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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 52/2010

High Court of Embilipitiya Case No.142/2006

1. Kotta Gamage Pangnadasa,
   Hospital Junction,
   Pallebedda.

2. Kotta Gamage Sunil,
   Hospital Junction,
   Pallebedda.

3. Ratnayake Lekamlage Weeraratne,
   Hospital Junction,
   Pallebedda.

Accused

AND NOW

1. Kotta Gamage Pangnadasa,
   Hospital Junction,
   Pallebedda.

2. Kotta Gamage Sunil,
   Hospital Junction,
   Pallebedda.

3. Ratnayake Lekamlage Weeraratne,
   Hospital Junction,
   Pallebedda.

Accused Appellants

V.

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

Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Ranjith Fernando for the 1st Accused Appellant.

Nizam Kariapper PC with M.I.M. Iynullah for the 2nd Accused Appellant.

Janaka Bandara SSC for the Respondent.

ARGUED ON : 26.06.2019

WRITTEN SUBMISSIONS FILED ON : 17.02.2017 by the 1st Accused Appellant.

13.03.2017 by the 2nd Accused Appellant.

15.02.2016 by the 3rd Accused Appellant.

31.05.2017 by the Respondent.

JUDGMENT ON : 09.10.2019

K. PRIYANTHA FERNANDO, J.

01. 1st, 2nd and the 3rd Accused Appellants were indicted in the High Court of Ratnapura on the following counts.

Count No. 1: Against all 3 Appellants for committing murder of P.A. Dayaratne punishable under section 296 of the Penal Code.

Count No. 2: Against 3rd Appellant for committing the offence of attempted murder of Hema Dhanawardena punishable under section 300 of the Penal Code.

02. After trial, the learned High Court Judge found the 1st and 2nd Appellants guilty of count No.1 and were sentenced to death. The 3rd Appellant was found guilty of count No.3 and was sentenced to 10 years rigorous imprisonment and ordered to pay a fine of Rs. 5000/-. Being aggrieved by the said convictions and sentences, all 3 Appellants preferred the instant Appeal. However, the Appeal of the 3rd Appellant was dismissed upon withdrawal.

03. Grounds of Appeal urged and argued by the 1st and the 2nd Appellants are;

1. That the Appellants were deprived of the substance of a fair trial in view of;
    a. Irregular procedure was followed
    b. Erroneous principles of law applied by the learned High Court Judge who delivered the judgment

2. Failure by the learned Trial Judge to consider the exception of sudden fight/ grave and sudden provocation.

04. I considered the evidence adduced at the trial, judgment of the learned High Court Judge, grounds of appeal urged, written submissions filed on behalf of both Appellants and the Respondent and the oral submissions made by counsel for all parties.

Ground No.1

05. Counsel for the Appellants argued that the learned High Court Judge who finally delivered the judgment, initially informed His Lordship the Chief Justice of his disability to continue with the case, but His Lordship the Chief Justice has directed him to continue to hear and deliver the judgment. It is the contention of the counsel that this deprived the Appellants of a fair trial.

06. Senior State Counsel for the Respondent submitted that the learned High Court Judge never complained about his disability and that the disability in terms of section 48 of the Judicature Act had been on the part of his predecessor on being transferred to another station for administrative purposes.

07. On perusal of the proceedings in the High Court it is observed that the recording of evidence had started before learned High Court Judge Mrs. S.de L. Tennakone. Examination in chief of the main eye witness was recorded before her and cross examination of the witness had been before her successor learned High Court Judge Mrs. K. Weerawardena. The evidence of the remaining eye witness PW 4 and the evidence of the doctor who performed the autopsy on the body of the deceased were also recorded before her. Upon learned Judge Mrs. Weerawardena going on transfer, the evidence of witness No. 9 had been recorded before her successor Judge Mrs. W. C. Pushpamali where parties agreed to adopt the previous proceedings before her. Therefore, it is clear that even the High Court Judge Mrs. Pushpamali before whom parties agreed to adopt the proceedings, did not have the opportunity to observe the demeanor and deportment of the witnesses who testified before her predecessor.

08. The evidence for the prosecution was closed before the learned Judge Mrs. Pushpamali, at which stage, upon her transfer to another station, learned High Court Judge Mr. M.M.A. Ghafoor succeeded her.

09. Learned High Court Judge Mr. Ghaffoor has made a written request to His Lordship the Chief Justice as per the journal entry dated 15.09.2009,

to appoint Judge Mrs. Pushpamali to hear the case, as it was Judge Mrs. Pushpamali who had the opportunity to observe the demeanor and deportment of the witnesses. That request was made by the High Court Judge Mr. Ghaffoor not because he had a disability to hear the case but Judge Mrs. Pushpamali had a disability owing to her transfer. His Lordship the Chief Justice directed High Court Judge Mr. Ghaffoor to continue to hear the case.

10. It is pertinent to note that as I mentioned before in paragraph 07 in this judgment, it was not Judge Mrs. Pushpamali who had the opportunity to observe the demeanor of the main eye witnesses but Judge Mrs. Weerawardena. However, parties agreed to adopt before her, the evidence led before her predecessors. It is also important to note that the defence at that stage has not even demanded to recall the eye witnesses before Judge Mrs. Pushpamali, in terms of section 48 of the Judicature Act.

11. Section 48 of the Judicature Act as amended provides for continuation of proceedings before the successor Judge when a Judge becomes disable to hear the case.
Section 48;

> *.....In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committable for trial or otherwise, has been instituted or is pending such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh.*
>
> *Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and reheard.*

12. Application of section 48 when a Judge is transferred to another station was discussed by His Lordship Justice Sisira de Abrew in case of ***Herath Mudiyanselage Ariyaratne V. Republic of Sri Lanka. (CA 307/2006 [17.7.2013])*** where it was said:

> *'... I now again turn to the contention that succeeding HCJ in a criminal trial cannot, under Section 48 of the Judicature Act, continue with the proceedings recorded before his predecessor. When a HCJ is transferred from his station he ceases to exercise his jurisdiction in his area and thereby he suffers from disability to function as HCJ of the area. Thus, in my view, transfer of a JHCJ from a station is covered by the words 'other disability' in Section 48 of the Judicature Act.'*

13. Hence, it was not the High Court Judge Mr. Ghaffoor who had the disability as submitted by the counsel for the Appellants, but his predecessor Judge Mrs. Pushpamali for the reason of her being transferred to another station.

14. Intention of the legislature is clear when the amended Act No 27 of 1999 to the Judicature Act was enacted. It is to expeditiously continue and conclude the cases. To avoid any prejudice to the accused persons in criminal cases, proviso to section 48 provides for the accused to demand if he so wishes to recall the witnesses before the successor Judge. That gives the accused an opportunity to a fair trial. In the instant case, defence had not made any request before the successor Judge to recall any of the witnesses who testified before his predecessor. Hence, the contention of the counsel for the Appellants that the Appellants were deprived of a fair trial is untenable. This ground of Appeal has no merit.

Ground 2

15. Counsel for the Appellants submitted that the learned Trial Judge has not analyzed the evidence properly. In that, it was submitted that the learned Trial Judge has concluded that the 1st Appellant surrendered to police as

he was guilty. It was further submitted that the learned Trial Judge wrongly rejected the dock statements made by the Appellants and wrongly applied the *Lucas* principle.

16. Making submissions on ground of Appeal No.2, counsel for the Appellants submitted that there was no evidence of premeditation and that it was a chance meeting. There had been only one stab injury, and in the circumstances learned Judge could have considered lesser culpability on the basis of a sudden fight.

17. Counsel for the 2nd Appellant submitted that PW 1 had been suspended from the police and that he had suffered from a mental disorder. Further it was submitted that PW4 had given contradictory evidence to that of PW1.

18. On ground of Appeal No.2, although Counsel for the Appellants submitted that it was not pre planned but was a chance meeting, the evidence clearly shows that the 1st Appellant and the 3rd Accused had been carrying weapons from which they inflicted the fatal injury on the deceased and three injuries on PW1 respectively. The Appellants evidence by their statements from the dock never suggested a sudden fight or any other basis to consider lesser culpability. It was total denial of any involvement of them in causing injuries to the deceased or PW1. The evidence of the main witness PW1 who was also injured does not suggest a lesser culpability on the part of the Appellant, nor the other evidence indicates. Hence, ground of Appeal No.2 should fail.

19. Counsel for the 2nd Appellant moved to demean the evidence of PW 1 stating that he was suspended from police service and that he had been suffering from a mental disorder.

20. There was no evidence to indicate that he was suffering from a mental disorder at the time he gave evidence. All what he said was after he was suspended from employment he was depressed and although he was called to be re-instated, his family did not allow him to go back due to his

mental status. Although PW1 was cross examined at length repeating question put to him for two days, his evidence had been consistent. Learned High Court Judge rightly found his evidence to be credible and should be acted upon.

21. According to his own testimony, PW4 had gone to the scene after he heard about the incident. He has not even seen PW1 who got injured. It is doubtful whether he had seen the real incident. Learned High Court Judge was right when he accepted the evidence of PW1 whose evidence was clear and consistent to the evidence of PW4. An Accused can be found guilty on the evidence of a single eye witness provided that Court finds the evidence of the single eye witness to be cogent, consistent and totally acceptable.

22. Learned High Court Judge has not rejected the dock statements solely on the basis that Appellants surrendered to the police within 1 hour of the incident. In page 33 of his judgment he has said that the Appellants had no reason to surrender to the police within 1 hour after the incident.

23. Senior State Counsel for the Respondents rightly conceded that the learned High Court Judge wrongly applied the *Lucas* principle against the defence in this case. Every time when the position taken up by the defence is rejected by Court, it cannot be taken as corroborative evidence for the prosecution as referred to in case of ***Rex V. Lucas [1981] AER 1008***.

24. Tests which should be applied in determining whether the Accused lied and whether it is capable of constituting corroboration is set out in case of *Lucas* that has not been applied by the learned High Court Judge in this case. However, the evidence taken as a whole amply proves the offence charged in count No. 1 beyond reasonable doubt against the Appellants. Notwithstanding the High Court Judge applying the *Lucas* principle wrongly, the evidence in this case justifies the conviction of the Appellants for count No. 1.

Hence, I find no reason to interfere with the conviction of both Appellants 1 and 2. I affirm the conviction and the sentence imposed on the Appellants.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL