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

C.A. Case No. 122/2016

H.C. Chilaw Case No. 70/2013

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

Complainant

V.

1. Muthugama Gonnage Anurudda Lakmal,
2. Marasinghe Thushara Sampath Fernando *alias* Suduwa

Accused

And Now Between

Marasinghe Thushara Sampath Fernando *alias* Suduwa

Accused-Appellant

V.

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

Complainant- Respondent

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Darshana Kuruppu for the Accused-Appellant. Riyas Bary for the Claimant- Respondent.
ARGUED ON	:	23.05.2019
WRITTEN SUBMISSIONS FILED ON	:	28.08.2018 by the Complainant Respondent 12.12.2017 by the Accused Appellant
JUDGMENT ON	:	02.08.2019

K. PRIYANTHA FERNANDO, J.

01. This is an appeal against the Judgment of the Learned High Court Judge of Chilaw dated 30.08.2016. The 2nd Accused (Appellant) was indicted with the 1st Accused on one count of murder punishable under Section 296 to be read

with section 32 of the Penal Code. Before the trial commenced, the 1st Accused died. The learned High Court Judge, after being satisfied that the Appellant was absconding, ordered the trial to proceed in the absence of the Appellant in terms of section 241 0f the Code of Criminal Procedure Act. After trial, the Appellant was convicted as charged and was sentenced to death. Being aggrieved by the said conviction, the Appellant preferred the instant appeal. Grounds of appeal urged by the Appellant as submitted by the counsel in his submissions are;

1. The learned Trial Judge has misdirected himself by not analyzing properly the evidence led at the trial and by not giving reasons for his determinations in his judgment.
2. The learned Trial Judge has failed to consider that the evidence of eye witnesses is not consistent and cogent to sustain a conviction.
3. The learned Trial Judge has failed to give his attention to the fact that none of the eye witnesses directly testify that the Accused Appellant assaulted the deceased.
4. The learned Trial Judge has misdirected himself by accepting the evidence of the prosecution witnesses despite the existence of numerous *inter-se* and *per- se* contradictions.
5. The learned Trial Judge has erred in law by convicting the Accused Appellant under common intention in the absence of evidence to establish common intention.
6. The learned Trial Judge has failed to consider that the medical evidence does not corroborate the evidence of eye witnesses.

7. The learned Trial Judge has failed to consider that the Prosecution has failed to establish the causation of death of the deceased beyond reasonable doubt
8. The learned trial Judge has failed to consider that the Prosecution failed to prove the date of the offence beyond a reasonable doubt.
9. The learned Trial Judge has failed to consider that the Prosecution failed to consider the events which create reasonable suspicion as to the guilt of the Accused Appellant.

02. Three eye witnesses testified before the High Court. According to PW 1, he had gone to the Chinese restaurant owned by the (Kingsly) deceased with one Nilupan. 1st Accused (Lakmal) and the Appellant (Suduwa) had come. 1st Accused had been carrying a manna knife and Appellant had been carrying a sword. Lakmal had cut the deceased. Appellant had tried to cut the deceased with the sword but, the deceased had held the chair to prevent. Then the deceased had run out of the restaurant. Lakmal had chased behind the deceased and Appellant also had run behind. When the witness went to see, the deceased had been fallen face down near the Fish plank (malulaalla). When the witness tried to get close, both Appellant and Lakmal had prevented him saying that he also would be cut. Then he had run away.

03. According to the evidence of PW2, for the living, he had been selling fish at the super market which is near the restaurant owned by the deceased. When he was asleep, he was woken up by a noise. He had heard the Appellant yelling at the deceased asking the deceased to come out and that he would come back in half an hour. At about 3.30, the 1st Accused and Appellant had come armed with a knife and a sword respectively. He had seen the incident clearly. 1st Accused had chased after deceased and the Appellant had been

near the gate keeping the sword. 1st Accused had cut the deceased twice with the knife and the Appellant had been waiting with the sword to prevent others coming. Appellant had prevented the witness going near the deceased to prevent the fight. Appellant had tried to assault him and he had run to escape.

04. PW3 when giving evidence had tried to avoid testifying. He even had denied making a statement to the police. Finally, upon admitting giving a statement about 06 months after the incident, he said that 1st Accused and the Appellant came in his three-wheeler to the restaurant. He initially said that the 1st Accused and the Appellant did not possess weapons. At this point in time the State Counsel had moved for an adjournment to lead further evidence as the original information book was not available. The learned Trial Judge making his observations that there is a possibility that the witness would give false evidence had remanded PW3 until the next date. On the next date, the witness gave incriminating evidence against both 1st Accused and the Appellant.

05. It is submitted by the Counsel for the Appellant, that remanding of PW3 for 3 months has caused prejudice to the Appellant and has caused a miscarriage of justice. On 26.03.2015 the learned High Court Judge remanded PW3 until the next trial date. The reason given by the learned High Court Judge was that on observing his demeanour, that he would give false evidence and it was doubtful that he would appear in Court to give evidence. Although PW3 initially tried to exonerate the Appellant and the 1st Accused, after coming from remand he testified incriminating the Appellant and the 1st Accused. The effect of remanding a witness who fails to give evidence in line with his statement given to the police was discussed in case of ***Priyantha Ratnayake***

V. The Hon. Attorney General CA 41/2012 [30.05.2014]. His Lordship Justice Anil Goonaratne said;

> *"It is the view of this Court that it is irregular and it amounts to a miscarriage of justice for the witness to be remanded for the reasons adduced by the Trial Judge. This act of remanding would have a serious impact not only on witness No.6 but on all other prosecution witnesses who gave evidence subsequently at the trial. On this aspect the trial Judge at pg. 190 also observes that witness Nos. 5 & 7 appears to be giving evidence not according to their free will and they appear to be scared. This is more than sufficient material enable me to address my mind that a fair trial had not been conducted and that it amounts to a miscarriage of justice. The evidence led and admitted in the trial Court would on one hand caused prejudice to the Accused-Appellant and on the other hand whatever the evidence transpired subsequent to witness No.6 being remanded would be tainted with bias and questionable position of each party before Court. Merely because the Trial Judge rejected the version of witness No.6 by his judgment would not suffice since by that point of time the damage had occurred, and left room, for a witness to tell the truth or untruth under oath due to the earlier act of Court in remanding a witness, and such a signal to the witness to give evidence according to the police statement, through fear of being remanded (like witness No.6)."*

06. It is clear that in this case witness PW3 in his evidence, whether he told the truth or the untruth, was compelled to give evidence in line with his statement to the police, due to the fear of being further remanded. Therefore, it would cause a grave miscarriage of justice if the Court acts upon his

evidence. Hence, his evidence has to be disregarded. However, unlike in the case of ***Ratnayake V. AG*** (supra), in the instant case, the evidence of PW1 and PW2 was recorded before recording of the evidence of PW3. Therefore, remanding PW3 would not have had any effect on the evidence of PW1 and PW2. Hence, taking the evidence of PW1 and PW2 into consideration would not cause any prejudice to the Appellant, nor that would cause any miscarriage of justice.

07. Counsel for the Appellant submitted that the learned Trial Judge has accepted the evidence for the prosecution, despite the fact that there were numerous *inter-se* and *per-se* contradictions. It is the contention of the counsel that witnesses have given different stories contradicting themselves. It is apparent that the eye witnesses for the prosecution PW1 and PW2 were not together at the time of the incident. According to PW1, he had been consuming alcohol with the deceased at the restaurant when the Appellant and the 1st Accused came. Therefore, he witnessed the incident from the beginning. However, PW2 was not inside the restaurant. He had been sleeping on the fish plank. Only after he heard the noise, he had woken up. By the time he saw the incident, the deceased and the accused persons had been outside of the restaurant. Therefore, it is obvious that the two witnesses, PW1 and PW2 had seen the incident in two different stages from two different places. PW2 had not seen what happened inside the restaurant initially. Hence, each witness gives evidence on account of when they saw. Therefore, if their evidence is believed to be true, one cannot say that they contradict each other for giving evidence on what each of them saw separately.

08. Counsel for the Appellant submitted that the learned Trial Judge has failed to give attention to the fact that none of the eye witnesses directly testifies that the Appellant assaulted the deceased. It is further submitted that the learned Trial Judge erred in convicting the Appellant in the absence of evidence to establish common intention.

09. In case of ***Sarath Kumara V. Attorney General CA 205/2008*** [04.04.2014] Court of Appeal held;

> *" ... Once a participatory presence is furtherance of a common intention is established at the commencement of the incident, there is no requirement that both perpetrators should be physically present at the culmination of the event unless it could be shown by some overt act that one perpetrator deliberately withdrew from the situation to disengage and detach himself from vicarious liability. ... "*

10. It is evident that both 1st Accused and the Appellant came to the scene together at the same time. PW1 in his evidence said that the Appellant struck the sword thrice on the deceased, but the deceased held the chair. PW1 further said that when the Appellant struck the sword, he went in between and it did not strike any one.

"ප්‍ර: සුදුවා මොනවාද කළේ?

උ: මේසය ළඟ ඉදලා කඩුවෙන් 3 පාරක් කෙටුවා. එයා පුටුව ඇල්ලුවා."

"ප්‍ර: 03 පාරක් කෙටුවේ මරණකරුටද?

උ: එහෙමයි. එයා පුටුව ඇල්ලුවා.

ප්‍ර: තමා අවන්හල තුල සිටියාද?

උ: මම මැදට පැනලා පුටුවක් ඇල්ලුවා.සුදු නිකන් ඉන්න කියලා.

ප්‍ර: තමා මැද්දට පැන්න අවස්ථාවේදී මොකද වුනේ?

උ: වැදුනේ නැහැ කාටවත්

ප්‍ර: කාගේ අතේද කඩුව තිබුණේ?

උ: සුදුගේ අතේ."

11. PW2 also testified as to what the Appellant did when he saw him.

"ප්‍ර: සුදු මොනවාද කළේ?

උ: සුදු හිටියේ එහා පැත්තේ. පීකින් එකේ අනික් කට්ටිය එලියට එයි කියලා කඩුව තියාගෙන හිටියා.

ප්‍ර: තමා සිද්ධිය දැක්කාම මොනවාහරි කරලා නවත්තන්න උත්සහ කළේ නැද්ද?

උ: මම ස්වාමීනි කෑගහගෙන දුවගෙන ගියා

ප්‍ර: මොනවා කියාද?

උ: කිංස්ලිට ගහන්න එපා කියා.දුවගෙන යද්දී එයා වැටිලා හිටියා. ලේ තැවරිලා. දුවගෙන ගිහිල්ල සුදුගේ අතින් අල්ලා නැවැත්තුවා.

ප්‍ර: ඇයි සුදුගේ අතින් ඇල්ලුවේ?

උ: මම ගහන කෙනා උස්සන්න යද්දී මට ගහන්න ගියා."

12. I bear in mind that mere presence of an accused at the scene of crime will not establish the common intention. However, the above evidence clearly shows that it was not mere presence, but the Appellant actively participated in assaulting the deceased and that it was in furtherance of the common intention he shared with the 1st Accused to kill the deceased. The weapons used and the injuries caused to the deceased clearly demonstrate the intention of the 1st Accused and the Appellant.

13. Counsel for the Appellant contended that the Prosecution has failed to establish the causation of death of the deceased beyond reasonable doubt. It is further argued that the medical evidence does not corroborate the evidence of eye witnesses.

14. PW14 Dr. Kumudu Kumari Jusar has testified on the injuries observed on the deceased by Dr.Athukorala when the deceased was initially hospitalized. Upon death of the deceased, the autopsy was conducted by Dr. Indra Lalani Ratnayake. According to her evidence, the deceased had been admitted to National Hospital initially on 20.10.2010. After 03 weeks he had been transferred to Negombo hospital and then again was admitted to National hospital on 11.06.2011. Patient had died on 08.08.2011. She gave clear evidence that the cause of death of the deceased was 'hydrocephalus', which is collection of fluid in the brain. She had said that it was due to the injuries caused to the head. Further she had said that the brain particles were dead due to the assault on the head. She further said that the deceased had been continuously unconscious from the 20.10.2010 till he died. Therefore, it is clear that the deceased died due to the injuries caused by the 1st Accused with the shared common intention with the Appellant.

15. The learned High Court Judge in his judgment at page 214 of the brief has given good and sufficient reasons as to how the Appellant shared the common intention with the 1st Accused in committing the offence.

16. In the above premise I find that the grounds of appeal urged by the Appellant are without merit and that there is no reason to interfere with the judgment of the learned High Court Judge. Therefore, the conviction and the sentence on the Appellant affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL