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

In the matter of an Appeal in terms of Section 331of the Criminal Procedure Code.

C.A.No. 244/2009
H.C. Kurunegala No.HC 108/97

01. Wijesinghe Arachchilage Ranjith Wijesinghe
02. Wijesinghe Arachchilage Lalith Wijesinghe
03. Wijesinghe Arachchilage Leslie Wijesinghe

Accused-Appellants

Vs.

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

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Ranjan Mendis with Lalith Dhanayake, B.S. Peterson, and Ashoka C. Kandambi for the 1st, 2nd and 3rd Accused-Appellants.

Rohantha Abeysuriya S.D.S.G for the respondent

ARGUED ON : 04.05. 2018 and 17.05.2018

WRITTEN SUBMISSIONS

TENDERED ON : 28.06.2018 (By the Accused-Appellants)

DECIDED ON : 31st August, 2018

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ACHALA WENGAPPULI J.

The 1st to 3rd Accused Appellants (hereinafter referred to as the Appellants) were indicted along with four others by the Hon. Attorney General for the murder of one *Kulasinghe Liyanage Sugatapala alias Sugath Liyanage* on 17th August 1994 before the High Court of Kurunegala, and for causing mischief to his house.

Initially all the accused opted for a trial by jury and on 2nd July 2009, they informed Court that they elect to be tried a Judge, without a jury.

The trial Court, with the pronouncement of its judgment on 8th September 2009, acquitted all accused from the two counts of mischief and proceeded to convict the three appellants for the 1st, 2nd and 3rd counts. It

acquitted the other four accused from these three charges. The three Appellants were sentenced to death in relation to 2nd and 3rd counts. An imprisonment of 6 months was also imposed on them on account of the 1st count.

In challenging the validity of the said judgment and sentences, the Appellants primarily claimed that the trial Court had fallen into grave error when it acted on the already disbelieved evidence of the two eye witnesses; in violation of the principle of evidence known as *falsus in uno falsus in omnibus.*

The case presented by the prosecution is that the deceased, who was residing in *Walaswewa,* had bought a house in an area called *Siyambalagaswetiya.* Witness *Dhanasena* provided first information to *Kobeigane* Police in the night of 17.08.1994 that the house of his brother (the deceased) at *Siyambalagaswetiya* is under attack by a group of people. He did not witness the attack on the house but complained to police on his brother's request to do so. He is not a witness to the fatal attack on the deceased, which took place sometime after his police complaint.

It was the day on which an election was held. A curfew was imposed in the area by the Government after the polling was over, to maintain peace.

Witness *Roshan Manjula,* one of the two eye witnesses presented by the prosecution, stated in his evidence that he saw several accused, including the appellants, have caused damage to *Siyambalagaswetiya* house. Thereafter he joined with the deceased at *Walaswewa.* Upon hearing that the Police has arrived at the damaged house to investigate the complaint,

the witness had accompanied the deceased with the other eye witness to *Siyambalagaswetiya* house. On their way, the deceased was attacked by the appellants in the company of other accused. The 1st appellant has attacked the deceased on his head with a sword while the 2nd appellant attacked him with a bottle. The 3rd appellant also had attacked the deceased with a club and the witness identified the sword (P1), the bottle filled with sand (P2) and the club (P3) in Court. He identified the assailants by moonlight and, in addition, with the aid of an electric torch.

During the cross examination of witness *Roshan Manjula,* several omissions were highlighted. These omissions are mainly in relation to his failure to mention the names of any of the seven accused as the persons responsible for causing damage to *Siyambalagaswetiya* house in his statement to Police and that he failed to state that he in fact had witnessed the act of mischief.

Having considered the evidence placed before it, the trial Court concluded that the prosecution has failed to establish the two counts of mischief against all accused beyond reasonable doubt and proceeded to acquit them of these two counts.

In his lengthy oral and written submissions, learned Counsel for the appellants, stressed the point that the trial Court has "disbelieved" the evidence of eye witnesses to the incident, in respect of one charge, but had erroneously convicted the appellants on a capital offence, based on already rejected evidence. He relied on the principle as per the maxim *falsus in uno falsus in omnibus,* as laid down in the judgment ***The Queen v Julis*** 65 N.L.R. 505. He emphasised that in the absence of any "compelling reason" to

accept the testimony of a witness who was shown to have given false evidence on a material point, the trial Court has erroneously convicted the Appellants.

Learned Senior DSG for the Attorney General sought to counter this submissions by referring to the judgment of ***Samaraweera v The Attorney General*** (1990) 1 Sri L.R. 256 has overruled this position.

Learned Counsel for the Appellants, claimed that the said judgment has not been overruled by the judgment of ***Samaraweera v The Attorney General*** (ibid) as ***The Queen v Julis*** (ibid) was decided by three judges of the Supreme Court.

Thus, it is clear that the learned Counsel for the Appellants, made his submissions on this primary ground of appeal based on the premise that the trial Court has "disbelieved" a segment of the evidence of witness *Roshan Manjula* and since there was no compelling reason for it to accept balance part of his evidence as true, in order to convict the appellants, it had fallen into error.

In view of these submissions, it is relevant to consider as to the basis on which the trial Court entered an acquittal of all accused in relation to the two counts of mischief.

Upon perusal of the judgment of the trial Court, it becomes clear as to the reason why it acquitted all accused form the said two counts. In this context it is also relevant to note that the learned High Court Judge who delivered the judgment is the presiding Judge when witnesses *Roshan Manjula* and *Premaratne* gave evidence and has therefore had the opportunity of observing their demeanour and deportment.

In the narration of evidence, learned High Court Judge has reproduced all the omissions marked off *Roshan Manjula's* and *Premaratne's* evidence. This is indicative of the fact that the learned High Court Judge was mindful of the challenge mounted on the truthfulness and reliability of the evidence of *Roshan Manjula* and *Premaratne* by the accused, in determining their testimonial trustworthiness. Then, in his analysis of the evidence in relation to the two counts of mischief from the testimony of *Roshan Manjula*, learned High Court Judge clearly holds (at p. 694) that the inconsistency from his statement to police that he only "heard" that *Siyambalagaswetiya* house was under attack, taken in conjunction with the several omissions in relation to the lack of direct reference to any of the seven accused, the prosecution has failed to prove its case beyond reasonable doubt and therefore the two charges of causing mischief fails against all accused.

It is evident from the wording used in the judgment that the learned High Court Judge has not "disbelieved" his evidence as the Appellants claim but had merely opted not to rely on that part of his evidence. Its relevant to remind here that the prosecution must prove its case to the required degree of proof by placing both truthful and reliable evidence.

Clearly this is an instance where the evidence presented by the prosecution through witness *Roshan Manjula* failed to satisfy the reliability component and not the truthfulness component of the said requirement. Therefore, it is our view that the learned High Court Judge has considered the contradictions and omissions marked on the evidence of the two witnesses in its correct perspective and decided in favour of the accused as the evidence implicating them of causing mischief is unsafe to act upon.

This proposition is supported by the fact that immediately after the said conclusion, learned High Court Judge considers the submissions placed before him by the accused as to the inconsistencies, in the light of judicial precedence which lay down the applicable principles on evidence. The appellants as well as other accused have, in their submissions before the trial Court, referred to the inconsistencies *inter se* and *per se* and omissions in relation to the evidence of two eye-witnesses to the incident. In dealing with the omissions it was held in ***Banda and Others v Attorney General*** (1999) 3 Sri L.R. 168, that *"omissions do not stand in the same position as contradiction and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions".*

Then the learned High Court Judge arrived at the conclusion that it was the three appellants who caused the death of the deceased as per the evidence of the witnesses *Roshan Manjula* and *Premaratne*. Learned High Court Judge was also mindful of the animosity that existed between the appellants and the investigating officer *Siyambalapitiya* due to an application filed before the Supreme Court alleging violation of fundamental rights but was convinced as to the truthfulness and reliability of the testimony of the two eye witnesses, despite the perceived partiality of the police officer in favour of the prosecution.

In convicting only the three appellants out of seven accused, learned High Court Judge was satisfied that there was an unlawful assembly and in pursuance of the common object of that unlawful assembly they have committed murder of the deceased and thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code. If the evidence of the eye witnesses is "disbelieved" by the learned High

Court Judge as the Appellants claim, then he had no basis to convict the appellants under the said count as there was no truthful and reliable evidence to prove there were five or more persons forming an unlawful assembly to which the three Appellants were also members.

The acceptance of the evidence of *Roshan Manjula* and *Premaratne* as truthful and reliable, is a question of fact. As already noted, learned High Court Judge had the distinct advantage of observing their demeanour and deportment in assessing the testimonial trustworthiness of the witnesses.

The trial Court, aided itself with the principle laid down in ***Bandaranaike v Jagathsena*** (1984) 2 Sri L.R. 397 where it was held;

> *"When versions of two witnesses do not agree the trial Judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether the witness's power of observation were limited. In weighing the evidence the trial Judge must take into consideration the demeanour of the witness in the witness box."*

Witness *Roshan Manjula,* when confronted by the accused in cross examination that he is a liar, boldly admitted that he had forgotten some details of the incident but remembers some. He gave evidence 15 years after the incident. In ***Sunil v Attorney General***(1999) 3 Sri L.R. 191, it was re-emphasised the relevancy of the principle that " *...the Court must not be unmindful of the fact they are human witnesses and it is hallmark of human testimony that such evidence is replete with mistakes, inaccuracies and misstatements.*" The Court further added that " *... the witness should not be disbelieved on account of trivial discrepancies especially where it is established that there is substantial reproduction in the testimony of the witness in relation to*

his evidence is before the Magistrate or the sessions Court and that minor variation in language used by witness should not justify total rejection of his evidence."

We have carefully perused the evidence of the witnesses. In relation to *Roshan Manjula* the accused have marked several omissions and few contradictions. It must be noted that almost all these inconsistencies and omissions were in relation to the mischief charges. Except for two omissions, there were no inconsistencies marked off his evidence in relation to the attack on the deceased. It is almost the same position with witness *Premaratne.* The two inconsistencies that were marked off his evidence in relation to the attack on-the deceased are on the sequence of the events. No inconsistency exists which has the character of making a dent of his credibility. The evidence of the two witnesses, when considered in its entirety, are not tainted with any defect which " *...do not go to the root of the matter and shake the basic version of the witnesses"* as per of cited judgment of ***Bhoginbhai Hirjibhai v State of Gujarat.***

In ***Attorney General v Theresa*** (2011) 2 Sri L.R.292, adopting a Privy Council judgment, Tilakawardane J, thought it fit to reiterate the principle that;

> *" appellate Court should not ordinarily interfere with the trial Courts opinion as to the credibility of a witness as the trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination."*

In view of the above considerations, it is our considered view that the primary ground of appeal, as urged by the Appellants fails.

The Appellants have raised an ancillary ground of appeal, on the basis that the trial Court has erroneously considered the contents of the police statements and the depositions and had "borrowed" material from these two sources to convict them. This error committed by the trial Court, according to the appellants, is fatal to their conviction. The appellants have relied upon the dicta of the judgment of ***King v Namasivayam*** 49 N.L.R. 289 and another unreported judgment of this Court in C.A. 9/2010 C.A.M. of 25.09.2014, in support of their contention, where it was held that the treatment of the contents of statements and depositions as "substantive evidence" was illegal and inadmissible.

This complaint against the judgment of the trial Court is based upon a solitary statement contained in the judgment (at p. 695) where the learned High Court Judge has stated when the evidence of witness *Premaratne* is "weighed" (තුලනය) by comparison with his statement to police and evidence before the Hettipola Magistrate's Court; what remains is after the attack on the deceased by the three appellants, out of several sword blows dealt by the 1st appellant, one blow has struck the head of the deceased. This statement is found in the segment of the judgment where the trial Court has considered the evidence of the witness to determine its truthfulness and reliability. This exercise undertaken by the trial Court was a necessary step in evaluation of *Premaratne's* evidence for its credibility.

It must be noted that in the process of evaluation of evidence, contrary to the claim of the appellant, the trial Court has not "borrowed" material from the statement or deposition and treated them as substantive evidence when it arrived at the conclusion to convict the appellants. In ***Banda and Others v Attorney General*** (supra), Jayasuriya J cited from the judgment of ***Queen v Mutu Banda*** 73 N.L.R. 8, where it was held that;

> *"... the Judge who has the use of the information book, ought to use this book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his police statement in the discharge of his judicial duty and functions in terms of Section 122(3) of the Criminal Procedure Code."*

In relation to the depositions of witnesses, the position is identical as in ***King v Mudalihamy*** 42 N.L.R. 103, it has been held by the Court of Criminal Appeal that *" ...it was proper for the Judge to examine the extent of such inconsistency by reference to the whole of their depositions."*

It is thus clear that the learned High Court Judge was merely fulfilling his judicial duty when he referred to the statement and depositions in evaluating the witnesses evidence before him. This ground of appeal is therefore necessarily fails.

The appellants also claim that the failure of the prosecution to explain the injuries suffered by some of the accused challenged the validity of the conviction. The appellants cited a judgment of the Indian Supreme Court in support of this position.

In the judgment of the trial Court, this aspect of evidence has been dealt with in relation to its explanation by the accused. The 1st appellant had a laceration above his left ear while the 3rd appellant had five abrasions on the back of his chest, and shoulder. 2nd appellant also had a contusion on his forehead.

The prosecution witnesses have admitted that some of the accused appeared to have suffered injuries when produced in Court. It is the evidence of *Roshan Manjula* and *Premaratne* that they had only an electric torch when the accused have mounted the attack on the deceased. According to them, they had no role to play in the attack and were mere spectators to it. This attempt by the Appellant to create an impression that the prosecution has deliberately concealed a part of the sequence of events, should bound to fail as it is improbable for the two eye witnesses to proceed to *Siyambalagaswetiya* house in the company of the deceased armed, to meet up with the police party that had arrived there to investigate the act of mischief.

The seven accused were arrested by IP *Siyambalapitiya* on the same evening, approximately five hundred meters from *Siyambalagaswetiya* house, whilst walking along *Pubbiliya* Road, shouting. The 1stAppellant had a sword in his hand while the 2ndAppellant had a wooden club. The 4th accused had a bottle filled with sand. They were arrested initially for violating curfew and at the time of arrest they appeared to be under the influence of alcohol. The Appellants did not cross examine the two eye witnesses on the basis that they have caused those injuries to the accused nor did they suggest that it was the deceased who caused those injuries. IP *Siyambalapitiya* in his cross examination negated the suggestion of the

appellant that there was a fight among two factions. When questioned whether he enquired from them about the injuries, his answer was that due to their high level of intoxication it was not possible to obtain information from the accused as the injuries. Interestingly, the Appellants opted not to suggest that there was a fight among the two factions to any of the eye witnesses during otherwise lengthy cross examination. In addition, it must be noted that the prosecution claimed that the Appellants were arrested after an act of mischief and an act of fatal attack on the deceased. They were arrested more than an hour later.

The appellants have relied on the judgment of ***The Queen v Santin Singho*** 65 N.L.R. 445, before the trial Court that they need not explain their injuries.

Considering the evidence presented by the prosecution before the trial Court, we would prefer to follow the reasoning of the local precedent of the Court of Criminal Appeal judgment in ***The King v Appuhamy et al*** 46 N.L.R. 570 where it was observed by the Court that;

> *"... the evidence for the prosecution in this case showed that the accused have assaulted a number of persons in succession and they may have received their injuries after the attack on the deceased, and even if the deceased struck some blows on the third and fourth accused, the possibility that it was after he was attacked was not excluded. We do not think it is possible to draw any inference in this case from the fact that the third and the fourth accused had injuries, in the absence of evidence to explain these injuries; they have a bearing on the special defences set up by the accused, ... "*

Lastly, the appellants contended that the trial Court has failed to consider their culpability for a lesser offence. In the judgment, the trial Court has considered in detail as to the establishment of elements of the offence of murder, particularly that of the presence of murderous intention. The Appellants have relied on the judgments of ***Wickramanayake v The Queen*** 73 N.L.R. 273 and ***Kumarasinghe v The State*** 77 N.L.R. 217 in support of their contention.

The trial Court, having observed that the deceased has suffered a total of 19 injuries out of which the cut injury inflicted by a sword on his head, termed as necessarily fatal injury, establishes the fact that the Appellants, with persons unknown to the prosecution, have caused his death with murderous intention.

In fact the medical evidence revealed that there were five injuries to the deceased's head. Four of them were termed by the medical witness as contusions caused by blunt trauma resulting in with fractures in the skull. There was a cut injury on the head and the cut has extended to the brain matter. In view of these five injuries, the medical witness was of the opinion that each of these injuries taken individually are fatal in the ordinary course of nature while their cumulative effect would result in a very high probability of death. He further estimated that the death of the deceased could have occurred within an hour of sustaining these injuries.

It is relevant to consider the circumstances under which the deceased was attacked by the Appellants and others. There was a curfew imposed by the Government on account of the election, the cultivation and the house of the deceased was damaged by a mob, the accused was

waylaid by the appellants and others. The appellants were among several others who were arrested by the police whilst walking along a public road. The 1st appellant had a sword and other appellants were armed with bottle and a club. They appeared to be intoxicated.

The question raised by the Appellants that whether the trial Court ought to have considered the possibility of convicting the appellants to a lesser offence should be considered in the light of these items of evidence.

A similar consideration has already received attention of this Court. In ***Farook v Attorney General*** (2006) 3 Sri L.R. 174, this Court in determining the scope of limb three-to Section 294 of the Penal Code cited the following dicta from the judgment of Indian Supreme Court in ***Anda v State of Rajasthan*** AIR 1966 SC 148;

> *"... the emphasis in the third clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists, and death ensues and if the causing of the injury is intended, the offence is murder."*

When the medical evidence is considered in the light of this dicta, it is clear that all the requirements as per this judgment had been satisfied and the trial Court has correctly convicted the appellants for the offence of murder. The Appellants, except for the instance of suggestion to the investigating officer that this was an altercation between two factions, placed no material before the trial Court that would attract the consideration of any of the exceptions contained in Section 294 of the Penal Code.

Learned Senior DSG contended that Section 105 of the Evidence Ordinance imposes a burden on the appellants of "proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code ...". When the trial Court ruled that the Appellants have a case to answer, they opted to exercise their right to silence. In ***The King v Podimahatmaya*** 46 N.L.R. 31, the Court of Criminal Appeal noted that in order to discharge this burden, the accused could "... adduce some material in support of it either by way of evidence led by him, or by way of matters elicited from the witnesses for the Crown, or by way of some circumstances clearly pointing ..." to such an exception.

The appellants have relied on the judgments of ***Wickramanayake v The Queen*** 73 N.L.R. 273 and ***Kumarasinghe v The State*** 77 N.L.R. 217. In ***Wickramanayake v The Queen,*** the appellate Court interfered with the conviction purely on the basis that there was absolutely no direction to the jury as to the alternative verdict of culpable homicide. The instant appeal is in relation to a trial before a Judge. In ***Wickramanayake v The Queen,*** the Court of Criminal Appeal altered the verdict on the basis that there was no distinction made in the summing up of the trial Judge between the concepts of "knowledge" and "murderous intention" which had the effect of a possibility of convicting to a lesser offence "virtually withdrawn from the jury". This is not the position in the instant appeal.

It would have been helpful if the trial Court, indicated its mind in much clearer terms than it did in the judgment. However, in view of the evidence placed before the trial Court and the reasoning of the judgment, we are of the considered view that it has reached a legally tenable conclusion in convicting the Appellants for murder as there is ample

evidence to conclude that the Appellants have acted in furtherance of common object of the unlawful assembly and shared a common murderous intention.

Accordingly the conviction and sentences of the High Court of Kurunegala are hereby affirmed by this Court.

The appeal of the 1st to 3rd Appellants is dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL