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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No: Democratic Socialist Republic of Sri Lanka

HCC-0055-058-19

High Court of Hambantota Case No:

HC/134/2005

COMPLAINANT

Vs.

1. Dadallage Amila Tharanga
2. Yaddehi Guruge Sumith Wasantha
3. Sumith Chinthaka Malalgoda
4. Gamahewage Sunil alias Podiputha
5. Dayan Indika Alahaperuma

ACCUSED

AND NOW BETWEEN

1. Dadallage Amila Tharanga

   (First Accused-Appellant)

2. Yaddehi Guruge Sumith Wasantha
   (Second Accused-Appellant)
3. Sumith Chinthaka Malalgoda
   (Third Accused-Appellant)
4. Gamahewage Sunil alias Podiputha
   (Fourth Accused-Appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : K Priyantha Fernando, J. (P./C.A.)

: Sampath B Abayakoon, J.

Counsel : Nihara Randeniya, for the 1st and 2nd Accused-Appellants

: Indika Mallawarachchi, for the 3rd and 4th Accused-Appellants

: Dilan Ratnayaka, SDSG for the Respondent.

Argued on : 28-10-2021

Written Submissions : 21-10-2019 (By the 1st and 2nd Accused-Appellants)

: 10-10-2019 (By the 3rd and 4th Accused-Appellants)

: 28-10-2019 (By the Respondent)

Decided on : 29-11-2021

Sampath B Abayakoon, J.

This is an appeal by 1st to 4th accused appellants (hereinafter referred to as the appellants) on being aggrieved by the conviction and sentence of them by the learned High Court judge of Hambantota.

The five accused named in the indictment were indicted before the High Court of Hambantota on the following counts.

(1) For being members of an unlawful assembly on or around the 6th October 2001 at a place called Uduwila within the jurisdiction of the High Court of Hambantota, with the common object of causing injuries to one Landage Jayasena, an offence punishable in terms of section 140 of the Penal Code.

(2) At the same time and at the same place, causing the death of the said Jayasena in furtherance of the said common object and thereby committing an offence punishable in terms of section 296 read with section 146 of the Penal Code.

(3) At the same time and at the same place, acting with common intention and causing the death of the said Jayasena, thereby committing an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the Learned High Court judge of Hambantota by his judgment dated 08-02-2019, found the appellants guilty on the 3rd count, and they were acquitted of the 1st and the 2nd counts against them. The 5th accused was acquitted of all three counts. The appellants were sentenced to death accordingly.

This trial has proceeded against the 2nd appellant in absentia under the provisions of section 241 of the Code of Criminal Procedure Act, but was arrested and produced in the Court before the judgment was pronounced.

At the hearing of the appeal, it was informed by the learned counsel for the 1st and the 2nd appellants that, of the several grounds of appeal urged in the written submissions, he is pursuing only the following ground of appeal.

(1) The learned trial judge has erred in law in failing to properly consider that the PW-03 was not an independent witness and her evidence has not been corroborated.

The learned counsel for the 3rd and the 4th appellants pursued the following grounds of appeal.

(1) The 3rd accused appellant was denied a fair trial as the counsel assigned to him has not been afforded sufficient time for the preparation for the trial.
(2) Appellants have been denied of a fair trial, as the trial Court has imposed a burden on the appellants to prove their innocence, thereby shifting the burden of proof to the appellants and reversing the presumption of innocence.
(3) Conflict of evidence between PW-03 and Police evidence relating to the crime scene creates a serious doubt with regard to the authenticity of the version of PW-03.

Facts in relation to the incident as uncovered by evidence, briefly, are as follows;

The main witness PW-01, namely, Pallage Ariyaratne was deceased at the time the case went to trial before the High Court, and it was PW-03 Pallage Ariyawathi who has given evidence as the eyewitness of the incident.

PW-03 and her brother PW-01 lived in adjacent houses facing Tissa-Matara main road. On the day of the incident, namely 6th October 2001, at around 8.30 in the night, Ariyaratne was at the house of PW-03, and after hearing a cry of a person from the direction of the main road, he has gone towards the road to inquire. Few minutes later, he has come back running, informing the witness that it was Jayasena who was assaulted and the assailants are chasing after him. After Ariyaratne sought refuge in her house the persons who came after him started damaging Ariyaratne's house, which has prompted the witness to come out of her house. She has seen the 1st to 4th appellants whom she knew very well as all of them are from the same village and neighbours. She has had no difficulty in identifying them from the available light. After causing damage to the doors and windows of Ariyaratne's house, the appellants, having come in front of the house of PW-03 have called for Ariyaratne. The witness has seen that it was the 2nd accused who called for her brother and has also seen him armed with an iron rod.

When PW-03 told them to leave, the 1st and the 2nd appellants have started scolding her in filth while threatening her too. After that all four who went towards the road has started pelting stones towards the house, which resulted in damages to the roof of the house and the electricity meter. She has admitted that there was a minor animosity between her and the 1st appellant due to her refusal to give her daughter in marriage to him. While this was happening, her brother who sought refuge in the house has managed to leave the house from the back door and had informed the Police about what was happening.

Police have come to the scene about half an hour later along with Ariyaratne, and the appellants have bolted hearing the Police jeep. At that time the deceased also had crawled towards the Police jeep with injuries. After hearing

about the direction the appellants went, the Police jeep has left the scene looking for them, leaving the deceased near the main road. While the Police party was away, the appellants have returned to the place where the deceased was. The witness has heard Sumith Wasantha the 2nd appellant saying "මූ ඇදගෙන යමල්ලා" and has seen the deceased being dragged toward the nearby reservation. She has seen the 1st appellant carrying a wooden pole and the 2nd appellant carrying an iron rod. It was the 3rd and the 4th appellants who have dragged the deceased along the road. A few minutes after the deceased was dragged away, the witness has heard a cry "ගහන්න එපෝ මරණ්න එපෝ," which she has clearly identified as that of Jayasena the deceased. She has had no difficulty in identifying the voice of the deceased as he was also a neighbour who lived next to her brother's house. The Police who returned about half an hour later has found the deceased with injuries. The deceased has succumbed to his injuries at the hospital. PW-03 has specifically stated that the 5th accused was not there when the attack took place.

This witness has been subjected to lengthy cross examination by the defence, but has failed to dent the trustworthiness of her testimony, although several omissions have been brought to the notice of the Court.

The learned High Court judge who heard and observed the demeanor and deportment of the witness has commented that "මෙම සාක්ෂි කාරිය ඉතාමත් සෘජු ලෙස සාක්ෂි දීමත් සිදුකරන බවට සටහන් කරමි."

PW-05 was the daughter of the deceased who has reached the place of the incident after it happened upon receiving the information provided by the 5th accused that her father was being assaulted. She has travelled with the deceased in the Police jeep to the hospital. Although she has given evidence about a dying declaration by her father about his assailants, the learned High Court judge has decided not to consider her evidence as legally acceptable with

regard to the dying declaration and has not relied on that evidence for his judgment.

PW-06 was the Police officer who conducted investigation into the incident. He has observed the place where the deceased had been assaulted which was a veranda of a house by the other side of the road from the house of PW-03. He has also observed damage to the houses of PW-03 and her brother Ariyaratne. After the arrest of the 2nd appellant, he has recovered the iron rod marked as P-02 based on the statement made by him. The relevant extract of the statement which led to the recovery of the iron rod has been marked as P-01 under the provisions of section 27 of the Evidence Ordinance.

As the Judicial Medical Officer (JMO) Dr. D. G. Dissanayaka, who conducted the postmortem examination of the deceased was not available to give evidence, it was the then JMO of the Tissamaharama Base Hospital who has given evidence based on the postmortem report which has been marked as P-03 at the trial. There had been multiple contusions on either side of the chest and several abrasions on the body. The JMO has recorded that of the left ribs of the body, 2nd, 3rd, 4th and the 5th front ribs and 3rd and 4th back ribs fractured, while the 3rd, 4th, and the 5th front right ribs have also been fractured. The JMO has opined that the death was due to shock and hemorrhage due to multiple fractures to the ribs.

When called for a defence at the end of the prosecution case, all the appellants who were present in Court then, had made dock statements. The 1st appellant has claimed that he was falsely implicated in the crime because of the enmity PW-03 had with him due to a love affair he had with her daughter.

The 3rd appellant had claimed that Ariyaratne gave evidence against him due to a grudge he had with his wife's father and he was not involved in the crime.

The 4th accused has claimed that he came home only at about 9 p.m. on the day of the incident from Kataragama and he had no involvement of the incident. In other words, he has taken up a defence of alibi.

The 5th accused's statement had been that he was never involved in the incident, but was the one who went and informed the daughter of the deceased that her father is being assaulted.

With the above facts in mind, I now proceed to consider the grounds of appeal urged by the learned counsel.

Ground of appeal of the 1st and the 2nd appellants: -

It was the contention of the learned counsel for the appellants that since PW-03 had an enmity with the 1st appellant, she cannot be regarded as an independent witness, and hence, it was not safe to act on her evidence alone, as she was the only eye witness to the incident. It was his submission in view of the several omissions which has been brought to the notice of the Court her evidence was unreliable and not credible, which has escaped the mind of the learned High Court judge.

However, as correctly pointed out by the learned Senior DSG for the Respondent, the learned High Court judge had been very much alive as to the issue of credibility of the witness when the evidence of PW-03 was analyzed. The learned High Court judge has separately considered each of the alleged omissions to come to a firm finding as to whether they have any relevance to the credibility of the witness and has determined that they do not go into the root of the matter and are of no importance.

As considered correctly by the learned High Court judge, in the case of **The Attorney General Vs. Sandanam Pitchi Mary Theresa, S. C. Appeal No-79/2008 decided on 06-05-2010,** S.Tilakawardane, J. referred to the case of **Boghi Bhai Hiraji Bhai Vs. State of Gujarat, AIR 1983 SC 753** which states thus;

"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature, tenor of the inconsistency or contradiction and whether they are material to the fact in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance."

In the instant action, there are no contradictions of the evidence of PW-03. Although the alleged omissions by PW-03 when she made her statements to the Police have not been established through the Police witness who recorded the statement, the learned High Court judge has very correctly considered the said omissions and reached his conclusions as mentioned above. He has also correctly drawn his attention to the comment by the learned High Court judge who had the benefit of listening to the evidence of PW-03 with regard to her demeanor and deportment, which I find relevant in the context of the argument.

It is settled law that even when there is only one witness, if the evidence is credible and trustworthy, a trial Court need not look for corroboration and a trial court can act upon such evidence.

The relevant section 134 of the Evidence Ordinance reads as follows;

134. No particular number of witnesses shall in any case be required for the proof of any act.

In the case of **Mulluwa Vs. The State of Madhya Predesh 1976 AIR 989** it was stated that,

"Testimony must always be weighed and not counted."

After considering the relevant principles, Jayasuriya,J. in the case of **Sumanasena Vs. Attorney General (1999), 3 SLR, 137** stated thus;

"The Court could have acted on the evidence of solitary witness Nandasena, provided the trial judge was convinced that he was giving cogent, inspiring and truthful testimony in Court. The learned trial judge has come to such a favourable finding in favour of witness Nandasena as regards to his testimonial trustworthiness and credibility."

I do not find any basis to conclude that PW-03 was not an independent witness as claimed. It is very much clear from her evidence that she has spoken about what she has seen on that fateful day. She has testified that she rejected the advances made by the 1st appellant to marry her daughter, but it is abundantly clear in the way she has given her evidence, she was not a partisan witness. On the contrary, I find that it may be the very reason for the 1st appellant and others to attack her house and use foul language on her, although their initial dispute was with someone else.

The evidence of PW-03 has been corroborated by the evidence of the JMO, which confirms her evidence as to the injuries sustained by the deceased. The Police evidence as to the observations of the crime scene are also clearly corroborative as to the truthfulness and credibility of the evidence of PW-03.

For the reasons as discussed above, I find no basis in the ground of appeal urged on behalf of the 1st and the 2nd appellant.

Grounds of appeal of the 3rd and the 4th appellants: -

The trial of this case has commenced on 14-03-2012 and the evidence of the two main witnesses, namely, PW-03 and PW-05 has been concluded. However, when the case resumed for further trial on 11-06-2012, there had been no legal representation for the 3rd appellant, which has resulted in the appointment of an assigned counsel through the state expense on his behalf. It is correct that the assigned counsel has not been given time to get ready before leading further evidence on that day, nor has it been requested. However, I find that this irregularity has not caused any material prejudice to the 3rd appellant,

which amount to a denial of a fair trial. On the above mentioned 11-06-2012, PW-06 who has visited the scene of the crime and recorded his observations has given evidence. He was not the Police officer who arrested the 3rd appellant and or recorded his statement. He has not given any evidence detrimental towards him. It was only the PW-06 who has given evidence on that day, and the next trial date had been on 11-07-2012, which had provided sufficient time for the assigned counsel to get ready for the case.

The next matter urged by the learned counsel for the 3rd and the 4th appellants was that the learned High Court judge in his judgment has shifted the burden of proof to the appellants and thereby they have been denied of a fair trial.

The learned counsel relied on the comment made by the learned High Court judge at page 32 of the judgment (Page 293 of the brief) that; "චූදිතයෙකු එම චෝදනාවට නිර්දෝෂ වන්නේ තම නිර්දෝෂී බාවය පැහැදිලි කල යුතුය."

I find it is not a sentence that can be taken in its isolation to argue that the learned High Court judge has shifted the burden of proof to the appellants. If one reads the relevant paragraph of the judgment, it becomes clear that the burden that a prosecution carry in a criminal case has never been shifted as claimed.

The relevant paragraph reads as follows;

"ඒ අනුව පැමිනිල්ල විසින් 3 වන චෝදනාව 1,2,3,4 චූදිත්යන්ට එරෙහිව සාදාරන සැකයෙන් ඔබ්බට ඔප්පු කිරීමට ප්‍රමනාවත් වන්නා වූ ප්‍රභල පර්වේෂණීය සාක්ෂි මෙහෙයවා ඇති බවට නිගමනය කළ හැකිවේ. අපරාධ නඩුවක පැමිණිල්ල විසින් චෝදනාවන් ඔප්පු කිරීමට ප්‍රමාණවත් ප්‍රභල සාක්ෂි ඉදිරිපත් කරුනු ලබන තෙක් චූදිතයෙකු නිර්දෝෂීබාවයේ පූර්ව නිගමනයෙන් ආරක්ෂා වේ. එහෙත් පැමිණිල්ල විසින් චෝදනාව ඔප්පු කිරීමට ප්‍රමාණවත් ප්‍රබල සාක්ෂි මෙහෙයවා ඇති විට චූදිතයෙකු එම චෝදනාවට නිර්දෝෂී වන්නේ තම නිර්දෝෂීබාවය පැහැදිලි කළ යුතුය. අප ශ්‍රී ලංකා අධිකරණ විසින්ද පිළිගෙන ඇති එලින්බරෝ සිද්ධාන්තිය අනුවද එය මනාව පැහැදිලි වේ."

Although the learned High Court judge has used a wrong word "නිර්දෝශීබාවය" in the above paragraph and the following paragraph as well, the way he has analyzed the evidence of the prosecution as well as the dock statements clearly establishes that what has been considered was whether the appellants have provided a reasonable explanation or has created a reasonable doubt as against the strong prima facie evidence established by the prosecution. The learned High Court judge has not imposed any higher burden on the appellants by the said statement.

The learned High Court judge had been mindful of the protection given to an accused person by way of presumption of innocence until proven otherwise by the prosecution, and has considered the evidence in its totality to reach his findings with clear reasoning, which has not occasioned any prejudice to the appellants.

The proviso of Article 138 of the Constitution reads as follows;

> **"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

In the case of **Mannar Mannan Vs. The Republic of Sri Lanka** (1990) 1 SLR 280,

Held: The enacting part of sub-section (1) of section 334 mandates the Court to allow the appeal where-

(a) The verdict is unreasonable or cannot be supported having regard to the evidence; or

(b) There is a wrong decision on any question of law; or

(c) There is a miscarriage of justice on any ground.

The proviso vests discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the Court is precluded from applying the proviso in any particular category of wrong decision or misdirection on questions of law as for instance, the burden of proof.

There is no hard and fast rule that the proviso is inapplicable where there is non-direction amounting to misdirection in regard to the burden of proof. What is important is that each case falls to be decided on the consideration of

(a) The nature and intent of the non-direction amounting to a misdirection on the burden of proof

(b) All facts and circumstances of the case, the quality of evidence adduced and the weight to be attached to it.

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

Both the above mentioned are cases where the trial at the High Court was before a jury, and decided in appeal under section 334 of the Criminal Procedure Code, which has similar provisions to Article 138 of the Constitution in the section itself. I find that the principles discussed in the said appeals are of equal relevance to a determination of an appeal under the provisions of section 335 of the Criminal Procedure Code of a trial held without a jury before a High Court in view of the Proviso to Article 138 of the Constitution.

In the appeal under consideration, there was no misdirection or non-direction as to the law, but only a choosing of wrong words, which has not caused any prejudice to the appellants or has not occasioned a failure of justice as discussed before.

The alibi of the 4th appellant has been well considered by the learned High Court judge with a clear understanding that it was the duty of the prosecution to establish that he was one of the participants of the crime in rejecting his plea of alibi.

There is no reason to accept that there is a discrepancy as to the crime scene between the evidence of PW-03 and the Police officer who recorded his observations. According to the evidence, after the initial attack on the deceased, he had been dragged along the road towards the reservation by the appellants. PW-03 had heard the cry of the deceased few minutes thereafter. The Police witness has seen blood like stains in the veranda of a house on the other side of the road, where he had determined that it was the place of assault of the deceased. In my view, this observation matches exactly to the evidence of PW-03 without any doubt. For the reasons stated, I find no merit in the grounds of appeal of the 3rd and the 4th appellants either.

The appeals are therefore dismissed as they are devoid of merit. The conviction and the sentence of the appellants affirmed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P./ C.A.)

I agree.

President of the Court of Appeal