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.15/1979 and Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

C.A.No.255-256/2015
H.C. Negombo No.101/2003

01. Karunanayake Liyanage Rexi Angello Perera alias Rexi

02. Amerasinghe Arachchige Rangana Chandimal Amerasinghe alias Baba

Accused-Appellants

Vs.

The Hon. Attorney General
Attorney General's Department

Colombo 12.

Respondent

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BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI J.**
COUNSEL	:	Saliya Peiris P.C. with Delan de Silva for the 1st Accused-Appellant. L.M.K. Arulanandan PC with Anura Seneviratne and Lakni Silva for the 2nd Accused-Appellant Dileepa Peeris D.S.G for the respondent
ARGUED ON	:	12.06. 2018 and 13.07.2018
DECIDED ON	:	21st September, 2018

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ACHALA WENGAPPULI J.

The two Accused-Appellants (hereinafter referred to as the "1st Appellant" and the "2nd Appellant" respectively) were indicted before the High Court of Negombo for the murder of *Herath Mudiyanselage Priyantha Chaminda* on or about 3rd August 1997. Upon their election to be tried without a jury, the 1st and 2nd Appellants were convicted for murder and were sentenced to death. Being aggrieved by the said conviction and sentence, the Appellants have preferred this appeal.

Learned President's Counsel for the 1st Appellant sought to challenge the validity of the conviction on the basis that the trial Court has failed to analyse the evidence of the prosecution and thereby arrived at an erroneous finding. In support of the said ground of appeal, learned President's Counsel relied on the following considerations;

i. the inconsistencies that exist in the prosecution case, in relation to the factual position of who brought the gun to the scene,

ii. the inconsistency that exists between the eye witness' testimony and the opinion of the medical expert as to the distance at which the gun was fired at the deceased,

iii. the failure to call *Don Jude Nishantha Appuhamy* who has apparently brought the gun to the scene and was arrested by the Police as a suspect,

iv. deficiency of the evidence in relation to discovery of the gun and particularly its production before the trial Court.

In support of the appeal of the 2nd Appellant, Learned President's Counsel has raised following grounds of appeal, in addition to the grounds raised by the 1st Appellant;

i. the evidence does not reveal any overt act by the 2nd Appellant,

ii. the comparison of the defence evidence and arriving at a finding that "the evidence of the 1st accused did not corroborate the dock statement of the 2nd accused",

iii. consideration of the denial of any involvement with the incident by the 2nd Appellant as defence of *alibi.*

iv. Consideration of the contents of the statement and depositions as evidence before the trial Court.

In view of these grounds of appeal of the Appellants and before we undertake consideration of the submissions in support of them in detail, at least a cursory glance through the evidence presented before the trial Court by the prosecution is warranted.

The case for the prosecution was based on eye witnesses account of the incident and several other items of circumstantial evidence. The deceased has died due to gunshot injuries to his chest, resulted in internal injuries to heart, lungs and liver.

Witness *Appuhamy* is the father of the deceased. Witness *Nalinda* is a brother of the deceased. Both these witnesses claim that they saw the deceased being shot by the 1st Appellant in the company of the 2nd Appellant.

In relation to the commencement of the series of incidents which culminated with the act of shooting, the witness *Appuhamy* said in evidence that his daughter was running an eatery in the building belonged to the 2nd Appellant and the 1st Appellant was operating a grocery in close proximity to the eatery. He also served food in his boutique. As the popularity of the eatery run by his daughter rose, the 1st Appellant showed his displeasure about it by harassing her customers.

On the day of the shooting, *Appuhamy's* daughter and her husband returned to the eatery at about 8.30 or 9.00 p.m. having visited the hospital. The witness was waiting in the front portion of the eatery which was closed at that time due to the absence of his daughter. Then a group of persons including the 1st Appellant arrived at the eatery and attacked the

eatery. He too was assaulted by the group. In fact, the attack commenced with the assault on his young grandchild.

Upon the return of his daughter and her husband, the witness narrated what happened during their absence. Then he decided to visit his son, *Nalinda* who was residing about 100 to 200 fathoms away from the eatery. *Appuhamy* thereafter returned to the eatery to sleep to find that the group had again returned with clubs. A fellow villager intervened to settle the unrest, and the crowd dispersed. When the witness returned to the eatery, he was accompanied by the deceased, witness *Nalinda* and his daughter.

After about 15 minutes of their return to the eatery, the two Appellants also returned to it for the 3rd time armed with clubs. Again, with the intervention of someone, an attack was averted. Then the two Appellants have gone to the boutique and returned with a gun. Thereafter, the 1st Appellant had fired a shot in the direction of the witness and two others from a distance of 9 feet. The deceased was hit on his chest and the two Appellants had ran towards their boutique taking the gun with them.

Nalinda in his evidence stated that he came to know about the initial attack on the eatery through his father and when they arrived at the eatery at about 9.00 p.m., the two Appellants came to attack them with clubs. When the Appellants were pushed by the witness the 1st Appellant fired a shot and ran away. He maintained that there was no enmity between him and the 1st Appellant but said there was a problem about the eatery ran by his sister.

The Police evidence reveals that they received 1st information about the incident on 3rd August 1997 at about 11.55 p.m. and upon their visit to the place of the incident, they have recovered a spent cartridge, a wooden club and an iron pipe lying near the place of the incident, where blood stains were also observed. Both the Appellants have surrendered to Police two days after the incident, on 5th August 1997and upon information provided by the 1st Appellant, a 12-bore shot gun was recovered hidden under a culvert of an abandoned shrubby land.

Medical evidence reveals that the death of the deceased was due to "internal bleeding as a result of gunshot injuries to heart, lungs and liver." The medical officer who performed the post mortem examination on the body of the diseased, stated that he observed blackening and tattooing around the injuries caused by the pellets of the gun shot.

During his cross examination, the medical officer further explained that the spread of the pellets he observed in the pattern of injuries indicate that the deceased was at about 3 to 4 feet away from the muzzle end of the gun. He based this opinion on the basis if it is a close range, then he would not expect the spread of the pellets.

With this summery of evidence, we could now turn to consider the several grounds of appeal as urged by the learned President's Counsel on behalf of the Appellants.

Since both Appellants challenge the credibility of the two eye witnesses and the reliance on their evidence by the trial Court, it is appropriate to consider this ground at the outset.

The contention of the Appellants is based on the fact that in relation to the claim of *Appuhamy* that they ran back to their boutique, returned with the gun and fired a shot. During cross examination, a contradiction was marked as 1V4, as he has stated to Police that he saw one *Krishantha* handing over a gun to the 1st Appellant. Similarly, during cross examination of witness *Nalinda* a contradiction was marked as 1V5 when he said in evidence that he saw the 1st Appellant picking up a gun near the lamp post, as he has stated in his deposition that the 1st Appellant had picked up a gun from a thorny bush.

Learned President's Counsel, in their submissions on this particular inconsistency, as to the way in which the 1st Appellant came to possess a gun, has emphasised the fact that the trial Court had failed to consider the credibility of the prosecution witness in the light of this important inconsistency and had therefore arrived at an erroneous conclusion.

The trial Court, in its judgment has observed that the witnesses for the prosecution were subjected to lengthy cross examination, but there was no reason to doubt the truthfulness of their evidence.

It is noted by this Court that the learned trial Judge who convicted the Appellant was not the trial Judge who recorded their evidence. He had no opportunity of observing the demeanour and deportment of these witnesses. In the circumstances, this Court is also placed at a similar position as the learned trial Judge who convicted the Appellants, in assessing whether the evidence of *Appuhamy* and *Nalinda* are truthful and reliable version of events or not.

The inconsistency marked as 1V4 off the evidence of *Appuhamy* could be divided into two parts. In one part, the evidence of the witness was consistent that the 1st Appellant had a gun in his hand while the other part as to how that gun came to his hand contradicts with his statement to Police. Then, the evidence of the witness *Appuhamy* on this point contradicts with the evidence of his son who said that the 1st Appellant had picked up a gun from a nearby bush, whereas he attributes both the Accused gone to the boutique and returned with a gun.

The fact that the 1st Appellant was having a gun at the place of incident, is common to both witnesses. Obviously, there is an inconsistency of *Appuhamy's* evidence *inter se* and *per se* on this factual position. Then this Court must decide, in view of the submissions of the Appellants, whether that is a material contradiction or not.

In the judgment of ***King v Mudalihamy*** 42 N.L.R. 103, it was decided that in assessing a contradiction, it is necessary to examine the whole of his deposition "for the purpose of forming an opinion with regard to the contradiction ...". This principle of evaluation was more clearly laid down in ***Best Footware (Pvt) Ltd., and two Others v Aboosally and Others*** (1997) 2 Sri L.R. 137, where it was emphasised that " *the Court should look at the entirety and totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial...*".

Another factor this Court should consider in this regard is the time gap between the incident and giving evidence. It is alleged by the prosecution that the incident had taken place on 3rd August 1997 whereas the witnesses have given evidence in the latter part of 2010, more than 13

years later. Both these witnesses are average villagers and therefore their credibility must be assessed in this back ground.

In ***Wickremasuriya v Dedoleena and Others*** (1996) 2 Sri L.R. 95, Jayasuriya J observed that;

> *"After a considerable lapse of time, as has resulted in this application, it is customary to come across contradictions in the testimony of witnesses. This is a true characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by the witnesses. A judge must expect such contradictions to exist in the testimony."*

His Lordship reproduced the test adopted in ***Jagathsena v Bandaranaike*** (1984) 2 Sri L.R. 397that *"Whether the discrepancy due to dishonesty or to defective memory or whether the witnesses power of observations were limited ? "*

The judgment of ***Samaraweera v The Attorney General*** (1990) 1 Sri L.R. 256, in relation to the evaluation of proven false evidence, added that *"... 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."*

Turning to the appeal before us, it is seen upon the consideration of the testimonies of both these witnesses, that they had added some exaggeration to their evidence by providing an explanation to the question as to how the 1st Appellant, having had a club in his hand, just before the attack, all of a sudden possessed of a gun. *Appuhamy* explained it by

stating in evidence that they brought it from the boutique, whereas 13 years ago he attributed it to one *Krishantha* handing it over to the 1st Appellant. On the contrary, his son had stated in his evidence that the 1st Appellant just picked up a gun from a bush.

When considered in the light of the above principles of evaluation, it is safe to assume both these witnesses have added their own explanation to what each of them had not clearly observed. It is natural, when faced with this type of challenge with a life-threatening risk, for these witnesses to focus on the most threatening conduct to their safety. At one point, it was an Appellant armed with an iron pipe and then at another point, the 1st Appellant armed with a gun. One cannot expect the description of the sequence of events as accurately as observed by a detached witness to the incident from a person who is under a threat of receiving a life-threatening injury.

Therefore, it is our considered opinion, none of the witnesses have uttered deliberate falsehood under oath, which would render their evidence false and, on that account, unreliable.

When the evidence is considered in totality, especially the facts that the Police recovered a spent cartridge from the scene, death was cased due to gunshot injury and the subsequent recovery of a gun, against this inconsistency, it could not be said that the said inconsistency would shake the basic version of the prosecution.

In addition to this common ground of appeal, the 1st Appellant also raised several grounds of appeal.

The complaint of the 1st Appellant is that there exists an inconsistency between the eye witness testimony and the opinion of the medical expert as to the distance at which the gun was fired from the deceased which had gone unnoticed by the trial Court. It appears that there is an inconsistency between the eye witnesses and the opinion of the expert as to the distance. However, a close examination of the relevant evidence clears any doubt that there is no such an inconsistency among the witnesses. The distance of 9 feet was related by the lay witness is an answer to the question put to him as to how far way the deceased was from the 1st Appellant. There is no questioning as to the distance between the muzzle end of the gun and the deceased. The evidence that are available before the trial Court dispels any inconsistency. During cross examination, the medical officer explained that the spread of the pellets he observed in the pattern of injuries indicate that the deceased was at about 3 to 4 feet away from the muzzle end of the gun. He based this opinion on the basis if it is a close range, then he would not expect the spread of the pellets. As such this ground of appeal has no merits.

One of the other ancillary grounds of appeal of the 1st Appellant was in relation to the failure of the prosecution to call *Don Jude Nishantha Appuhamy* who has apparently brought the gun to the scene and was arrested by the Police as a suspect. This complaint is made by the 1st Appellant, not on the evidence led before the Court but on the contents of a statement attributed to *Appuhamy* in 1V4. This factor only leaves the 1st Appellant with the fact that *Nishantha* was also produced as a suspect only. There is no material to conclude that he unfolds a narration, not spoken to by other witnesses. In any event, his credibility as a witness would be

seriously impaired owing to the fact that he was initially arrested as a suspect. We cannot appreciate the prejudice caused to the 1st Appellant upon the failure to call him as a witness for the prosecution.

Lastly the ground of appeal based on the deficiency of the evidence in relation to discovery of the gun and particularly its non-production before the trial Court also could not be considered in favour of the 1st Appellant as a defect in the prosecution's case that would vitiate his conviction. The prosecution led ample evidence that in fact a gun was recovered and handed the same to the Magistrate's Court, through which it was sent to Government Analyst Department for analysis and report. Due to a fire that erupted in the said Department, this item of production was destroyed. But the documentary evidence clearly establishes to the required level of proof that such a firearm in fact was recovered upon information provided by the 1st Appellant.

In addition, the learned President's Counsel for the 1st Appellant raised yet another ground of appeal at the hearing based on lesser culpability in relation to him was not considered by the trial Court when it is clear that there was a sudden fight. He contended that *Appuhamy* after the initial act of aggression by the mob, has sought support from his two sons to meet up the threat by the Appellants and the incident took place when there was a sudden fight between these two factions.

This Court, in the judgment of CA 131/2000, C.A.M. of 10.09.2008, held in respect of exception 4 to Section 294 of the Penal Code that;

" ... in order to derive the benefit of this special exception, the following ingredients will have to be fulfilled.

(a) The suddenness of the fight should be common to all participants and should not be one sided where one of the assailants with deliberate design to exploit the situation wades in and launches an assault.

(b) The quarrel should be sudden to all antagonists generating instantaneous heat of passion under the influence of which the offence is committed.

(c) The offender should not have an undue advantage such as attacking a defenceless unarmed person with a deadly weapon.

(d) The offender should not have acted in a cruel or unusual manner such as dealing repeated stab blows with great force on a defenceless adversary, where the intention to kill is not the product of passion generated instantaneously but more likely springing from malice or vindictiveness." (emphasis original)

In addition, it was also held that *" ... the burden of proof that the circumstances come within the ambit of the plea of sudden fight devolves on the offender on a balance of probability. Where one or more of the several elements that needs to be proved are in doubt in relation to independent circumstances in each case, then the plea cannot be said to be proved and therefore fail."*

It must be noted, in fairness to the 1st Appellant, the suggestion of a sudden fight was put to the prosecution witnesses, who of course denied it. Once it was also suggested that the gun was brought by the witness's party and when the Appellant grappled for it, the gun went off accidently.

However, the evidence of the prosecution does not support a sudden fight. Their evidence is that the Appellants were the aggressors and after repeated acts of violence, the 1st Appellant had shot the deceased at a short distance. In his evidence, the 1st Appellant claimed that *Nalinda* and his brother-in-law had threatened them. One *Shanaka* had a gun with him and that frightened him. When he tried to take it away from *Shanaka*, the gun accidently went off. The deceased was also standing close by when the gun went off and he later learnt that the deceased has died due to a gun shot. The evidence of the 1st Appellant was rightly rejected by the trial Court based on improbability. It considered the nature and direction of the gunshot wounds suffered by the deceased. The reference to *Shanaka* was made only in his evidence and could be considered as an afterthought.

We are in agreement with the submissions of the learned Deputy Solicitor General that the evidence does not support such a proposition and the 1st Appellant had failed to prove its existence to the required level of proof, namely on a balance of probability.

In the circumstances, it is our considered view that the appeal of the 1st Appellant is devoid of merit and therefore owing to that reason, ought to be dismissed.

The 2nd Appellant, also raised few other grounds of appeal in addition to the common ground of appeal, that had already been dealt

with in the preceding paragraphs of this judgment. One such additional ground, as raised by the 2nd Appellant was that the evidence does not reveal any overt act by him.

Upon consideration of the evidence, it appears that there is merit in this submission. The evidence does not attribute the 2nd Appellant with any specific act other than participating in a mob attack. Then, just before the shooting he was seen with the 1st Appellant armed with a club. Then the 1st Appellant shot the deceased. There was no utterences attributed to the 2nd Appellant as to the deceased either for his death or causing any injury, before or after the shooting incident. In short, there is insufficiency of evidence in relation to common murderous intention.

This Court, in ***Rajadheera and Others v Attorney General*** (2008) 2 Sri L.R. 321, has followed the reasoning in ***King v Ranashnghe***47 N.L.R. 373 and ***King v Piyadasa***48 N.L.R. 295, where it was held that;

> *"... in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other."*

In view of the principles laid down, it is clear that there was insufficiency of evidence to prove that the 2nd Appellant had common murderous intention with the 1st Accused beyond a reasonable doubt. Therefore, his appeal should be allowed by setting aside his conviction and sentence. Other grounds of appeal, as urged by the 2nd Appellant does not arise for consideration, in view of the above finding.

In the circumstances, this Court makes the following orders;

i. the appeal of the 1st Appellant is dismissed whilst affirming his conviction and sentence,

ii. the appeal of the 2nd Appellant is allowed, whilst setting aside his conviction and sentence.

Registrar is directed to communicate this order to the Superintendent of Prisons as expeditiously as possible enabling him to take necessary steps to release the 2nd Accused-Appellant forthwith.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL