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

Attorney General

Complainant

CA. No. 243/2015

High Court of Matara

Case No. HC 150/2010

Vs.

1. Abeywickrama Gamachige Jayantha Kumarasiri alias Ranji.
2. Boparagoda Gamage Sirisena alias Sira.
3. Boparagoda Gamage Chandrasena alias Chandare.

Accused

And Now

1. Abeywickrama Gamachige Jayantha Kumarasiri alias Ranji.
2. Boparagoda Gamage Sirisena alias Sira.
3. Boparagoda Gamage Chandrasena alias Chandare.

Accused-Appellants

Vs.

Attorney General

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.
: R. Gurusinghe, J.

COUNSEL : U.R. de Silva PC., with Savithri Fernando for Appellants.
A.Navavi DSG. for Respondent.

ARGUED ON : 29.03.2021

DECIDED ON : 29.07.2021

R. Gurusinghe, J.

The appellants, in this case, were charged with the murder of one Prasanna and were convicted. In addition, they were accused of hurt punishable under Section 315 of the Penal Code and convicted. The appellants preferred this appeal against the conviction and the sentence.

The appellants urged the following grounds of appeal.

a). The learned Trial Judge has erred in law in not taking into account the fact that the visual identification of the appellants by PW2 and PW3 does not satisfy Turnbull principles.

2). The learned Trial Judge has misdirected himself on the facts transpired in the evidence of PW2.

3). The learned Trial Judge has erred in law by failing to consider the absence of indication of the participatory presence of 3rd accused. The learned Trial Judge has erred in law in not contemplating the defects in the investigation, which has consequentially failed in sustaining the conviction on the indictment.

In addition to the above grounds, when this appeal was taken up for hearing, Counsel for the appellants argued that the evidence of PW3 on the first date of his evidence contradicts the rest of his evidence. On the first date of evidence, PW3 had stated that he could not identify the assailants of the deceased.

The first accused is a son of PW3 Ariyadasa and a brother of PW2, Kularatne. PW1 is the wife of PW2.

PW3 stated in his evidence that on 4th July 2008 at about 8.30 p.m. when he was at home, he had heard a loud wailing sound of his neighbor, "Mahathun" from a distance and he came to his threshold. He also heard people running about when he flashed his torch through the window in the front, and he had seen his son, the first accused, assaulting somebody on the ground with a sword. The first accused had slashed several times up and down. He had seen the second and third accused there. Immediately, he went to his almirah and took acid for his defence. When he came back to the window, about one or one and half minutes later all had gone. He opened the door and looked. He saw the deceased lying fallen on his threshold in a pool of blood.

He telephoned his daughter and told her that "Mahathun" was killed and lying fallen on the threshold of his house and told her to inform the police.

The police had come at about midnight. One of the grounds of appeal is that the evidence of PW2 and PW3 does not satisfy Turnbull principles.

In this case, all the accused were known to PW2 and PW3. The first accused is one of the sons of PW3. The second and third accused were from the adjoining village. The witnesses have seen them before the incident. PW3 had observed the incident about one and half minutes by flashing the torch. One of the accused also flashed the torch. There

was a window with a broken glass panel; PW3 observed through that space. He was very close to the scene.

PW3 described as follows:

[Evidence was recorded on page 114 and 115 of the appeal brief]

ප්‍ර: තමන් සිද්ධිය වුනා කියන්නේ තමන්ගේ කොහේද පුද්ගලයෙක් වැටිල හිටියේ?

උ: මගේ ඡනේලය මෙහෙම නම් එතනම හිටියේ.

ප්‍ර: තමුන්ගේ ඡනේලය කියන්නේ?

උ: ගෙයි බිත්තිය ලගම, ඡනේලය ලග.

ප්‍ර: ඒ කියන්නේ තමුන්ගෙ ගේ ඇතුලෙ ඉදල බලන කොට අඩියක් දෙකක්වත් නැහැ?

උ: නැහැ.

The Court had observed that though there was a limitation, the space was sufficient to see what had been described by PW3. PW3 has said three, four times that "දැකපු හරිය තමයි ඔය කිව්වේ". The police had recorded the statement of PW3 on the following day. PW3 had stated to the police as to what had happened on the same night. There was no delay at all. The appellants' argument is largely based on the evidence of PW3 given on the first date. However, PW3 had explained what had happened to him on that day, and that learned High Court Judge had accepted that.

In view of the above circumstances, no reasonable doubt would cast to vitiate the conviction of the first accused.

Counsel for the appellants argued that the evidence of PW3 is contradictory per se as he had not given evidence on the first date incriminating the appellants.

However, PW3 had explained as to why he was not able to give proper evidence on the first date of the trial on page 72 of the brief.

PW3 stated as follows:

ප්‍ර: ඇයි තමා පෙර දිනයේදී මේක මෙහෙම කිව්වේ නැත්තේ?

උ: එදා මට මොනව උනාද දන්නේ නැහැ. මෙහෙ ඇවිල්ලා ඉදගන්න බැරුව කලන්තෙ හැදිල පුටුවෙ වාඩිවෙලා ඉන්දද්දිත්, නෝන කෙනෙක් ඇවිල්ල මට කිව්වා ඔහොමද උසාවියේ හැසිරෙන්නේ කියල. මේ උතුම් අධිකරණයෙන් මා නැවතත් සමාව ඉල්ලනව. එදා මොනව උනාද දන්නේ නැහැ.

The police recorded a statement of PW3 on the following day.

When leaving aside the evidence of the first date, the only contradiction marked was regarding whether he was after dinner or not when the incident happened. This was considered by the learned Trial Judge and decided that it was not a material contradiction. I have no reason to disagree with this finding. The contradiction was not with regard to vital parts of the evidence. Whether he was after the meal or not is not material at all for the case.

With regard to the first date of evidence as described above, PW3 had explained what had happened to him on that day. Further, the learned Trial Judge observed that PW3 was not a willing witness. He further stated that a father would not readily come to give evidence against his own son, and his behavior is natural even though he is legally bound to tell the truth. Even on the first date of evidence, PW3 did not try to implicate any of the accused. He only tried to help the accused. Therefore, the suggestion that PW3 had given evidence because he had animosity against the first accused cannot be accepted. This position was suggested to PW3, and he had rejected that suggestion.

Except for the above-mentioned contradiction regarding whether he was after dinner or not, there was no contradiction or omission. PW3 stood by what he had stated to the police on the day of the incident. I find no reason to disbelieve the evidence of PW3.

The evidence regarding the second and third accused was that they were just there. The learned State Counsel who appeared at the trial had put several leading questions to the witnesses to obtain evidence regarding the participation of the second and third accused. However, there was no sufficient evidence against the second and third accused. There is evidence that they were present there. However, there is no evidence that the second and third have had done anything, which would clearly suggest that they had shared a common intention to kill the deceased. The second and third accused were from the adjoining village, and they did not have any connection or animosity with the deceased or PW2.

The evidence of PW2 reveals that he did not clearly identify the second and third accused. There was no evidence of a prearranged plan among the accused.

The prosecution is under an obligation to establish that there existed a common intention which requires a prearranged plan to convict for the criminal act of another, the act must have been done in furtherance of the common intention of all. It is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference, and the incriminating facts must be incompatible with the innocence of the accused.

There was no sufficient evidence to infer that the second and third accused had a common intention with the first accused to kill the deceased or injured PW2.

In the circumstances, I hold that the evidence was insufficient to support the conviction of second and third accused appellants. Therefore, the second and third accused-appellants are acquitted of both charges.

For the reasons set out above, I hold that there is sufficient evidence against the first accused-appellant and therefore, the conviction and the sentence imposed on the first accused-appellant should be affirmed.

The appeal of the first accused-appellant is dismissed. The appeals of the second and third accused appellants are allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal