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

In the matter of an appeal under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

CA/HCC/235/16 **VS**

High Court of Matara
Case No: HC 57/14

Kamal Rasika Amarasinghe Alias Chief Inspector Amarasinghe

Accused

And now between

Kamal Rasika Amarasinghe Alias Chief Inspector Amarasinghe

Accused– Appellants

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : D.S. Hewapathirana

for the accused-appellant

Anoopa De Silva, SSC

for the respondent

ARGUED ON : 06/08/2021 and 02/11/2021

DECIDED ON : 15/12/2021

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Matara for having caused grievous injuries to a person named Hemasiri, an offence punishable under section 316 of the Penal Code.

After trial, the Learned Trial Judge found the appellant guilty to a lesser offence, namely simple hurt, punishable under section 314 of the Penal Code.

The Learned Trial Judge imposed a fine of Rs. 1,000/= on the appellant with a default term of one-month simple imprisonment.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The alleged incident happened on the 19th of December 2009, at Hakmana around 10.00 p.m. The appellant was attached to the Hakmana police station as an officer-in-charge.

PW1 gave evidence that he, PW2 and PW3 were working for a candidate in the Presidential Election, and they were entrusted with publicity work. They were waiting in Hakmana town after pasting the posters for the meeting which was to be held in Matara on the 20th of December 2009. As per the evidence of PW1, a police jeep came and stopped near them. The appellant was driving the jeep and without getting down, he told the three of them using abusive language, "don't you know that pasting posters after the 16th was prohibited". PW3 was carrying the bundle of posters and the appellant had asked the police constable to put PW3 into the jeep. At this juncture, PW1 resisted the policeman. Then the appellant got down and hit PW1 on his mouth with his fist. Three teeth were dislocated. PW3 was arrested and released the following day.

PW5, The Judicial Medical Officer, also gave evidence. Considering his evidence, the Learned Trial Judge had come to the conclusion that the appellant had not caused any grievous hurt to PW1 as charged by the prosecution.

PW7, Assistant Superintendent of Police also testified. The appellant had given evidence from the witness stand and was subjected to cross-examination. The defense also called a doctor who examined PW3 on the 20th of February 2009 and PW8.

The Learned Trial Judge convicted the appellant under section 314 of the Penal Code and imposed a fine of rupees one thousand with a one-month default term.

The grounds of appeal are as follows:

1) that the conviction is bad in law;

2) that the order of conviction is not supported by the evidence;

3) that the Learned High Court Judge had misdirected himself on the burden of proof on the prosecution of a criminal case;

4) that the Learned High Court Judge has failed to analyse the evidence properly;

5) the Learned High Court Judge has failed to consider the many discrepancies and the contradictions in the prosecution evidence;

6) the Learned High Court Judge has failed to evaluate the defense evidence;

7) the Learned High Court Judge has misdirected himself on the contradictions inter-se in the prosecution case.

The position of PW1 was that the appellant hit him on the mouth with his fist and as a result, three of his teeth shook. However, considering the medical evidence, the Learned Trial Judge came to the conclusion that the mobility of the teeth was not due to the shot with the fist, but PW1 is suffering from a gum disease known as "Periodontitis."

It is to be noted that the loosened teeth were not in one place. There were three loose teeth on the right upper jaw and two on the left lower jaw. The evidence of PW1 is that he already had lost some teeth before the incident happened. He also stated that the relevant three teeth were in good condition before he was hit. After consideration of the medical evidence, the Learned Trial Judge decided that the mobility of teeth was not a result of the hit. There were no external injuries at all. Also, there were no injuries to the outer or inner lip.

In the judgment, the Trial Judge has observed that the demeanor of PW1 as follows:

සාක්ෂි දීමෙදී ඉතා මූරන්ඩූ, තම මතයන්ගේ දැඩි ලෙස එල්ලුනූ පුද්ගලයෙකු බව නිරීක්ෂණය කලෙමි. තවද උගත් විත්තියේ නීතිඥ මහතාගේ හරස් ප්‍රශ්න වලටද ප්‍රශ්නය තේරුම් ගැණීමට කාලය ගත නොකර ක්ෂණිකව පිළිතුර දීමට පෙලඹීමෙනුත් උපහාසාත්මක ලෙස පිළිතුරු දෙන්නට පෙලඹෙන බැවිනුත් මෙම සාකෂිකරු තමාට මෙම අධිකරන කාර්යයෙනුත් නිසැකවම අසාධාරණයත් වෙයයි යන පූර්ව මතයක් ඇති කරගෙන ක්‍රියා කරන තැනැත්තෙකු බව පෙනී යන ළඳී . (At Page 413)

PW1 had admitted that he had stated certain false statements in his affidavit to the Supreme Court. The Learned Trial Judges assessment in this regard is as follows:

විත්තිය විසින් සාක්ෂිකරු විසින් විත්තිකරු වගඋත්තරකරුවෙකු කරමින් පවරන ලද මුලික අයිතිවාසිකම් නඩුවෙ දිවුරුම් පෙත්සමේ සඳහන් කරුනුත් අධිකරනයේ ලබාදුන් සාක්ෂියෙහි ඇති වෙනස්කම් සාක්ෂිකරුගේ අවධානයට ගෙන එමින් ඒවා පිළිබඳව ප්‍රශ්නකර ඇත (At Page 421)

ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන ලද දිවුරුම් ප්‍රකාශයේ අසත්‍ය දෙයක් සඳහන් වී ඇති බවත් එසේ කරන ලද්දේ ලබා දුන් උපදෙස් අනුව බවත් සාක්ෂිකරු පවසයි ශ්‍රේෂ්ඨාධිකාරණයට අසත්‍ය පැවසුවානම් ඒ පිලිබඳව ක්‍රියා කල යුත්තේ. ශ්‍රේෂ්ඨාධිකරණයයි මෙම අධිකාරණයට එහි වැදගත්කම වන්නේ තමන්ට බාහිර මාර්ගයකින් ලැබුනු උපදෙස් අනුව අසත්‍ය ප්‍රකාශයක්. ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කලා නම් මෙම අධිකරණයට ඉදිරිපත් කරන සාක්ෂින් වෙනත් අයෙකුගේ ඉගැන්වීමකට කරන්නේද යන්නයි

මෙවැනි ප්‍රකාශයක් කිරීමේදි මෙම ප්‍රකාශය මත ශ්‍රේෂ්ඨාධිකරණ නඩුව අසාර්ථක විය හැක බව පමනක් නොව තමන්ට ඉදිරියේදී ශ්‍රේෂ්ඨාධිකරණයට අසත්‍ය දිවුරුම් ප්‍රකාශ ඉදිරිපත් කිරීම මත දඩුවම් විඳීමට සිදුවිය හැකි බවට අවබෝධයකින් තොර අයෙකු විය නොහැකි බව සාක්ෂිකරුගේ පසුබිම අනුව පෙනියයි එවන් අන්තරායක් ඇති අවස්ථාවකදී එය නොසලකමින් මෙම අධිකාරණයේ කරන පිලිගැනීම් මත විශ්වාසයක් තැබිය හැකි බව තීරණය කරමි. (At Page 423)

It is very difficult to agree with these findings of the Learned Trial Judge. The Learned Trial Judge thinks that even though PW1 had given a false statement

to the Supreme Court, his evidence in the High Court is reliable because of the risk he had taken. The Learned Trial Judge says if PW1 had given a false statement to the Supreme Court, the Supreme Court must deal with it. However, the Learned Trial Judge has failed to appreciate that such statements were in regard to the same incident before the High Court and evidence is contradictory. It also diminishes the creditworthiness of such evidence. On one occasion, the Learned Trial Judge himself described PW1's evidence as an exaggeration, and he wanted to prove somehow that the appellant was guilty.

The evidence of PW3 regarding the incident is considerably inconsistent with the evidence of PW1. However, the Learned Trial Judge had chosen to disregard the evidence of PW3 as an unreliable witness. The Learned Trial Judge had not given due consideration to the contradictions between the testimony of PW1 and PW3. Even though the events described by PW1 and PW3 in their respective testimonies are different, the Learned Trial Judge has stated that they both say that the appellant hit PW1 and has taken that fact into consideration without giving consideration to the substantial differences in their evidence.

The Learned Trial Judge has applied the principle of divisibility to this effect. For this, he has applied the principles laid down in the case of *Francis Appuhamy vs. The Queen 68 NLR 437*. However, I am of the view that the Learned Trial Judge has wrongly applied the principle laid down in this case. In the case of *Francis Appuhamy vs the Queen*, there were five accused persons. The witness had known four of the accused people for a considerable period of time, and the fifth accused was only known to her for a relatively shorter period. The issue at hand was regarding the identity of the fifth accused. The Jury never came to the conclusion that the witness had given false evidence regarding the identification of the fifth accused: but rather was of the opinion that there was a probability of making a mistake regarding his identity. This case does not talk about giving false evidence but the insufficiency of evidence.

Thus, the principles laid down in *Francis Appuhamy vs. The Queen* cannot be applied to this case.

The appellant's evidence is that he was on duty at the time of this incident when PW3 was arrested. PW3 and a few others were there. All the others had run away except PW3. PW3 was arrested with a bundle of posters. He denied that he had hit PW1. He further stated that he was in a Special Unit of the Police, and he had the training to fight with or without arms. He is 5ft. 10 inches in height, and his weight is 100 Kgs. He used to carry three arms, pistols and 100 rounds, M16 Gun, GPMC Gun, 600 rounds of ammunition, two mines, six hand grenades, food and water. They walk 25 kms a day carrying all these. If he had hit PW1 using his fist, he would have got severe injuries; at least the lips would have got injured.

The Learned Trial Judge has refused his evidence for three reasons.

Firstly, the appellant could not state everything that had happened there without looking at his notes. The Learned High Court states that as there was a complaint against the appellant within a few days from the incident, the appellant should be able to recollect things without looking at his notes.

I think this is not a fair comment. The ability to recollect past events varies from person to person. The appellant did not use any notes in his evidence in chief. He said he wanted to see his notes when he was cross-examined extensively. Those notes were not with him. He is no longer in the Police service. Police had the notes. The High Court Judge says that this is a mere act. (රඟපෑමක්)

As per the provisions of section 159 of the Evidence Ordinance,

'A witness may, while under examination refresh his memory by referring to any writing made by himself at the time of transaction. The Court is concerned

that when he was questioned soon after the transaction had happened, it should have been fresh in his memory.'

There is nothing wrong with the appellant's request to see his own notes to testify before the Court. He cannot be expected to remember everything in detail, and section 160 explicitly permits a witness to testify the facts mentioned in the documents referred to in section 159, although he has no recollection of the facts themselves, is sure that the facts were correctly recorded in the document. The State Counsel used the appellant's notes, and the statement to the ASP, to cross-examine the appellant did not show a single contradiction.

Justice A W A Salam, President Court of Appeal, in his judgment of *Karuppiah Punkady vs. The Attorney General CA 11/2005 HC Colombo 39/00 decided 26th of August 2014* stated that;

"In as much as the learned trial Judge had said that the evidence of the prosecution witnesses had not been contradicted, she has failed to apply the same yardstick with regard to the uncontradicted testimony of the accused and her witnesses. Undoubtedly, as between the evidence of the accused and her witnesses hardly any material contradictions had been suggested or adverted to by the prosecution. In this respect it could be argued that the learned High Court Judge may have forgotten to apply and give effect to the idiomatic expression that what is sauce for the goose must be sauce for the gander as well. If the same yardstick that was applied to the evidence of the prosecution with regard to the absence of contradictions is equally applied to the evidence adduced by the defence, the learned High Court Judge would have had no alternative but to conclude that in the least degree that a reasonable doubt had arisen with regard to the prosecution version in the light of the evidence of the defence."

Taking the above judgment into consideration, when the evidence of the defence is uncontradicted, the benefit of the same should be given to the accused and a similar view should be taken when weighing the evidence of both parties. In this case, the evidence of the appellant is uncontradicted. However, the Learned Trial Judge has disregarded this fact but has considered the contradictory evidence of prosecution witnesses. Therefore, the Learned Trial Judge has failed to apply the same principles to the defense evidence. Thus, the grounds on which the Learned Trial Judge has refused the appellant's evidence cannot be accepted.

The second reason for the refusal of the evidence of the appellant is that the defense had not put to PW3 that PW1 did not resist the arrest of PW3. PW3 only answered a leading question put by the Learned State Counsel as follows:

ප්‍ර: අනිත් මිත්‍රයෝ දෙන්නා මොනවද කලේ? මහත්යාව ගෙනියන්න එපා කියලා කියුවාද

උ: හේමසිරී මහත්යා (PW1) කියුවා, ඔයා ගෙනියන්න එපා කියලා

Thus, there was no physical resistance.

The third reason was PW3 had not violated section 74 of the Parliamentary Election Act as PW3 did not display anything. However, PW3 himself admitted that they were entrusted with the task of sticking posters. At the time he was arrested, he was carrying a bundle of posters. Therefore, the view of the Learned Trial Judge cannot be sustained.

It is to be noted that the appellant had given evidence on oath and was subjected to extensive cross-examination. The appellant's evidence should have been treated in the same way as the prosecution witnesses' evidence.

The Learned Trial Judge has not considered certain facts which were favorable to the appellant. The position of PW1 is that three teeth were broken due to the

injury caused by the appellant. However, the Learned Trial Judge conceded that this position was incorrect. He had not considered PW3 as a credible witness and dismissed his evidence. PW1 admitted that he had given false statements in the affidavit filed in the Supreme Court and further admitted that he had lied to the Police as well. The Learned Trial Judge says that admitting these facts shows that PW1 spoke the truth. PW1 did not admit all that readily. After extensive cross-examination, he was made to admit them. The learned Trial Judge considered all these facts, which plummeted the credibility of PW1 as facts, which strengthens the evidence of PW1. On the contrary, he has rejected the uncontradicted evidence of the appellant given under oaths.

When considering the evidence as a whole, I am of the view that the evidence is not sufficient to support the conviction

For the reasons stated above, appeal is allowed.

The appellant is acquitted.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal