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:
HCC-0188-189-17

High Court of Anuradhapura
Case No:
HC-14-2007

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. *Prins Gunasekara*
2. *Kadireshan Jeyakanth*

ACCUSED

AND NOW BETWEEN

Prins Gunasekara

(1st Accused-Appellant)

Kadireshan Jeyakanth

(2nd Accused Appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Neville Abeyratne, P.C. with Shanika Perera for the 1st Accused-Appellant

: Ermaza Tegal with Thiagi Piyadasa and Mark Schobert for the 2nd Accused-Appellant

: Janaka Bandara, SSC for the Respondent.

Argued on : 09-02-2022

Written Submissions : 06-07-2020 (By the 1st Accused- Appellant)

:16-02-2018 (By the 2nd Accused-Appellant)

:16-10-2018 (By the Respondent)

Decided on : 29-03-2022

Sampath B Abayakoon, J.

The Accused appellants (hereinafter referred to as appellants) filed these appeals on being aggrieved by the conviction and the sentence of them by the Learned High Court Judge of Anuradhapura, where they were sentenced to death on the first count and ten years rigorous imprisonment on count two in addition to the fines imposed upon them.

The appellants were indicted before the High Court of Anuradhapura, on the following counts:

1. Causing the death of Chandralika Samaraweera on 25-01-2002, thereby committing the offence of murder, punishable in terms of Section 296 read with Section 32 of the Penal Code.
2. At the same time and at the same transaction causing injuries to Vidura Hewage Sumith Bodhinayake using a firearm and thereby committing the offence of attempted murder, punishable in terms of Section 300 read with Section 32 of the Penal Code.

At the hearing of the appeal, although the learned Counsel for the appellants formulated several grounds of appeal for the consideration of the Court, the main grounds of appeal urged by the learned Counsel are as follows;

1. The prosecution failed to establish the identity of the appellants beyond reasonable doubt and hence, the judgement is bad in law.
2. Identification parade notes relied on by the prosecution were wrongly admitted as evidence, despite the witnesses failed to correctly identify the accused appellants.
3. The common intention under in terms of Section 32 of the Penal Code was also not proven before the trial Court.

As the above-mentioned grounds of appeal are interrelated, the said grounds will be considered first, and the rest of the grounds of appeal urged by the learned Counsel will be considered only if it becomes necessary for the purposes of this appeal.

Facts in brief:

The deceased Chandralika Samaraweera was the mother-in-law of PW-01 Nirosha Dilrukshi and was the mother of Sumith Bodhinayake who was the person who suffered injuries in this incident. There was a divorce action pending

before the District Court of Anuradhapura between Sumith Bodhinayake and PW-01 fixed for the day of the incident, namely, 25-01-2002.

The deceased had accompanied her daughter-in-law Nirosha Dilrukshi to the Court and she was with her grandson outside of the Court while PW-01 was inside the Court house attending to the divorce case. Upon hearing some noise PW-01 has come out of the Court house and had seen people running towards a direction of an incident. When she reached the place where the incident took place, she found her mother-in-law and her husband who was the other injured namely Sumith Bodhinayake with bleeding injuries. It is in evidence that upon admission to the hospital the deceased was pronounced dead.

PW-08 was the police officer who was engaged in guard duties at the main entrance of the Court. While on duty, he has heard 4 or 5 gunshot sounds from the direction of his left-hand side. Upon hearing the sound, he has readied his T56 weapon and gone towards the direction where the sound came and he has seen a person running holding a pistol in his hand and getting into a three-wheeler. He has seen the three-wheeler speeding towards the airport. PW-08 has fired two shots towards the three-wheeler which has struck its front windscreen. He has observed the three-wheeler as a cream-coloured vehicle. However, despite of the shots fired, the three-wheeler had fled the scene.

PW-08 was specific in his evidence that he could not identify the person who ran and got into the three-wheeler. It was his evidence before the High Court that he could not identify the person even at the identification parade held in that regard. It was also his evidence that there was another person who drove the three-wheeler but could not identify him either.

Evidence of PW-12 was of no importance as he has neither seen the incident nor has seen the person who shot at the deceased and the injured.

At the trial, the doctor who examined the injured Sumith Bodhinayake has confirmed that injuries suffered by him are a result of gunshot wounds inflicted

on him at a close range and injury number 2, 3,4,5,6, and 7 are injuries that are sufficient to cause death in the ordinary course of nature.

PW-16 was the Judicial Medical Officer (JMO) who examined the first accused appellant Prins Gunasekara after his arrest. The relevant medical report has been marked as P-01. He has observed a piece of glass entangled in his hair, which appears to be a part of a windscreen of a vehicle and he has been smelling of liquor at that time.

PW-09 was a fellow WPC who was on duty with PW-08 at the main entrance to the Anuradhapura Court complex. She has confirmed the evidence of PW-08 and has stated that after hearing the gunshots, she too readied her weapon and went towards the direction of the incident, but it was the PW-08 who fired at the three-wheeler fleeing towards the airport. She also says that she could not identify the two persons who were in the three-wheeler.

PW-10 PS31228 Sarathchandra Jayalath was the officer who went after the three-wheeler after hearing of the incident along with some other officers in their official motor bikes and arrested the first appellant about four km away from the Court premises. At the time of the arrest, he was driving a light yellow coloured three-wheeler which had a broken front windscreen. He has found an empty beer bottle inside the vehicle as well.

PW-15 who was the JMO who conducted the post mortem on the deceased Chandralika Samaraweera has marked the report as P-03, he has confirmed that her death was due to several gunshot injuries. It was his opinion that she has been shot at from the left hand side and she may have been walking at that time.

Since the main witness PW-01 who was the person who got injured in the incident, namely Sumith Bodhinayake has left the island and could not be found, the Trial Court has allowed the deposition he made at the non-summary inquiry to be marked through the Court Interpreter as P-06.

Subsequently, the report of the identification parade conducted by the Acting Magistrate has also been marked as P-07.

It has been revealed that under cross examination before the magistrate at the non-summary inquiry, the PW-01 has stated that the person who fired at him was unknown to him and he was not near enough to that person so that he could identify him when he made his statement to the police. (The contradiction marked 2VI).

In his judgement, the Learned High Court Judge has accepted the evidence against the first appellant on the basis that PW-08 has clearly identified him at the identification parade held in that regard, although he was unable to identify him in Court. Similarly, the learned High Court Judge has relied on the identification parade notes with regard to the identification of the second appellant by PW-01 on the basis that he was identified by him at the parade and also on the basis that PW-01 was able to identify him when shots were fired at him and his mother.

It was the contention of the Learned Counsel that both the above-mentioned conclusions of the learned High Court Judge were wrong, therefore, the conviction has no basis to stand.

After giving careful consideration to the arguments put forward by the learned Counsel for the appellants in that regard, the learned Senior State Counsel (SSC) conceded that he is in no position to support the conviction and the sentence, for which this Court would like to express appreciation towards the learned SSC.

Evidence given at the trial by PW-08, the police officer who was on duty near the main entrance of the Court premises was clear that he could not identify the person who ran towards the three-wheeler holding a pistol in his hand and got into it. He was also clear that he did not see the person who drove the three-wheeler. However, his evidence establishes that the three-wheeler was shot at and the front windscreen was broken as a result.

The first appellant has been apprehended some four Km away from the scene of the crime while driving a cream-coloured three-wheeler with a broken windscreen.

There cannot be any argument that this creates a serious suspicion against the first appellant's possible involvement in the crime. However, a trial Court has to be mindful of the fact that suspicious circumstances in itself do not establish guilt.

Bassnayake CJ in the case of **The Queen Vs. Sumanasena 66 NLR 350** stated that;

> *"In our opinion the learned Trial Judges direction was wrong. 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.*
>
> *We are unable to reconcile the learned Judge said earlier in his summing up with what he said in the passage to which exception is taken. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remain on the prosecution through the trial"*

The learned High Court Judge in his judgement has relied mainly on the identification of the first appellant by PW-08 at the identification parade, despite the fact that PW-08 in giving evidence before the High Court stating that he did not see who was driving the three-wheeler at the time of the incident. The learned High Court Judge has decided that the evidence given at a trial has to be considered as substantive evidence and identification parade can only be used to establish the consistency of his evidence.

Considering the judgements of **Athukoralage Nihal Perera and another Vs. Attorney General, CA case No. 43/44/2002 decided on 05-08-2005** and also

relying on the case of **Ram Nath Mahto Vs. State of Bihar (1996) A.I.R Supreme Court (11) 2511**, it has been decided that the identification of the first appellant by PW-08 was proven beyond reasonable doubt. He has also considered that the PW-08's failure to identify the first appellant 13 years after the incident while giving evidence in the Court, is not a matter that can be considered against him, given the time period taken from the date of the identification parade and the date of giving evidence in Court.

However, I am in no position to agree with the finding of the learned High Court Judge in that regard. It is necessary to view the totality of the evidence before such a conclusion can be reached. PW-08 has given clear evidence in Court that he could not identify the person who ran towards the three-wheeler with a pistol in his hand or the driver of the three-wheeler which was speeding towards the airport.

Other than saying he fired two shots at the three-wheeler, there was no evidence to establish that PW-08 had any opportunity of seeing the driver of the three-wheeler. It is very much possible that he was telling the truth when testifying before the High Court. Being a police officer, his identification of the first appellant despite failing to see him at the time of the incident is very much possible since the first appellant has been arrested on the same day and taken to the police station, where the witness may have had the opportunity in all probabilities of seeing him.

I find that in the judgments considered by the learned High Court Judge, the evidence was clear that the witness who failed to identify the accused in open Court was able to identify the accused at the time of the incident and as a result, had the ability to identify the accused at the identification parade as well. I find that it was under those circumstances, despite the fact of the failure to identify the accused at the trial, the identification of him at the identification parade by the witness had been accepted as relevant.

I find that this was not the situation in the case under consideration in this appeal. The substantive evidence of the PW-08 was that he did not see the first appellant under any circumstances, which appears to be the true version of events given the facts and the circumstances of this case. Hence, I find that the learned High Court Judge was misdirected when he concluded that the presence and the identity of the first appellant was proved beyond reasonable doubt against him.

I also find that PW-01 who was the brother-in-law of the first appellant seeing him at the Court premises on the day of the crime cannot in itself regarded as a fact that can be considered against the first appellant unless corroborated by other facts. It may also be possible that he may have come to see the divorce case proceedings that was held on that day between his sister and PW-01. Therefore, I am of the view that as contended by the learned Counsel for the first appellant the conviction against him has no basis to be allowed to stand.

When it comes to the conviction against the second appellant, the learned High Court Judge has determined that PW-01 was able to identify him at the identification parade held in that regard and he has correctly identified him in his deposition before the learned Magistrate of Anuradhapura at the non-summary inquiry.

However, I find that before admitting the deposition by PW-01 at the non-summary inquiry as substantive evidence the learned High Court Judge has failed to consider the value that can attach to such a deposition. It is settled law that there is a duty cast upon a trial judge to bear in mind that such evidence needs to be considered given the infirmities that has to be attached to such evidence. Although PW-01 has been cross examined at the non-summary inquiry, the fact that he was not before the trial Court to give evidence and the fact that defence was unable to subject him to the test of cross examination needs to be considered before admitting such evidence. I do not find that the

learned High Court Judge's attention has been drawn to the above infirmities that needed to be considered when admitting the deposition as evidence.

In his deposition, PW-01 has stated that he saw his brother-in-law at the Court premises on that day, which was not unusual given the divorce action scheduled to be taken up on that day between PW-01 and the sister of the first appellant. However, he has admitted that at the time of the firing, he did not see the first appellant. In his deposition he has identified the second appellant as the person who fired at him and his mother. However, under cross-examination the defence has established that in his statement made to the police, his position had been that; "කලින් නොදැකපු පුද්ගලයෙක්, මේ වෙඩි තිබ්බම සිදු කලේ මට ඔහු හදුනාගැනීමට තරම් දුරක සිටියේ නැහැ" (the contradiction marked 2V-01).

In his judgement the learned High Court Judge has gone on the basis that PW-01 identified the second accused appellant at the identification parade held as the person who shot at him. On that basis, he has decided that the contradiction marked as 2V01, where PW-01 has stated that he was not in a position to identify the person who shot at him was not a contradiction that alters the credibility of PW-01. However, on the contrary, as pointed out by the learned Counsel for the appellants, in fact, the identification parade note marked P-07 shows that PW-01 has failed to identify the second accused appellant at the parade. PW-01 was the third witness called before the parade. When he was asked to identify any person or persons involved in the incident the first appellant had been standing at the 14th position from the left. Since he was his brother-in-law there was no need for PW-01 to identify him at a parade as he was previously known. The second accused appellant had been standing as the third person from the right, according to the Acting Magistrate's notes. After inspecting the parade three times, PW-01 has identified the 8th person standing from the left as the person he is suspecting to be the person who shot at him and his mother.

That means he has failed to identify the second accused appellant who was standing at the 3rd position from the right. I find that there is a procedural defect

in the learned Acting Magistrate's notes with regard to the identification parade. He has failed to mention the identified suspects by their names. However, that is not a matter that can be determined that it was the second appellant who was identified by the PW-01.

As the findings against the second accused in the judgement has been entirely based on the assumption that PW-01 was able to identify the second accused appellant at the time of the shooting and at the identification parade was a total misdirection as to the facts by the learned High Court Judge, I am of the view that the conviction and the sentence against the second accused appellant also has no basis to stand.

In view of the fact that there was no identification in any manner of the involvement of the second accused appellant in the crime, the common intention under which the charges have been formulated will have no basis.

In the case of **King Vs. Assappu 50 NLR 324** it was held that:

> *"In a case where the question of common intention arises the Jury must be directed that—*
>
> *(i) The case of each accused must be considered separately.*
> *(ii) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
> *(iii) Common intention must not be confused with the same or similar intention entertained independently of each other.*
> *(iv) There must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention.*
> *(v) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention."*

There was no evidence to establish beyond reasonable doubt that it was the second accused appellant who got into the three-wheeler and it was the first accused appellant who was driving the three-wheeler at the time of the incident.

Hence, I find that, there was no basis to consider that the common intention has been proved.

As I have stated before, there may be serious suspicions that can be directed at the first accused appellant as he was found driving a three-wheeler with a damaged windscreen 4 Km away from the scene of the crime. However, since the prosecution has failed to connect that fact to any other evidence to establish the first appellant's or the second appellant's involvement beyond reasonable doubt against them to the crime, I am of the view that the conviction was bad in law and cannot be allowed to stand.

In view of the determinations on the above considered grounds of appeal, this Court is of the view that the rest of the grounds of appeal urged by the learned Counsel need not be considered, as the appeals should in anyway succeed as stated above.

Therefore, allowing the appeals, I set aside the conviction and the sentences imposed on the accused appellants and acquit them of the charges preferred against them.

Appeals allowed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal