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 Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0005/19

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo Case No:

HC/4664/2009

1. Gamage Chandana Ajith Kumara Alias Lal
2. Mahage Sampath Fernando alias Champika
3. Migel Julige Surantha alias Army Malli
4. Karandeya Mahadurage Ajith alias Gora Ajith

ACCUSED

AND NOW BETWEEN

Mahage Sampath Fernando alias Champika

(Second Accused-appellant)

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

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

: Sampath B Abayakoon, J.

Counsel : Neranjan Jayasinghe with Harshana Ananda and Dulshan Katugampola for Accused-Appellant

: Lakmali Karunanayake, D.S.G for the Respondent

Argued on : 17-12-2021

Written Submissions : 19-05-2021 (By the Accused-Appellant)

: 29-10-2021 (By the Respondent)

Decided on : 27-01-2022

Sampath B Abayakoon, J.

This is an appeal by the 2nd accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Colombo.

The appellant, along with the now deceased 3rd accused and two others were indicted before the High Court of Colombo for agreeing and abetting to conspiracy, along with one Asoka Upaneetha Perera alias Pamankada Asoka who is also dead, between 18th September 1999 and 25th September 1999 to murder U.D.Dilantha Saman Kumara, an offence punishable in terms of section 296 read with sections 102 and 113A of the Penal Code.

After trial without a jury, the appellant and the now deceased 3rd accused were found guilty as charged by the learned High Court Judge and sentenced accordingly. The 1st and the 4th accused were acquitted of the charge.

The main contention of the learned Counsel for the appellant at the hearing of the appeal was that since this was a charge based on an alleged conspiracy to murder, it was necessary for the prosecution to prove the agreement in that regard with the main suspect, namely, Ashoka, for the murder of the deceased. It was his position that the prosecution failed to prove beyond reasonable doubt such an agreement, hence, the conviction is bad in law.

It was the contention of the learned Deputy Solicitor General (DSG) that the prosecution proved the necessary ingredients of conspiracy to murder. It was her position that since the learned High Court judge has considered all the relevant evidence and the law before coming to his findings with sound reasoning, there exists no basis to interfere with the conviction.

The following are the facts that transpired in evidence relating to the charge of conspiracy.

This is an incident that had resulted due to a gang rivalry between two underworld gangs, of which the deceased was a prominent member of one gang. There had been several killings and counter killings between the two rival gangs and the deceased was suspected of killing some members of the gang led by Asoka, the person named in the indictment. It has been revealed that both sides were looking for an opportunity to kill each other and were hiding from each other due to that.

On 25th September 1999 the deceased Dilantha and five others were gunned down while travelling in a car near Delkanda junction in Nugegoda. There were no eye witnesses to the incident. The main suspect for the killings was the earlier mentioned Asoka and members of his gang.

Some days after the incident, the officers of the Criminal Investigation Department (CID) arrested Asoka in the company of the four accused named in the indictment, one of whom is the appellant, when they were coming to a temple in the Kalutara area. Subsequently, Asoka, the main suspect of the murder was also killed while being kept in the remand cell of the Gangodawila Magistrate Court premises using a remote-controlled bomb placed in the remand cell.

The prosecution has relied on the evidence of following witnesses to establish the conspiracy charge against the accused.

(1) Evidence of PW-01, the sister of the deceased who says that in mid-August, which was about one and half months before the incident, the appellant, who was well known to her as he lived previously at their home, telephoned her on two occasions and informed that her brother will be killed by them.

(2) The evidence of PW-02, who says that he was a friend of Asoka who maintained contacts with him and visited him in his hiding place, where he saw the appellant in the company of others giving protection to Asoka. It was his evidence that he met Asoka while travelling in a van in the company of three others including the appellant a week before the incident. He was also the person who has returned the van used by Asoka which had a broken window and a door lock, on his instructions to the person from whom the vehicle was rented. However, he has not overheard any conversation relating to a conspiracy to kill the deceased.

(3) Deposition made by PW-03 Kumudu Preethi at the Magistrate Court non-summary inquiry led under the provisions of section 33 of the Evidence Ordinance, as he was not available to give evidence before the High Court.

He was earlier a friend of the deceased who fell out with him after the killing of one Naushard and joined the gang led by Asoka. He has also been with Asoka at his hiding place from time to time, but never a part of any discussion Asoka had with other members of the gang. He has seen Asoka using a white-coloured van and supposed to have seen him leaving in the same van in the company of the appellant at around 6.30 in the evening of the day of the incident, and returning at around 8.30 in the night.

Apart from the above main pieces of evidence, Senior Superintendent of Police (SSP) Shani Abeysekara who has led the team of CID investigators into the incident has given evidence that he arrested the appellant in the company of Asoka and the other accused while they were entering the premises of the Kalutara Bodhi temple on 18th October 1999. He has also recovered the van alleged to have been used in the commission of the offence. It was his evidence that there were some bullet marks in the vehicle when he recovered the same, apart from other damages to the vehicle as described by PW-02.

Consideration of the Grounds of Appeal: -

It is an accepted fact that finding an eyewitness in a case where a conspiracy is involved is a rarity, unless the witness is an accomplice to the crime in some way or the other. Hence, it is usually by way of circumstantial evidence a charge of conspiracy is sought to be proved as in the case under appeal.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

Per Soertsz J.

> *"In order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypotheses of his innocence."*

In **Don Sunny Vs. The Attorney General (1998) 2 SLR 01** it was held:

1) *When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the offence. On consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.*

2) *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*

3) *If upon consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. 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 if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

A trial judge also has to be mindful that suspicious circumstances do not establish guilt and the burden of proving a case beyond reasonable doubt against an accused is always with the prosecution.

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350** it was held:

> *"In a criminal case 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 and compel the accused to give or call evidence"*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as

to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of The **King Vs. Gunaratne 47 NLR 145** it was held:

> *"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*
>
> *The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."*

In the case of **Regina Vs. Exall (176 English Reports, *Nisi Prius* at page 853)** Pollock, C.B., considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link brock, the chain would fall. It is more like the of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."*

With the above legal principles in mind, I now draw my attention to the offence of conspiracy and the ingredients that has to be proved.

The definition of conspiracy as defined in section 113A (1) of the Penal code reads as follows;

> **113A (1) If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.**

The essence of the offence is the agreement between the parties to commit the alleged offence whether it was committed or not, as argued correctly by both the learned Counsel.

The charge against the appellant is that he, along with the other accused conspired and agreed with one Asoka to kill the deceased between the period of 18th to 25th September 1999.

Therefore, it was necessary for the prosecution to prove beyond reasonable doubt that fact, in order to prove the charge against the appellant.

It was held in the case of **The King Vs. M.E.A.Cooray 51NLR 433** that;

> *The commission of the offence of conspiracy is established within the meaning of section 113A of the Penal Code in one or the other of the following circumstances.*
>
> *(a) If two or more persons agree, with or without any previous concert or deliberation, to commit an offence or to abet an offence, or*
>
> *(b) If two or more persons agree, with or without any previous concert or deliberation, to act together with a common purpose for or in committing or abetting an offence.*
>
> *In either set of circumstances conspiracy consists in the agreement or confederacy to do some criminal act, whether it is done or not.*
>
> *In order to establish the offence of "abetment of conspiracy" under section 100 of the Penal Code, an agreement is an essential prerequisite.*

The conversation the appellant is alleged to have had over the phone with PW-01, the sister of the deceased, was nearly one and half months before the actual incident, and well before the period mentioned in the indictment as the period of the conspiracy.

Section 10 of the Evidence Ordinance, which referrers to things said or done by a conspirator in reference to the common intention reads thus: -

> **Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.**

I am of the view that it was necessary for the prosecution to establish beyond reasonable doubt that the alleged utterances of the appellant to PW-01 has a direct nexus to the conspiracy that is alleged to have been hatched some weeks after the said conversations. It may even be independent utterances of the appellant since he was well known to the sister of the deceased, to whom he has addressed as elder sister 'අක්කේ' according to the evidence of the PW-01. I am unable to find any evidence that eliminates such a doubt in this action.

There is also a doubt cast upon the accuracy of the words spoken allegedly by the appellant with PW-01 as she has stated about the threat received by her only when her statement was recorded by the CID, admittedly, one and half months after the incident. Although she says that she gave the information to the Mirihana Police soon after the incident, no evidence had been produced by the prosecution to substantiate that fact. There is evidence in this action that in the process of investigations the CID had called for the relevant telephone details, obviously to verify the correctness of the statement of PW-01. However, the prosecution has not produced such details as evidence at the trial.

The evidence of PW-02 only speaks about of him seeing the appellant in the company of Asoka giving him protection at his hiding place, and travelling with him in a van one week before the incident. According to the evidence of SSP Shani Abeysekara when the appellant was arrested by him some three weeks after the incident the appellant was in the company of Asoka the main suspect of the killing.

At this juncture I would like to draw my attention to the Indian Supreme Court case of **Sardul Singh Caveeshar Vs. State of Bombay A.I.R. (1958) S.C. 747; Crim. L.J. 1325,** where it was held that evidence as to the activities of any conspirator after the expiry of the period of conspiracy is not admissible either to prove the existence of the conspiracy or the participation of the follow conspirators therein.

It was held in the case of **The Queen Vs. Liyanage (1965) 67 NLR 193** that;

> *Mere evidence of a person's association with the conspirators, in the absence of words or conduct which prove that they also willingly entered into the conspiracy is not sufficient for the inference of conspiracy to be drawn against him.*

I find that out of the three main witnesses relied on by the prosecution to prove the conspiracy, the deposition of PW-03 Kumudu Preethi was the one that needed the most careful scrutiny as he was also a member of the gang led by Asoka and had all the reasons to save his skin of any involvement to the crime. Besides that, he was not a person whose testimony was available for the test of cross-examination at the trial, although he had been cross-examined at the non-summary inquiry. According to his deposition, he had not been invited to any of the discussions that took place, and has not overheard any conspiracy to kill the deceased. He has seen the appellant leaving with Asoka in a van on the evening of the day of the incident and returning in the night. This may lead to high suspicion being levelled at the appellant of his involvement in the crime that took place on that day, but that in itself is not sufficient to prove a

conspiracy unless it is supported by other circumstantial evidence when taken together.

I am of the view that although the evidence leads to the suspicion being pointed at the appellant in his involvement in the crime, even when taken together the evidence in its totality, it does not elevate to the level of proving suspicions beyond reasonable doubt.

I am unable to agree that the evidence placed before the High Court was sufficient to conclude without any reasonable doubt, of an agreement between the appellant and the other alleged conspirators given the unreliable nature of the evidence of the witnesses called by the prosecution for the given reasons.

Although an appellate Court is reluctant to interfere with findings of facts by a trial judge who had the benefit of seeing and listening to the evidence, an appellate Court would not hesitate to intervene when in it is not in agreement with the findings of facts by the learned trial judge.

For the aforesaid reasons, I am of the view that it is not safe to let the conviction and the sentence of the appellant be allowed to stand.

Therefore, allowing the appeal, I set aside the conviction and the sentence and acquit the appellant of the charge against him.

Appeal Allowed.

Judge of the Court of Appeal

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

I agree.

President of the Court of Appeal