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

The Socialist Republic of Sri Lanka

Complainant

V.

CA 188/2013

HC Monaragala 112/2008

1. Karunaratne Ganitha Gedara Weerasena Alias Abe
2. Saranguhewa Gedara Pathmasiri Alias Banda

Accused

And

1. Karunaratne Ganitha Gedara Weerasena Alias Abe
   99, Hunukate, Ratthota.

1st Accused Appellant

The Socialist Republic of Sri Lanka

Complainant/Respondent

Before	A.L.Shiran Gooneratne, J
	K.Priyantha Fernando, J
Counsel	Ranjith Fernando for the Accused Appellant.
	Thusith Mudalige, DSG for the Respondent.
Argued on	20.02.2019
Written Submissions	
Filed on	05.03.2019-Accused-Appellant
	19.03.2019-Respondent
Judgment on	25.03.2019

K. PRIYANTHA FERNANDO, J.

1. The Appellant with another (2nd Accused) was indicted in the High Court of Badulla on two counts on the basis of joint liability for committing murder of Hewa Kaluge Don Seneviratne Basnayake punishable in terms of section 296 of the Penal Code in count No. 1, and for committing robbery punishable in terms of section 380 in count No. 2.

2. After trial, on 29.08.2013, the learned High Court Judge convicted the Appellant on both counts 1 and 2. He also convicted the 2nd Accused on count No. 2 and acquitted him on count No. 1.

3. Appellant and the 2nd Accused were sentenced as follows;

Appellant;

Count No. 1. Death sentence

Count No. 2. Imprisonment for 5 years, a fine of Rs. 25,000/-, in default imprisonment for 2 years,

Compensation of Rs. 100,000/- to the wife of the deceased, in default imprisonment for 2 years.

2nd Accused;

Count No 2. Imprisonment for 2 years, suspended for 15 years

Fine of Rs. 25,000/-, in default imprisonment for 2 years,

Compensation of Rs. 100,000/- to the wife of the deceased, in default imprisonment for 2 years.

4. Being aggrieved by the said conviction, the Appellant filed the instant appeal against the same. At the argument of the appeal, the learned Counsel for the Appellant urged the following ground of appeal.

(1) The Appellant was deprived of a fair trial for the reason of the learned Trial Judge not applying the maxim *'Falsus in uno falsus in omnibus'* when he considered the evidence of the 2nd Accused.

5. We carefully considered the evidence adduced at the trial, judgment of the learned High Court Judge, written submissions filed on behalf of the

Appellant and the Respondent, and the submissions made by Counsel for both Appellant and the Respondent at the hearing of this appeal.

6. Brief facts of the case as evident at the trial are as follows.

   Deceased had been working as a driver of the van registration no. 54-9238 that belonged to one M.N.M. Insar (P.W.26). The Appellant and the 2nd Accused had taken the van for hire on 20.02.1997 at about 1 pm. The deceased had been the driver (Evidence of P.W.1, 3 and 5). On 24.02.1997 the body of the deceased was found at a teak plantation. Deceased body was identified by the wife (P.W.2).

   On 21.02.1997, the Appellant and the 2nd Accused had kept the van with P.W.4 stating that they will come and take it back. However, as they did not come back to collect the van, and as he felt suspicious, P.W.4 Pathmasiri had informed the police. P.W.4 had become suspicious as the Appellant and the 2nd Accused had removed the curtains and the number plate of the van when they left the van with him. Police have found finger prints of the Appellant and the 2nd Accused from the van and also recovered a knife each, subsequent to the statements made by the Appellant and the 2nd Accused in terms of section 27 of the Evidence Ordinance.

7. Appellant gave a dock statement denying any involvement in the commission of the offences. The 2nd Accused gave sworn evidence implicating the Appellant to the crime.

8. Counsel for the Appellant submitted that the learned Trial Judge erred when he found the Appellant guilty accepting part of the evidence of the 2nd Accused. Counsel also contended that the learned Trial Judge could not have convicted only the Appellant for murder on the evidence of the 2nd Accused, as the learned Trial Judge in his judgment (at page 45) has said

that both the Accused persons with the common intention had committed the murder of the deceased.

9. Counsel for the Respondent submitted that the evidence of one Accused given from the witness box can be used against another. He also submitted that the learned Trial Judge has taken the evidence of the 2nd Accused only to exonerate the 2nd Accused and not to find the Appellant guilty. It was the contention of the Counsel for the Respondent that the proved circumstances evident are sufficient to find the Appellant guilty of both counts even without taking the evidence of the 2nd Accused into account.

10. Our Superior Courts have discussed the credibility of witnesses and applicability of the maxim *'Falsus in uno falsus in omnibus'* (He who speaks falsely on one point will speak falsely upon all) at length in many cases. (*Queen V. Julis 65 N.L.R 585, Francis Appuhamy V. The Queen 68 N.L.R. 437.)* In case of Francis Appuhamy V. Queen (Supra) His Lordship T.S.Fernando J. Said;

> *"We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly, in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seen to implicate others who are either members of the family of that person or enemies of that witness. In that situation, the Judge or Jurors have to decide for themselves whether that part of testimony which is found to be false taints the whole or whether the false can safely be separated from the true."*

11. It is the Trial Judge who has the opportunity to see the demeanor and deportment to assess the credibility of a witness. In case of *Fradd V. Brown & company Ltd. (20 N.L.R. Page 282)* Privy Council held:

> *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled 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 of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance'*

12. In the above premise, if the evidence supports, there is no legal impediment for the Trial Judge to convict the 2nd Accused for count No. 2 and to acquit him on count No.1. Also, there is no legal impediment for the learned Trial Judge to find the Appellant guilty for count No. 1 and to acquit the 2nd Accused for the same if he found that the 2nd Accused did not share the common intention with the Appellant to commit murder of the deceased although he shared the common intention to commit robbery. Appellant cannot claim that he was not afforded a fair trial merely because the learned Trial Judge accepted part of the evidence of 2nd Accused and acquitted the 2nd Accused on the charge for murder.

13. Evidence given by an Accused person on his own behalf which implicates the co-accused person can be taken into account as against the latter (*Rex V. Ukku Banda 24 N.L.R. 327*). In case of *Ukku Banda* (supra), on directing the jury as to the precautions to be taken when consider the evidence an Accused implicating the co-accused, His Lordship Bertram C.J. said;

"In my opinion, therefore, the proper direction to give the jury in such cases is that while they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, that subject to that warning, they must weigh and consider evidence so given against another prisoner. In my opinion the judgment and sentence in the case should be confirmed."

14. Learned Trial Judge in page 42 of his judgment has clearly directed himself on the above warning.

15. The prosecution had led very strong circumstantial evidence against both Appellant and the 2nd Accused. In that, the Appellant and the 2nd Accused had taken the van on hire on 20th February 1997. On 21st February the day after the deceased was last seen with the Appellant and the 2nd Accused, both Appellant and 2nd Accused had taken the van to Pathmasiri (P.W.4). Body of the deceased was found on 24th February at a teak plantation in Wellawaya-Buttala road in a putrefied state. Judicial Medical Officer who conducted the autopsy on the body of the deceased had opined that the death had occurred 3-4 days prior to the 25th February, the day the autopsy was conducted.

16. In the above circumstances, the Trial Judge could have safely come to the conclusion that the Appellant was guilty of the offences charged. Therefore, even without taking the evidence of the 2nd Accused into account, there is sufficient evidence to prove beyond reasonable doubt that the Appellant is guilty of both counts.

17. The learned Trial Judge in his judgment at page 45 had said that both the accused persons with the common intention had committed the murder of

the deceased. With that finding, although he could have found the 2nd Accused also guilty for the charge of murder, State has not appealed against the acquittal. Merely because the learned Trial Judge acquitted the 2nd Accused on count No.1 when in fact he could have found him guilty on his own findings, the Appellant cannot claim that the Learned Trial Judge was wrong when he convicted the Appellant for the same count. Appellant was not deprived of a fair trial on that basis. Hence the ground of appeal should necessarily fail. Counsel for the Appellant did not raise any other ground.

Hence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL