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

In the matter of application for appeal in terms of the section 331 of the code of Criminal Procedure Act No 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of sri Lanka.

Court of Appel Case No:
HCC 96-98/2016

The Democratic Socialist Republic of Sri Lanka

Complainant

High Court of Nuwara Eliya
Case No: HC 29/10

VS

1. Nalin Yusuf
2. Sajeewa Mahinda Bandara
3. Gamini Wijesooriya

Accused

And Now between

1. Nalin Yusuf
2. Sajeewa Mahinda Bandara
3. Gamini Wijesooriya

Accused-Appellants

VS

Attorney General,
Attorney General's Department
Colombo 12.

Respondent

Before	**:**	**Devika Abeyratne,J** **P.Kumararatnam,J**
Counsel	**:**	Asthika Devendra with Sanjeewa Ruwanpathirana for the Accused Appellant Sudarshana De Silva, DSG for the Respondent
Written Submissions on	**:**	03.05.2018 (by the Appellants) 06.08.2018(by the Respondent)
Argued On	**:**	15.02.2021
Decided On	**:**	25.03.2021

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Devika Abeyratne,J

The accused appellants were indicted in the High Court of *Nuwara Eliya*, that on or about the 10th September 2001, the accused committed the murder of one *Karupaiah Vanarajah* at *Kandapola* an offence punishable under Section 296 of the Penal Code. After trial all 3 accused were convicted and death sentence was imposed.

Being aggrieved by the conviction and the sentence, on the following grounds of appeal the accused appellants have preferred their appeal.

I. Did the learned High Court Judge fail to consider the serious infirmities in the evidence of main witness for the prosecution, *Anura Wijesooriya* (PW 5)?

II. Did the learned High Court Judge fail to consider whether the prosecution witnesses are credible and /or consistent witnesses?

III. Whether the learned High Court Judge has failed to fairly and properly analyze the contradictions?

IV. Whether the learned High Court Judge has failed to fairly evaluate the dock statements of the accused?

V. Whether the prosecution has failed to produce sufficient circumstantial evidence?

VI. Whether the learned High Court Judge has failed to fairly and properly analyze the uncorroborated evidence of PW 9 regarding the identification of the body of the deceased?

VII. Whether the learned High Court Judge has delivered the judgment without sufficiently analyzing the evidence presented in this case?

The facts of the case, *albeit* briefly, are as follows;

According to the wife of the deceased PW 2 *Pakya Leela* , the deceased was a watcher at St Johns Estate. He was also employed by one *Kelum Mudalali* to guard the railway sleepers that were lying by the side of the *Kandapola -Nuwara Eliya* main road which was about 225 to 250 meters away from their home.

It was submitted that the deceased usually leaves home around 6.00 pm, with his torch and a sword and returns home around 6.00 am on the following day. When

he failed to return from guarding the sleepers on the morning of September 10th 2001, after searching for him she had complained to the police. During the search with the police the body of the deceased with injuries all over was found at a place called *Kupana*. Only a torn trouser had been on his body and the shirt, belt and his jerkin which were found was identified as items worn by the deceased when he left for work on the night of the 9th September 2001.

Two contradictions were marked from the evidence of PW 2 to the effect that at the inquest before the learned Magistrate she had stated that the deceased left at 9 pm on the 9th (V1) and not at 6 pm as she had stated in evidence. V 2 is on the basis her stating that the deceased had came back in the night to take the sword, when in evidence she has stated that he took the sword along with him when he went for work at 6.00 pm.

However it was apparent on perusal of the evidence of PW 2 before the trial court her unwavering evidence has been that the deceased left at 6.00 pm

The trial judge has stated that these contradiction do not go to the root of the case and decided that they did not affect the credibility of the evidence of PW 2.

At the hearing of the appeal the learned counsel for the appellants contended that V1 is a material contradiction on the basis that if the deceased left at 9.00 pm in the night , when considered with the evidence of PW 5 who has stated that it was around 8.30 in the night that the three accused came to his house and, if that was the case the accused were not in a position to harm the deceased.

If a contradiction is to be material it should be sufficient to create a reasonable doubt in the evidence of the witness concerned. There was no reason to disbelieve PW 2 when she said the deceased left at 6 pm. She had no opportunity to know that the accused appellants were planning on using the alleged discrepancy of the time, which is based on her evidence at the inquest, to their advantage. Thus, it appears that the contradiction is highlighted not to create a doubt in the evidence of PW 2, but to formulate a defence. Therefore, it is my considered view that the learned trial judge has arrived at the correct decision that the contradictions failed to create a reasonable doubt in the evidence of PW 2.

The brother of the deceased *Karupiah Pugaladan* PW 4 who had searched for the missing brother and later identified the body has given evidence explaining that the body had suffered much damage and the trouser was in tatters. A contradiction V 4 was marked on the basis that in his statement to the police he had stated that his brother had once told him that until he was paid money for his services he will not allow the sleepers to be taken away. Before V4 was marked, several questions were asked as to whether the brother told him that *Kelum mudalali* was not giving money for guarding the sleepers. However, he has repeatedly stated that he cannot remember saying anything to that effect. This contradiction the learned High Court Judge has quite correctly not considered as a vital or material contradiction, as it did not affect the root of the case.

The crucial and the main witness is PW *5 Anura Wijesuriya* , who was earlier a suspect for this murder and was remanded with the other 3 suspects for over 3 months in the Magistrates' Court. He is the first cousin of the third accused *Gamini Wijesuriya*. According to him when he was sleeping at home on the fateful night, the 3rd accused together with *Nalin Usuf*, the 1st accused and *Sajeewa* the 2nd accused, both known to him , have come in the white Elf vehicle driven by *Gamini* the 3rd accused and asked his assistance to unload and keep the 2 sleepers that was in the lorry which he and the third accused had unloaded. Thereafter, he had been asked to

accompany them to drop off *Nalin Usuf* and *Sajeewa* to their respective homes. The third accused had asked PW 5 to sleep at his place. (page 151 of the brief). It was stated that because of their close relationship there was nothing to suspect or to be afraid of. All four have travelled in the front seat of the lorry and on the way the 3rd accused has stated that a t*amil* person who was knocked down by the lorry was inside the lorry and threatened to kill PW 5 if he divulged it to anyone.

In page 153 of the brief it is stated as follows,

ප්‍ර : මොනවද කිවුවේ කියලා ගරු අධිකරණයට කියන්න?

උ : මනුස්සයෙක් වැදුනා ලොරියට පස්සේ ඉන්නවා කියලා කිවුවා. කාටවත් කිවුවොත් මරනවා කියලා කිව්වා.

In page 159 of the brief PW 5 goes on to say that the 3rd accused mentioned that *Nalin* and *Sajeewa* had stabbed a person with a knife when a fight ensued when the sleepers were taken.

Thereafter, at the *Kura* estate boundary, *Sajeeva* after checking under the lorry had informed that the body had fallen off. However, when they were returning they have observed the body fallen on the road but had driven off, leaving the body there.

According to PW 5 he had not looked at the body and V5 contradiction was marked in page 167 of the brief as follows.

ප්‍ර : තමුන් මෙහෙම කිවුවාද ගරු මහේස්ත්‍රාත් අධිකරණයේදී මම ටෝච් එක ගසා බැලුවාම දැක්කා. මම එය දැක බය වුනා කියලා තමුන් කිවුවාද?

උ : නැහැ.

However, in page 157 of the brief PW 5 in evidence in chief has admitted that he was told that the person was tied to the axle bar of the lorry. This position was clarified in page 167 when he was cross examined where he had admitted seeing a person tied to the axle of the lorry.

It was unchallenged that PW 5 was a suspect in the Magistrate's Court and was later named as a prosecution witness. The suggestion by the counsel for the appellant that he gave evidence implicating the accused as he was angry with them was vehemently denied by him.

It is to be considered that if PW 5 was not in good terms with his cousin the 3rd accused, stolen goods would not have been brought to his place nor would he have travelled in the vehicle. Thus, it is apparent that the suggestions by the counsel for the accused that it was PW 5 who was responsible for the incident and the person who took away the sleepers were without any logical basis.

PW 6 *Nelson Wijesuriya* the brother of PW 5 has testified that the sleepers that were in a drain in the cabbage patch in their garden was taken by the police. PW 8 *Osman de Silva* had stated that his driver the 3rd accused had taken the white *Nissan Atlas* lorry on the 9th and returned it only on the 11th. The *Ragala* Police had taken the vehicle in to custody on the night of the 13th. PW 5 has been referring to the white lorry as an ELF lorry but in fact it was a Nissan Atlas. However, it was the description of the make of the lorry which was incorrect but there was no issue about the identification of the vehicle.

PW 09, JMO *Dr Kithsiri Samarasinghe* has testified that the face and body of the deceased was severely damaged and injured and opined that it could have being caused by a serious accident or being dragged by a vehicle. (page 216 of the

brief). The large blood vessels in the chest area had been damaged and parts of the liver, gall bladder, lungs and some muscles were missing. It was also stated that the major organs such as the brain, lungs and liver was sixty percent damaged and the other organs 40 percent damaged and with that percentage the injuries were necessarily fatal.

Further, he has observed three stab injuries on the head, chest and right side of the hip area and a *tyre* mark on the right leg below the genetical organs. An opinion has been given that this sort of injury could have occurred by the body being dragged along the road tied to the vehicle. The cause of death according to the post mortem report is '*dragged on the road by tying a wire on the right side of the leg after stabbing'.*

The evidence of PW 10 given at the *non summary* inquiry was admitted under section 33 of the Evidence Ordinance. He has observed blood marks near the sleepers. The body had been discovered quite a distance from where the sleepers were kept. All three accused have been arrested by this witness. On the statement of the 1st accused, a knife hidden under the seat of the lorry and on the statement of the 3rd accused, the lorry, a wire and the sleepers have been recovered.

PW 13, the government analyst had examined the vehicle on 27.09.2001, 17 days after the incident. The vehicle had been at the *Ragala* Police Station well covered. Human blood has been detected on the rear left mud guard, inside the mud flap, inside the left front mud guard, side of the left seat and on the spare wheel. Some hairs also have been recovered. The pieces of cloth and thread that were recovered had matched the clothes worn by the deceased. It was also stated that the damage to the clothes could have been caused by being dragged on the road.

All three accused have given their statements from the Dock, denying the allegation levelled against them. They have stated that they were assaulted by the police and their signatures were placed on some papers. The first accused further stated that his finger prints were placed on a knife. The learned trial judge has considered the Dock Statements and rejected them stating that no doubt was created in the prosecution case by the Dock Statements.

It is noted that the items of evidence found by the government analyst is not from easily visible open places, but from hidden locations. The evidence from the owner of the lorry established that the vehicle was in the custody of the 3rd accused who is the driver from the 9th to the 12th. PW 5 identified the vehicle in which the three accused visited him with the sleepers, which were later taken by the police and marked as productions at the trial. The sleepers, the lorry and the wire were recovered as section 27 recoveries. This evidence has not been challenged by the accused appellants.

It is trite law that the burden of proof is on the prosecution in a criminal trial.

In *Queen vs Sumanasena 66 NLR 351* it was held that;

> *"…. suspicious circumstances do not establish guilt nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt…."*

At the hearing of the appeal, the counsel for the appellants contended that the failure to mention section 32 of the Penal Code in the indictment is an irregularity which the learned trial judge has not considered.

In *CA Appeal 78-80 2001, decided on 01.10.2007, Ranjith Silva, J* has held that,

> *"....Although Section 32 of Penal Code was not mentioned, it is clear that the basis on which accused-appellants were found guilty was that they acted in furtherance of a common intention. It is not necessary to mention Section 32 of the Penal Code when all the accused are charged for committing the offence."*

In *Attorney General V Munasinghe 70 NLR 241*, it was stated that,

> *"....the fact that no reference was made in the indictment to the common intention set out in section 32 of the Penal Code was not an error or omission which could prevent the court from convicting the 2nd and 3rd accused for count 1 of the indictment."*

In *Ranji Singh V State of Bihar AIR 2001 SC 3853 Ashok Bihan J.* held

> *"....even in the absence of the charge under Section 34 the conviction could be maintained by the courts below."*

> *".....Counsel for appellants could not show that any prejudice was caused to either of the accused person because of the non-framing of charge under section 34."*

It is apparent on a perusal of the judgment at pages 338 and 339 of the brief that the learned judge has considered the liability of each accused separately. Although he has failed to set out the law that he has applied in express terms, he has nevertheless considered the ingredients of common intention when he arrived at the conclusion. Accordingly, the argument of the counsel for the appellants on that point cannot be sustained.

Another question agitated by the counsel for the appellants is the probability factor on the basis that it was not probable that the three accused appellants would be travelling with a dead body with stolen goods to PW 5's house and divulging their mis deeds then threatening to kill him.

It has to be conceded that there is no hard and fast rule how different people will act in different situations. PW 5 has testified that the 3rd accused invited him to spend the night with him, after dropping off the other two. However, it appears that there was a change of plans and in the end PW 5 was brought home and the 3rd accused had gone to his place.

In the absence of any contrary evidence, it is a fair assumption that PW 5 was asked to accompany them so that after dropping off the other two accused appellants, the 3rd accused would not be alone to travel back to his house with a dead body in the vehicle as originally planned. The body falling off from where it was tied would not have been anticipated when PW 5 was invited to accompany them. In such circumstances, the behaviour of the accused appellants cannot be considered as improbable.

The case for the prosecution depended to a very large extent on the evidence of PW 5 although the prosecution was also based on circumstantial evidence.

PW 5 had testified that the three accused came to his house with the sleepers and that they travelled in the lorry and looked for a body underneath the lorry and later observed a body fallen off on to the road. The accused appellants have not disputed or challenged this evidence in cross examination. All that was suggested to the witness was that he has falsely implicated the accused and that it was PW 5 who should be charged.

The learned trial judge has correctly held that PW 5 cannot be considered as an accomplice. It is clear that PW 5 who according to the evidence cannot be considered as a guilty associate who willingly participated in the crime, when there is no such evidence against him.

According to the available evidence, it is quite obvious that PW 5 did not know of the incident which led to the death of a person and the subsequent arrangement to dispose the body. However the body has fallen off from where it was tied to the vehicle and was left behind to be discovered by the police.

The counsel for the appellants contended that the learned trial judge was in error when PW 5 was referred to as an eye witness in page 336 of the judgment.

It is apparent that PW 5 is not an eye witness to the incident that led to the death of the deceased. However, it is not incorrect to say he is an eye witness to certain incidents such as the three accused coming to his house and unloading the sleepers, thereafter, travelling in the vehicle, looking for the body underneath the vehicle, witnessing the dead body on the road and dropping off the accused. Therefore, it cannot be said that the learned judge was incorrect altogether stating that PW 5 was an eye witness.

The counsel for the respondent has referred to the following authority in support of his position.

State of Uttar Pradesh Vs M.K. Anthony (184) SCJ 236/(1985) CRI.L.J.493 at 498/499 where the Indian Supreme Court held;

> *"while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as whole appears to have ring of truth, Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief."*

As stated earlier in the judgment the evidence of PW 5 was not challenged. Only a suggestion that due to his animosity with the accused appellants PW 5 was implicating them. This suggestion was without any acceptable basis and has to be rejected. When the evidence of PW 5 is unchallenged that evidence is admissible.

In *Fradd vs Brown and Company 20 NLR 282 at 283* it was 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 papers or from narrative of those who were present. It is very rare, in questions of veracity so direct and so specific as these, a Court of Appeal will over rule a Judge of first instance.'*

The unchallenged evidence of PW 5 is that a person was struck by the lorry driven by the 3rd accused, (*tyre* marks observed in the report) stabbed by the 2nd and 3rd accused which is corroborated by medical evidence, the vehicle was driven with the person tied to the axle of the lorry and being dragged in that manner has sustained extensive injuries in the body which again was corroborated by medical evidence and the evidence of the government analyst.

The participation of each of the accused and the joint responsibility and liability has been very well established by the prosecution beyond reasonable doubt.

In *AG Vs. Potta Naufer and others* 2007(2) SLR 144 *Thilakawardhena J* held that;

> *"When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence."*

In *Kusumadasa Vs. State* 2011(1) SLR 240 *Sisira de Abrew J* has decided that;

> *"The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence."*

In *Sarath Fernando Vs. Attorney General* 2014 (1) SLR 16 it was held that;

> *"In order to justify the inference of guilty from purely circumstantial evidence the inculpatory facts be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."*

In *Premawansa V Attorney General* 2009 (2) SLR 205 *Sisira de Abrew J* has held that;

> *"In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence."*

On the totality of the evidence led in the case and in the light of the above authorities, the only irresistible and inescapable conclusion that can be arrived with the proved items of circumstantial evidence is that the three accused appellants had committed the murder of *Karupaiah Vanarajah* at *Kandapola.*

Accordingly, the conviction and the sentence of all three appellants are affirmed. 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 *Nuwara Eliya.*

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL