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

In the matter of an appeal filed in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No. HCC/425/19

High Court of Colombo Case No. 2136/04

Vs.

Usgoda Arachchige Rohan Janaka Sampath Alias Sagara

Accused

AND NOW BETWEEN

Usgoda Arachchige Rohan Janaka Sampath Alias Sagara

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Anil Silva, PC with Mark Anton for the Accused-Appellant

R. Bary, SSC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 11.10.2021 (On behalf of the Accused-Appellant)
15.07.2021 (On behalf of the Respondent)

ARGUED ON : 23.03.2022

DECIDED ON : 26.05.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was convicted of committing the murder of Cottaduwa Gamage Jayathissa on or about 29.05.2000 at Kinsey Road Borella, along with an unknown person, an offence punishable under Section 296 of the Penal Code. This appeal has been preferred against the said conviction and the death sentence imposed on the appellant.

Prosecution witness No.01, Tharaka Samanmali Kumari is the daughter of the deceased. The deceased father had come to the Samanmali's school around 11.30 a.m. in his three-wheeler to pick her up. When Samanmali was getting into the three-wheeler, she stated in her evidence that the appellant had pulled the deceased out of the three-wheeler and there was a quarrel between the appellant and the deceased. PW1 has observed that there was blood on the deceased's shirt.

The police officer, PW5 has described how he witnessed the appellant fleeing the scene of the crime and the pool of blood that was there at

the place of the incident. The Judicial Medical Officer testified that there were 12 stab injuries and 4 cut injuries on the body of the deceased. He expressed his expert opinion that the death of the deceased was caused as a result of the said injuries.

Although 5 grounds of appeal have been stated in the written submissions tendered on behalf of the appellant, the learned President's Counsel for the appellant advanced his arguments on the issues of identification of the appellant and the motive of implicating the appellant.

At this stage, it is pertinent to consider the defence taken by the appellant. The accused-appellant made a dock statement and no other witness was called on his behalf. The appellant's position was that he was never there in the vicinity at the time of the incident and he was arrested after 4 months when he was in a boutique near the Dematagoda Police Station.

Now, I consider the issue of motive to implicate the appellant. The learned President's Counsel contended that her mother had coached PW1 to tell this story because of the animosity they had with the appellant. The learned Senior State Counsel submitted that if there was any animosity between the two parties, the said animosity might be the motive for the appellant to commit the murder. In addition, the learned Senior State Counsel pointed out that there was no time to coach the PW1, even if somebody wanted to do so because her statement had been recorded within a short period after the incident. Now, I have to consider whether the said motive that purported to be led to fabricate a story could be believed.

Firstly, it is vital to be mentioned that the appellant has not stated about any such animosity in his dock statement. Secondly, the allegation that the mother has coached the PW1 to tell this story could

not be believed because this has not been even suggested to the PW1 on behalf of the appellant. The only suggestion put to the PW1 was that the appellant was not there at the time of the incident. In addition, a question has been asked whether "Gamini mama" told her that the father was assaulted by "Sagara mama" which she denied. (page 124 of the appeal brief). The motive that has not been suggested to PW1 and that has not been stated by the appellant in his dock statement could not be believed and has to be rejected. Hence, the argument that the prosecution had fabricated a story because of the said animosity, necessarily fails.

The other issue is the identification of the appellant. The learned President's Counsel for the appellant pointed out that the only witness who speaks about the incident is the daughter of the deceased. The learned President's Counsel submitted that PW1 has said that there were many people at the time of assaulting her father. However, it was not the position of the learned President's Counsel that PW1 could not properly identify the appellant, since there were a number of people. The contention of the learned President's Counsel was that PW1 should not be believed and thus there is no satisfactory identity of the appellant to prove the charge against him.

It is to be noted that if the evidence of PW1 could be believed, the identification of the appellant is not an issue because undisputedly, the appellant was a known person to PW1. Even the learned President's Counsel for the appellant admitted the said fact. PW1 has stated that the appellant was residing close to her residence and he was a known person. The said item of evidence has not been challenged.

It has been stated in the written submission tendered on behalf of the appellant about the "Turnbull Principle" regarding the identification. Turnbull rules or guidelines were set out in the case of Regina V. Turnbull – (1976) 3 WLR 445. It is to be noted that the Turnbull

principle applies to mistaken identity. According to the Turnbull rules, it has to be examined closely the circumstances in which the identification by each witness had been made. How long did the witness have the accused under observation? At what distance? In what light? are material factors to be considered.

It is apparent that the aforesaid *Turnbull Rules* do not apply to instant action because there is no question about mistaken identity. The position taken up by the learned President's Counsel for the appellant was that PW1 had not seen the incident that she described. As stated previously, the appellant was a known person to PW1. If her evidence could be believed, there was no difficulty for her to identify the appellant because when she was getting into the three-wheeler, the appellant pulled the deceased out of the three-wheeler. So, she could have very well seen the appellant and identified the appellant without any difficulty.

Now, I proceed to consider whether there is any doubt in the evidence that PW1 had seen the incident. It has to be mentioned specifically that the defence did not challenge in any manner the fact that this incident happened when the deceased had gone to Samanmali's school in his three-wheeler to pick her up. The police witness, PW7 who carried out investigations immediately after the incident testified that the incident took place in front of Yashodara Balika Vidyala. Therefore, it is obvious that the incident happened when the deceased had gone to pick up his daughter PW1. The deceased came to pick up PW1 from the school and the incident occurred when she was getting into the three-wheeler. Therefore, there is no reason whatsoever to disbelieve that PW1 saw her father being pulled out of the three-wheeler by the appellant when she was getting into the three-wheeler. It is precisely clear that PW1 had seen this incident and identified the accused-appellant because the deceased had gone to that place, not for any other purpose but to pick up PW1 from her school.

Although the learned President's Counsel submitted that there were a number of people at the time of assaulting her father, it is evident from the following items of evidence of the PW1 that the presence of other people was not an obstacle in identifying the appellant. The relevant items of evidence are as follows:

ප්‍ර: කවුද ඇදලා ගත්තේ?

උ: අර අයියා. (විත්තිකරු පෙන්වයි.)

ප්‍ර: තව කවුද එතන හිටියේ?

උ: ගොඩක් අය හිටියා.

ප්‍ර: තාත්තාව ඇදලා ගත්තේ එක්කෙනෙක්ද?

උ: එක්කෙනයි.

ප්‍ර: කුමාරි දැක්කාද එතකොට කවුද තාත්තාව ඇදලා ගත්තේ කියලා, ඊට ඉස්සෙල්ලා එයාව දන්නවාද, එයාගේ නම කවුද කියලා දන්නවාද?

උ: සාගර කියලා.

ප්‍ර: සාගර කියන එක්කෙනාව කුමාරි ඔය කාලේ වෙනකොට කොහොමද දන්නේ?

උ: ගෙවල් පැත්තේ ළඟ ඉන්නේ.

(Page 102 of the appeal brief)

ප්‍ර: ඉන් පස්සේ කට්ටියක් කුමාරිගේ තාත්තාව අල්ලාගෙන ගැහුවා?

උ: කට්ටියක් ගහගත්තේ නැහැ.

<u>අධිකරණයට:</u>

ප්‍ර: කට්ටියක් ගහගත්තාද?

උ: කට්ටියක් ගහගත්තේ නැහැ.තාත්තා හා සාගර මාමා ගහගත්තේ.

(Page 122 and 123 of the appeal brief)

The charge against the appellant was framed on the basis that the appellant committed this murder with an unknown person. Therefore, even though the stab injuries and cut injuries were caused by the other person, the appellant is liable under common intention for committing the murder because he pulled out the deceased to cause this fatal stab and cut injuries. Even the learned President's Counsel for the appellant

conceded that if the evidence of the PW1 could be believed, the appellant is liable for the offence of murder under the common intention.

The police officer who testified as prosecution witness No. 5, identified the appellant in the identification parade held in the Magistrate Court as the person who ran away from the place of the incident soon after the incident. The learned President's Counsel for the appellant contended that PW5 had chased after a person, having heard the crowd gathered at the school gate saying the man on the run is the assailant. Therefore, the learned President's Counsel contended that PW5 having traveled in the police motorcycle and seeing a man on the ground in the midst of a crowd gathered around the scene, did not have sufficient time, opportunity or space to identify the assailant as the accused-appellant because the assailant was fleeing away from the crime scene. However, after two and a half months when the appellant was arrested, PW5 identified the appellant in the identification parade as the person who ran away from the crime scene. What is important is that the aforesaid chain of events perfectly corroborates each other. PW1 saw the appellant pull out the deceased from the three-wheeler. Then, there was a quarrel between the appellant and the deceased. The deceased was stabbed. At that moment, a person ran away from the crime scene. The crowd gathered there shouted the man who was running is the assailant. The police officer PW5 who chased that person later on identified that person as the accused-appellant. These items of evidence clearly established that the appellant is the person who committed the murder. It is to be noted that even the evidence of PW1 alone is sufficient to conclude that the appellant committed the offence.

In addition, it is to be considered that the appellant could have been arrested only after 2 ½ month of the incident. The incident took place on 29.05.2000. The appellant was arrested by PW8 on 18.08.2000. There was no explanation from the appellant about his subsequent conduct when he was making the dock statement.

The learned President's Counsel for the appellant advanced another argument regarding the item of evidence, the shouting of the crowd that the man who was running is the assailant. He contended that it is inadmissible hearsay evidence. Evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. Such evidence is admissible and becomes direct evidence under Section 60(ii) of the Evidence Ordinance as to the fact that the statement was made. Section 60(ii) of the Evidence Ordinance states that *"oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact."* So, the aforesaid evidence of shouting of the crowd had been led to explain why PW5 had chased after the person who was running. Since it is not the evidence led to prove the truth of what the crowd said, it is direct, admissible evidence.

In addition, in terms of section 6 of the Evidence Ordinance, facts forming part of the same transaction are relevant. Illustration (a) of section 6 reads as follows:

> "*A is accused of the murder of B by beating him. Whatever was said or done by A or B or the* ***by-standers*** *at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact."* (Emphasis added)

Hence, in terms of section 6 of the Evidence Ordinance also, what was said by the crowd at the scene the moment after the incident is relevant and admissible evidence.

For the reasons stated above, there is no issue regarding the identification of the appellant. Therefore, the defence version that the appellant was never there in the vicinity at the time of the incident could

not be believed and has to be rejected as correctly done by the learned High Court Judge. The other ground that the motive to fabricate a story is also failed for the reasons stated above.

Accordingly, I hold that there is no reason to interfere with the judgment of the learned High Court Judge. Hence, the conviction and the sentence imposed on the appellant are affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL