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

In the matter of an appeal against an order of the High Court under Section 331 of the Criminal Procedure Act No. 15 of 1979.

CA Case No:
HCC 180/18

HC of Kegalle
Case No:
HC 3015/2010

The Democratic Socialist Republic Of Sri Lanka

Complainant

Vs

1. Kiniwitage Samantha Kiniwita
2. Dangalla Pathiranage Amal Pathirana
3. Matara Kalusayakkaralage Udaya Kumara
4. Manannalage Sumith Priyashantha

Accused

AND NOW BETWEEN

Kiniwitage Samantha Kiniwita

1st Accused-Appellant

Vs

The Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

Before : **Devika Abeyratne,J**

P.Kumararatnam,J

Counsel : Indica Mallawaratchy for the Accused-Appellant
Sanjeewa Dissanayaka SSC for the Respondent

Written Submissions on : 29.04.2019 (by the Accused-Appellant)
04.07.2019 (by the Respondent)

Argued On : 08.02.2021

Decided On : 10.03.2021

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Devika Abeyratne,J

The 1st accused appellant has preferred this appeal seeking to set aside the judgement dated 25.06.2018 of the learned High Court Judge of *Kegalle* convicting him for murder in case Number HC 3015/2010 in the High Court of *Kegalle.*

The 1st accused appellant (hereinafter sometimes referred to as the appellant) along with 3 other accused were indicted for the following charges before the High Court of *Kegalle.*

1. That on or about the 19th of June 2008 committed the offence of murder, by causing the death of one *Unagolla Devage Somapala,*

an offence punishable under Section 296 to be read with section 32 of the Penal Code.

2. That on or about the 19th of June 2008 committed the offence of attempt to murder, by causing injuries to *Hewayalage Kamalawathi*, an offence punishable under section 300 to be read with section 32 of the Penal code.

At the conclusion of the trial, the 1st accused appellant was convicted for murder on the first count and sentenced to death and was acquitted on count 2. The 2nd to the 4th accused were acquitted and discharged from both counts.

Being aggrieved by the said conviction and sentence the appellant has preferred the instant appeal on the following grounds of appeal.

i. Evidence of star witness PW 15 namely *Dhanapala* is plagued with serious infirmities which taints his credibility as a star witness.
ii. The learned trial judge has failed to judicially evaluate the testimonial trustworthiness of PW 15 *(Dhanapala)* in its correct judicial perspective.
iii. The Learned trial Judge has flawed on the principles relating to section 27 recoveries.
iv. The basis of the conviction being eye-witness testimony, application of the Ellenborough principle is wholly unwarranted, inappropriate and flawed.
v. The conviction which is based on individual liability is legally flawed.

The prosecution has led the evidence of 06 Witnesses and it appears that the learned trial judge has placed much reliance on the evidence of PW 15 *Dhanapala.*

The factual circumstances *albeit* briefly are as follows;

According to the testimony of PW 1 *Kamalawathi* who is the victim in count 2, and is said to be the mistress of the deceased *Somapala* is that, around 8.00-8.30 on the night of 19.06.2008, PW 15 has come to her house with an invitation to participate in an almsgiving and the deceased had been at her house at that time. The deceased had accompanied PW 15 to give him some coconuts and a short time later she has heard his cries of distress "මැණිකේ මට ගහනවා".When she rushed out, a few meters from her house she had seen four people near *Somapala.* Out of the four, she had identified "කිණිවිට පුතා" (1st accused) and *Sumith* (4th accused) by name and stated that although she does not know their names she knows the other two assailants by sight who she later identified as the 2nd and the 3rd accused.

PW 1 in her evidence responding to a question by Court has stated that she ran shouting when she saw *Somapala* being assaulted, however she was unable to catch him before he fell and from the blow to her head she too had fallen alongside *Somapala.* A person who looks like *Dhanapala* (PW 15) had been running away from the scene. Thereafter, she had felt dizzy then remembers waking up in the hospital.

Her evidence is that the blow she received from the front from "කිණිවිට පුතා" did not affect her, but the blow from behind has affected her and she had fallen down. She has witnessed the 1st to the 4th accused

having clubs in their hands. According to her there had been sufficient light to identify the four people as the light from her son' s house had fallen on to the place of incident and also that she had run out with the Kerosene lamp in hand. These facts were not contradicted.

According to PW 12 the investigating officer, he has made a special note that the place of incident was visible with the moon light as the previous day was a *Poya* day. In evidence he had added that not only the moon light, but also the light from nearby buildings fell on the scene of the crime. He has evidenced that although PW 1 could not speak and she was in pain, she has pointed and tried to signal with her hand to a place with blood where presumably the deceased had fallen. Therefore, the fact that the scene of incident had sufficient light was established.

PW 4 who is the brother of the deceased on his way from work has come upon the deceased and PW 1 lying on the road in a pool of blood. He has reported the incident to the Police and on instructions has taken the deceased to the hospital in a three wheeler with the help of the wife of the deceased. They have left PW 1 injured, whining and groaning behind, who was later dispatched to the hospital by the investigating officer PW 12 who came to the scene around 22.29 pm at night, having being informed by a 119 police message.

The main eye witness, PW 15 *Dhanapala* in his evidence has stated that on the fateful day he went to the house of PW 1 to invite PW 1 and the deceased for his wife's 3 month almsgiving and after having dinner with them he had left with the deceased. About 10,15 feet away from the house of PW 1, after they went past a parked three wheeler,

Samantha Kiniwita (1st accused appellant) had come from behind and held him by his shirt collar and demanded money. The deceased had told the appellant to let go of PW 15 and that he does not have money. *Kiniwita* letting go of PW 15 had taken hold of the deceased and walked towards the house of PW 1. At that point the 3rd accused and some others had come out of the three wheeler and joined the appellant. Accordingly, PW 15 has identified the 1st, 3rd and the 4th accused being there. He alleged that the 3rd accused assaulted him and when he fell down that the 3rd accused took Rs 2300/- from his shirt pocket. Although the counsel for the appellant submitted that PW 15 has failed to file a complaint regarding the incident, it is noted in page 270 of the brief that PW 12 Inspector *Sumanapala* has stated that the third accused was arrested for assaulting and robbing Rs 2300/- from *Dhanapala.*

PW 15 has testified that he witnessed the 1st accused assaulting the deceased with a club "...........මෙයාගේ අතේ තිබුන පොල්ලෙන් දෑත බදලා ඔලුවට ගැහුවා" (page 168 of the brief) and that the deceased shouted "බුදු අම්මෝ". He has described the club that *Somapala* was assaulted with and after witnessing the assault on *Somapala* he had got frightened and run away from the scene and had hidden under a bed. He has not returned to check on *Somapala* as he feared for his life. The following morning he has learnt that *Somapala* had died. He has evidenced that there was sufficient light to recognize the assailants who are known people from the village. It was alleged that due to the death threat he received from the 1st accused he left the village and is now residing in *Kalawane.* He had given a statement to the police on 21.06.2008.

At the trial, the Counsel for the accused have marked some contradictions and omissions through PW 15. In pages 190 and 192 of the brief V1 and V 2 contradictions have been marked to the effect that in the statement to the police PW 15 has referred to a "ආයුධය" and not a club, (that was stated in evidence) that was in the hand of the 1st accused. However, PW 15 has sufficiently and clearly explained that when *Kiniwita* came out of the three wheeler he saw him carrying what he thought was a "ආයුධය", but when the deceased was assaulted he clearly saw that it was a club. This explanation can be considered as a reasonable explanation. The learned trial judge has considered this alleged contradiction and has arrived at a justifiable conclusion.

Contradictions 1V1 and 1V2 refer to whether PW 1 consumed liquor with *Somapala* which he has denied, and are not material contradictions.

In the case of *Wickramasuriya V Dedoleena and others* [1986] 2 SLR 95 his Lordship Justice Jayasuriya held that:

> "*This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are led long affer the events spoken to by witnesses. A judge must expect such contradictions to exist in the testimony. The issue is whether the contradictions go to the root of the case or relate to the core of a party's case.*"

In *Attorney General V Potta Nauffer and others* 2007 2 SLR 144 *Thilakawardena* J held that;

> *"Therefore, court should disregard discrepancies and contradictions, which do not, go to the root of the matter and shake the credibility and coherence of the testimonial as a whole. The mere presence of such contradictions therefore, does not have the effect of militating against the overall testimonial creditworthiness of the witness, particularly if the said contradictions are explicable by the witness. What is important is whether the witness is telling the truth on the material matters concerned with the event."*

The omissions cited during the trial when perused were of no significance to the main cause of the case.

In *Banda and others V Attorney General 1999 3 SLR 168* court held that;

> *"Omissions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions".*

In the light of the above authorities, when considering the above mentioned contradictions and the other marked contradictions as well as the omissions, it is apparent that they are not material or vital contradictions and are of minor importance and do not affect the root of the case, as correctly considered by the learned trial judge.

The counsel for the appellant contended that the evidence of PW 15 is plagued with infirmities which taints his credibility as a witness and drew the attention of Court among others to the following facts; the star witness PW 15 *Dhanapala* who is said to have been at the scene has not lodged a complaint to the police; the accused were not arrested on a police complaint; the prosecution failed to express how the names of the accused were disclosed; PW 3 who is alleged to have disclosed the name of the 1st accused has not given evidence; PW 15 has not given evidence at the inquest nor at the *non summary* inquiry.

PW 15 being the main eye witness has clearly identified the appellant as the person who assaulted *Somapala* with the club. It has been established without any doubt that there was sufficient light at the scene of the crime.

PW 15 has unhesitatingly admitted his failure to file a complaint to the police on the day of the incident. But it appears he has complied with his civic duty by informing the Police by calling 119 which has been corroborated. His statement to the police has been on the 21st of June about one and a half days after the incident. There is no inordinate delay in making the statement and in fact as corroborated by PW 12, the 3rd accused had been apprehended on the statement of PW 15. He has testified that he being a single parent feared for his life and that his attempt to complain to the police not being entertained made him decide to leave the village for good. The response of the police to his request is explained in page 176 of the brief as follows;

අධිකරණයෙන්

ප්‍ර : තමුන් පොලිසියට පැමිණිල්ලක් කලාද ඒ ගැන?

උ : මම පොලිසියට ගිහින් මතක් කළා. පොලිසිය මට තර්ජනය කළා මම පොලිසිය ගෙනල්ලා උබලගේ ගෙදර තියන්නද කියලා ඇහුවා. මම ඉතින් ඒ වෙලාවේම නිගමනය කළා මේ ගමෙන් යන්න ඕන කියලා.

It is to be noted that after PW 15 concluded his evidence at the trial court, the learned State Counsel has informed the learned judge about a threat to the witness and the accused appellant has been warned by court. (page 299 of the brief). This fact justifies the evidence of PW 15 about the threats to his life.

The Counsel for the appellant commented on the credit worthiness of the evidence of PW 15 as he had not given evidence either at the inquest or the *non summary* inquiry. It is correct that PW 15 has not given evidence at an inquiry before he testified at the trial. However, this fact does not disqualify him from giving evidence at the trial, as supported by the following judicial authorities.

In *Saram V Weera 1 NLR 95*

> *"In proceedings taken under chapter XVI. Of the Criminal Procedure Code, a Police Magistrate has to take and record evidence for the prosecution with the view of ascertaining whether there is such a prima facie case made out against the accused as could justify him in committing the accused for trial to a Superior Court, and not to determine his guilt or innocence which is in issue only in trials under chapter XIX."*

The King V Aron Appuhamy et al. 51 NLR 358 (Assize Court)

> *"The Magistrate committed the accused for trial without examining a material witness whose whereabouts could not be traced. After the indictment was signed, but before the trial, the missing witness was discovered. The Attorney general gave notice both to the accused and their legal advisers that he intended to move the Court of trial to amend the indictment by adding the name of the new witness. The defence was also supplied with a precis of the evidence which the witness was expected to give."*

Dias J, at page 359

> *"The question, therefore which I must now decide is whether in allowing this application, any substantial injustice or prejudice will be cased to the accused. No prejudice can possibly be caused to anybody by allowing the truth to be made manifest. Therefore, if there is a witness who should have been called in the Magistrate's Court but who, owing to his absence, could not be so examined, it cannot cause injustice to the accused, provided they have every opportunity of testing the evidence of the witness by cross-examination on oath."*

In *Attorney General Vs Ranmuthudewage Susantha Dhammika Rathnayake,* CA Application No. APN 43/2015, *L.T.B.Dehideniya J,* decided on 29.04.2016,

> *"The only issue in this case is whether the trial judge can call a person as a witness who was not called as a witness in the non summary inquiry. The purpose of holding the non*

summary inquiry is to ascertain whether there is a prima facie case against the accused to commit him for trial in a higher Court. The Magistrate is not required or empowered to decide whether the accused is guilty or not guilty at the non summary inquiry. His task is only to find out whether there is enough evidence to commit the accused for trial."

As stated in the above cited authorities the holding of a *non summary* inquiry is not to decide the guilt or innocence of the suspect but only to ascertain whether there is a *prima facie* case made against the accused.

In the instant case, without the evidence of *Dhanapala*, either at the inquest or the *non summary* inquiry, the learned Magistrate has come to a finding that there is sufficient evidence against the accused to be committed to the High Court. Thus, it is safe to assume that no substantial injustice or prejudice is caused to the accused by calling PW 15 as a witness at the trial. Therefore, merely because *Dhanapala* did not give evidence before the learned Magistrate, there is no necessity to shut out the evidence before the trial judge, who must have the benefit of hearing all the evidence to arrive at a 'just decision' of the case.

It is also to be considered that section 439 of the Criminal Procedure Code provides for the summoning of any person as a witness to arrive at a 'just decision'.

Further, PW 15 was listed as a witness the prosecution intended to call. Therefore, the appellant had due notice of that fact from the day the indictment was served on him and as such there is no element of surprise.

PW 15 has been named as a witness in the indictment and he is the main eye witness. In the light of the above judicial decisions it is abundantly clear that there was no bar for PW 15 to give evidence at the trial not withstanding his failure to give evidence at the inquest and the *non summary* inquiry.

It is also to be considered that PW 15 had witnessed the brutal assault by the appellant on *Somapala* who came to his rescue when money was demanded from PW 15. The lack luster response from the police for his request for protection surely would have discouraged him to be in the vicinity when there were threats to his life. He is an ordinary security guard with a small child to look after, who had lost the wife three months before the incident. In the circumstances, his evidence that he left the village informing the *grama sewaka* is believable. He has stated that although circumstances made him leave the village, he had decided to come and give evidence whenever he is noticed by Court, which he has done coming from *Kalawana* almost eight years after the incident. He has given cogent and consistent evidence. The learned trial judge after evaluating and analysing the evidence has correctly concluded that PW 15 is a credible witness.

It is trite law that the prosecution can rely on the evidence of a sole witness if it is cogent and impressive.

In the case of *Wijepala V AG 2001 SLR 46 Ismail J, held that;*

> *"Senaratne who was the sole eyewitness has thus been cross-examined on vital aspects relating to the incident and doubts have been raised in regard to his presence at the scene. Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact,* ***thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court,*** *but whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary". (* emphasis added*)*

The learned counsel for the appellant contended that the accused were not arrested on a statement by PW 15 and referred to it as an infirmity in PW 15's evidence. It has transpired from the evidence of PW 12 that all four accused were arrested by him. The name of the first suspect, now the appellant, has been disclosed by PW 3 who has assisted in taking PW 1 to hospital. On the statement of PW 15, the third accused and subsequently the other two accused have been arrested.

PW 3 has not given evidence in court as she was abroad. Her inability to attend courts is documented in the Journal Entry dated 21.07.2015. The learned counsel for the appellant submitted that as PW 3 was not called as a witness, the evidence of PW 12 was hearsay evidence. However, there is no requirement in law that suspects have to

be arrested only on the statement of a witness. Therefore, the argument of the counsel on that point cannot be sustained.

Another argument advanced on behalf of the appellant was that in the instant case the conviction which is based on individual liability is legally flawed.

King Vs Asappu 50 NLR 324 is a case in point, where it was held;

- *i.* *The case of each accused must be considered separately.*
- *ii.* *The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
- *iii.* *Common intention must not be confused with same or similar intention entertained independently of each other.*
- *iv.* *There must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.*
- *v.* *The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.*

It is obvious from the acquittal of the 2nd to 4th accused from both counts and the appellant from the second count that the learned trial judge has considered the case of each of the accused separately and acting judiciously has not imported the element of common intention on to the other accused and found them guilty. Therefore, this court cannot agree with the contention of the counsel for the appellant that the learned trial judge's consideration is legally flawed.

On consideration of the totality of the evidence adduced in court it is established that the prosecution has proved the case beyond

reasonable doubt. The appellant has not been able to convince this Court that there is a justifiable reason to interfere with the conclusion of the trial judge. Accordingly, we affirm the judgement dated 25.06.2018 and the sentence imposed on the appellant. The appeal is dismissed.

The registrar is directed to send a copy of the judgment together with the original case record to the High Court of *Kegalle.*

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL