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

Democratic Socialist Republic of Sri Lanka,

Complainant

V.

1. Udabage Gedara Palitha Amarawansha
2. Udabage Gedara Chandana Deepal Amarawansha

Court of Appeal Case No. CA HCC 274-275/17

High Court Case No. HC Kandy 172/2003

Accused

AND NOW BETWEEN

1. Udabage Gedara Palitha Amarawansha
2. Udabage Gedara Chandana Deepal Amarawansha

Accused Appellants

V.

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

Complainant Respondent

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Indika Mallawaratchy with K. Kugaraja for the Accused Appellants. Riyaz Bary SSC for the Respondent.
ARGUED ON	:	17.06.2019
WRITTEN SUBMISSIONS FILED ON	:	10.05.2018 & 15.07.2019 by the Accused Appellants. 29.08.2018 by the Complainant-Respondent.
JUDGMENT ON	:	17.09.2019

K. PRIYANTHA FERNANDO, J.

01. 1st and the 2nd Accused Appellants (Appellants) were indicted in the High Court of Kandy with one count of murder punishable under section 296 of the Penal Code and two counts of causing hurt punishable under section 315 of the Penal Code. After trial, the learned High Court Judge convicted the Appellants for all 3 counts and were sentenced accordingly.

Being aggrieved by the said conviction and sentence, Appellants preferred the instant appeal.

02. Grounds of appeal as urged by the Counsel for the Appellants are;

1. Conviction is wholly unsafe in view of the fact that identification of the Accused tantamount to dock identification.

2. Following closely on the heels of ground 1, learned Trial Judge's evaluation relating to identification is wholly deficient.

03. Both grounds of appeal are based on the identification of the two Accused Appellants. Main witnesses the prosecution relied on identification of the Appellants were, Sunil Jayasundera (PW1) and Kuda Banda Ratnayake (PW2). Evidence of PW1 was that on the day of the incident, he had gone with the deceased and PW2 to drink toddy at about 6.30 pm. The place had been a house that sells toddy. There had been about another 6 to 7 people including 1st Appellant who had come to drink toddy. An argument had taken place between the 1st Appellant and the deceased over a cup. The dispute was settled and they had gone back to their working place. When they were waiting for the watchers to come, 1st Appellant had come with the 2nd Appellant and had assaulted the deceased with poles. When the deceased fell, and when he questioned as to why they assaulted the deceased, they had assaulted him and PW2 as well. The time had been about 6.45 pm and there had been thick mist. With the help of the villagers, the deceased and the injured were taken to hospital.

04. PW2 also testified at the trial corroborating the evidence of the PW1 on the incident. However, it is important to note that the Appellants were not known to the witnesses before. They have seen the 1st Appellant for the first time at the place where toddy was sold. Then at the crime scene for

the second time. As far as the 2nd Appellant is concerned, both PW1 and PW2 had seen him at the crime scene for the first time. No identification parade was held on the Appellants and both witnesses identified the Appellants from the dock.

05. It is settled law that it is undesirable and unsafe to convict an Accused solely on dock identification. (***Muniratne and Others V. State 2001 2 Sri L.R. 382.***)

06. Witnesses may genuinely believe that the Accused in the dock was the person who committed the crime, for the reason that the police after investigation has brought the Accused to Court.

07. In case of ***Williams (Noel) V. The Queen [1997] 1 W.L.R.548***, it was said that where a witness volunteers a dock identification, the summing up should make it plain that such evidence is undesirable; that the proper practice is to hold a parade; and the evidence should be approached with great care.

08. In case of ***Holland V. HM Advocate [2005] UKPC D 1; The Times, 1 June 2005***, it was held that permitting a dock identification was not *per se* incompatible with the right to a fair trial. Factors to weigh the equation of whether an Accused had had a fair trial would include whether he was legally represented, what directions the Judge had given about identification evidence and the significance of the contested evidence in the context of the case as a whole.

09. In the instant case, the learned Trial Judge has given careful consideration on the evidence of identification. As rightly stated in his judgment by the learned Trial Judge, the 1st Appellant in his statement from the dock has admitted his presence at the toddy selling place as well as the time of the incident. He also admitted that he had a quarrel at the toddy selling place

over a cup. The 2nd Appellant also admitted his presence at the crime scene. Hence, the evidence taken as a whole, there cannot be any issue or doubt about the identification of both Appellants. Therefore, the grounds of appeal on identification should necessarily fail.

10. Although there was no other ground urged in this appeal, the learned Counsel for the Appellants submitted that the learned Trial Judge should have considered lesser culpability on the basis of a sudden fight. Counsel submitted that there was no pre meditation and that it was a chance meeting.

11. First Appellant in his dock statement said that after the first incident at the toddy selling place, he went along the road where he saw the people whom he had a quarrel before, talking to each other. When he went pass them, they had assaulted him. He never had any weapon, he said. He had seen his brother coming to rescue him, where the brother was also assaulted.

12. Second Appellant said that he saw four to five people assaulting the brother. When he went there, he was also assaulted. He had assaulted them with an umbrella.

13. Medical evidence revealed that the deceased had multiple injuries caused by a blunt weapon, that is compatible with the evidence for the prosecution. Evidence of the police officer who arrested the 1st Appellant revealed that the 1st Appellant had a bruise in his fingers. As pointed out by the counsel for the Respondent, it may well be an injury caused to him when the deceased and the other injured obviously tried to defend themselves. Although the 1st Appellant said in his dock statement that he did not carry any weapon, the learned Trial Judge had rightly rejected that evidence in the circumstances. Partial defence of lesser culpability was

never put to any of the witnesses for the prosecution when they gave evidence. It is evident that the Appellants had come armed with clubs to assault the deceased and the injured. The learned Trial Judge has given careful consideration to the evidence and rightly decided that the culpability cannot lessen to an offence under section 297 of the Penal Code.

In the above premise, I see no reason to interfere with the judgment of the learned High Court Judge. Convictions and the sentences imposed on the Appellants are affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL