්සෙන් එලවගෙන ගියා

Page 51

ප්‍ර: සදානන්දන් මේ අයට ගහන්න ගියාද?

උ: නෑ

ප්‍ර: සදානන්දන් මුකුත්ම කලේ නැද්ද?

උ: නෑ

ප්‍ර: ඒ කියන්නේ මේ අයයි සදානන්දන්ට ගැහුවේ?

උ: ඔව්

ප්‍ර: බැනගැනීමක් වවන හුවමාරුවක් වුනාද?

උ: ඔව්

ප්‍ර: සදානන්දනුත් බැන්නා

උ: ඔව්

Page 52

ප්‍ර: කොච්චර වෙලාවක් දැන් ඒගොල්ලොත් බැනගත්තද?

උ: විනාඩි 2ක්වගේ

ප්‍ර: ඒ බැනගැනීම, ඒ කියන්නේ විනාඩි 2ක් බැනගත්තාට පසුද මේ පහරදීම වුනේ?

උ: ගහන්න ගමන් බැනගත්තා

When considering the above portions of the evidence of witness Ravindran, it is clear that the only fight referred to by the witness was the attack on the deceased by all four accused-appellants which had not taken more than 2 minutes prior to the deceased taken to his heel in order to escape from his attackers.

Even though the learned Trial Judge had not made specific reference to this aspect of the case, he has referred to in his judgment and was mindful of all the exceptions under section 294 of the Penal Code.

As discussed above in this judgment, the evidence available in this case is not suggestive of a conviction for lessor culpability and in the said circumstance the trial judge cannot be faulted for his failure to consider lessor culpability on the three accused-appellants.

In the case of ***Saranelis Silva Vs, Attorney General 1997 3 SLR 182*** their lordships have considered this position and held that, "if there is no evidence before court to reduce murder to culpable homicide then judge cannot be faulted for not inviting the jury to consider a lessor offence."

Evidence of witness Ravindran, which was corroborated by the dying deposition and the medical evidence, clearly indicated that more than one weapon was used to attack the deceased person. When the Doctor who performed the autopsy was cross examined, it was suggested to him by the defence that the contusions found on the body of the deceased could have been caused due to a fall but the medical expert had denied those suggestions.

In the dying deposition referred to above, there is clear reference of attacking the deceased by all three accused using a knife by the 1st accused-appellant and clubs by the 2nd and 3rd accused-appellants. This position is further strengthen by the evidence of Irulai when she said that she saw the 1st,2nd and 3rd accused in the vicinity armed with weapons. As observed above, this position taken up by witness Irurai was further confirmed under cross examination. In these circumstances the defence of alibi taken up by the 2nd and 3rd accused-appellants have not created a doubt on the evidence placed on behalf of prosecution and in the said circumstances we see reason to interfear with the finding of the learned Trial Judge when he decided to reject the defecne of alibi taken by the 2nd and the 3rd accused-appellants.

However in this regard this court is further mindful of the decision in ***Dayananda Loku Galappaththi and Eight Others V. The State 2003 (3) Sri LR 362*** this position was discussed as follows;

"In a Jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties specified in section 232 of the Code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to section 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the Trial Judge was alive and

mindful of the relevant principle of law and has applied them in arriving at his conclusion. The law takes for granted that a Judge with a trained Legal mind is well possessed of the principles of law, he would apply."

When considering all the matters referred to above we see no reason to interfear with the findings of the Learned Trial Judge. As further observed by us the Learned Trial Judge has correctly evaluated the evidence placed before him and decided to acquit the 4th accused from the charge against him. In the said circumstances we are not inclined to grant any relief to the three accused-appellants.

We therefore dismissed this appeal and affirm the conviction and sentence imposed on the accused-appellants.

Appeal dismissed. Conviction and sentences imposed on all three accused-appellants are affirmed.

PRESIDENT OF THE COURT OF APPEAL

S. Devika de. L Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEAL