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

In the matter of an Appeal made under 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.

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

COMPLAINANT

Court of Appeal Case No:
CA/HCC/0214-215/2014
High Court of Negombo
Case No. HC/291/2005

1.Husniras Mohamed Hussain
2.Siyamras Mohamed Hussain
3.Abdullah Zubairul Ameer alias Subair
4. Haris

ACCUSED

AND NOW BETWEEN

1. Husniras Mohamed Hussain
2. Abdullah Zubairul Ameer alias Subair

ACCUSED- APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam,J.

COUNSEL : **Saliya Peiris, P.C with Sanjaya Ariyadasa For the 1st Appellant.**
Neranja Jayasinghe with Harshani Anandi and Dulshan Katugampola for the 2nd Appelant.
Rohantha Abeysuriya, P.C, ASG for the Respondent.

ARGUED ON : **07/02/2023**

DECIDED ON : **24/03/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) with 2nd and 4th accused being indicted in the High Court of Negombo under the following charge:

> On or about 24th of June 2001 at Porutota within the jurisdiction of High Court of Negombo committed the murder of Mohamed Liyabdeen Mohamed Thakeebdeen and thereby committed the offence of murder punishable under Section 296 read with Section 32 of the Penal Code.

In this case as the 1st Appellant and 2nd and 4th accused absconded the court, and the trial proceeded in absentia of them after following proper procedures under Section 241 of the Code of Criminal Procedure Act No.15 of 1979. The trial commenced before the High Court of Negombo as the 3rd Appellant had opted for a non-jury trial.

After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the 2nd Appellant had made the dock statement and closed his case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants and 2nd and 4th accused as charged and sentenced them to death on 09/06/2014.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

All the Learned Counsels for the Appellants informed this court that the Appellants had given their consent to argue this matter in their absence due

to the Covid 19 pandemic. Also, at the time of argument the Appellants were connected via Zoom platform from prison.

Background of the Case

This case rests solely on the evidence of sole eyewitness's testimony.
According to PW2, on the day of the incident, after a gathering at another house, when he and the deceased were returning home, they had met the Appellants and the 2nd and 4th accused. The 2nd and 4th accused had held the deceased while 1st Appellant had shot the deceased from awfully close range using a small firearm. At that time, the 3rd Appellant had swung a sword at him, but it missed. As PW2 was threatened not to give evidence, he ran away from the scene in fear. When he was running, heard another report of a gunshot. But did not see to whom it was fired.
Before this incident took place, the 1st Appellant had greeted the deceased and PW2 with "Salam" and inquired whether a car had gone passing them. PW2 had very clearly identified the Appellants and 2nd, and the 4th accused by their names with the aid of light emanating from a nearby light post.
PW9, IP Gunawardena who had gone to the scene of crime immediately after the incident, witnessed that the deceased was lying on Thakkiya Road close to a Mosque. He had also noticed the deceased's head bleeding and two spent cartridges lying close to the deceased's body. Further, he had noticed a lamp post 03 meters away from the deceased's body. Later, investigation revealed that the deceased lived in a wooden house situated 27-30 meters away from the place of incident.
PW16 who conducted the postmortem on the deceased reported that the gunshot wound to the head was the cause of death.
When the defense was called, the 2nd Appellant had made dock statement and denied the charge.

The following grounds of appeal were advanced by the 1st Appellant.

1. That PW2 the sole eyewitness should not have been believed upon as he is unworthy of credit.
2. The Learned High Court Judge has not considered the discrepancies in the evidence of PW2 and not given adequate reasoning or analysis of the evidence of PW2.

The following grounds of appeal were advanced by the 2nd Appellant.

1. The Learned High Court Judge had failed to take into consideration the infirmities of the eye witness whose evidence had not been corroborated.
2. Rejection of the dock statement based on Lucas Principle is wrong in law.
3. The law relating to evaluation of a dock statement had not been considered.
4. The Learned High Court Judge had failed to consider the law relating to common intention in the judgment.

As the Appeal grounds raised by the Learned President's Counsel and the 1st ground raised by the Counsel for the 2nd Appellant are interconnected, the said grounds will be considered together hereinafter.

In this case PW2 is the sole eyewitness who had witnessed this unfortunate incident pertaining to this case. The Appellants and the accused are personally known to PW2.

The Section 134 of the Evidence Ordinance states as follows.

> *"No particular number of witnesses shall in any case be required for the proof of any fact".*

In the case of **Sumanasena v. The Attorney General [1999] 3 Sri.L.R 137** held that;

> *"Evidence must not be counted but weighted and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of Law"*

In the case of **Madduma Siripala and another v. The Attorney General CA/125-126/10** decided on 27/10/2017, Justice Thurairaja held that:

> *"With reference to the above-mentioned section, there is no requisite number of witnesses needed to be called to prove a fact. In fact, the evidence of a single witness is sufficient to prove a fact provided the evidence of the witness is uncontradicted, truthful, independent, and reliable to court".*

With reference to above cited judicial decisions, it is abundantly clear that the trial court can act on the evidence of a single witness whose evidence is truthful and impressive to come to a correct finding.

In this case PW2 had clearly witnessed the incident with the aid of a streetlight. There is no enmity reported between the witness, the Appellants, and the accused.

It is the position of PW2 that the deceased was held by 2nd and 4th accused when the 1st Appellant shot the deceased. At the same time, the 2nd Appellant had dealt a blow with a sword on PW2, but he escaped from injury. As he was threatened not to give evidence and directed to run away from the scene, PW2 had run away from the incident but also went hiding for some time due to fear. As such he had given his statement to police on the following day. In

a criminal trial, delay in recording statement of an eyewitness is not detrimental when his non-availability is justified.

The Learned High Court Judge in his judgment had considered the delay in making the statement to the police. The relevant portion is re-produced below:

(Page 352 of the brief.)

පැ.සා. 02 විසින් මහේස්ත්‍රාත් අධිකරණයේදී 1,2,3 විත්තිකරුවන් හඳුනා ගත් බවට සාක්ෂි දී ඇති අතර මෙම සිද්ධිය සම්බන්ධයෙන් පොලිසියට ප්‍රකාශයක් කිරීමට ප්‍රමාද වූයේ ඔහුට තිබූ මරණ භය හේතු කොට ගෙන බවට ද සාක්ෂි දෙමින් කියා ඇත.

In the cross examination PW2 confirmed that the incident had happened close to the deceased's mother's house. Also admitted that a mosque is situated in front of the deceased' mother's house.

PW2's position is that the 2nd and 4th accused had held the deceased and facilitated the 1st Appellant to shoot the deceased. But to the police PW2 had stated that the 1st Appellant and 2nd accused had held the deceased. When the defence Counsel put this position he had taken when he gave his statement to the police, PW2 had reiterated that 2nd and 4th accused had held the deceased when he was shot by 1st Appellant. The Learned President's Counsel highlighting this discrepancy submitted that PW2 is not a trustworthy witness. This discrepancy had not been marked as a contradiction during the trial.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa (2011) 2 Sri L.R. 292** held that,

> *"Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.....The court*

observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies".

Considering the circumstances under which PW2 had witnessed the incident, I do not consider this contradiction forceful enough to affect the outcome of the case.

Although the Learned President's Counsel contended that the Learned High Court Judge has not considered the discrepancies in the evidence of PW2 and not given adequate reasoning or analysis of the evidence of PW2 in the judgment, the Learned High Court Judge in his judgment had considered this discrepancy.

(Pages 387-388 of the brief.)

මෙම නඩුවේ දී විත්තිය විසින් ඉදිරිපත් කර ඇති පරස්පතා නඩුවේ හරයට බලපානවාද යන කරුණු සලකා බැලිය යුතු වේ. පැ.සා. 02 හරස් ප්‍රශ්න වලදී පරස්පරතාවයක් ලෙස ගොඩ නගා ඇත්තේ පොලිසිය කරන ලද ප්‍රකාශය අනුව මරණකරුව හුස්නිරාස් සහ සියාම් විසින් අල්ලා ගත් බවට ප්‍රකාශ කළ බවටය. එහෙත් සාක්ෂිකරු පුන පුනා සාක්ෂි දෙමින් පැහැදිලිව ප්‍රකාශ කර සිටියේ සියාම්රාස් සහ හැරීස් මරණකරුව අල්ලා ගෙන සිටි බවය. එම පරස්පතාරවට අවධානය යොමු කිරීමේ දී එය නඩුවේ හරයට බලපෑම් කළ හැකි ආකාරයේ පරස්පරතාවයක් ලෙසට බැලූ බැල්මට සැලකිය නොහැක.

Hence, the grounds raised by the Learned President's Counsel and 1st ground raised by the Counsel for the 2nd Appellant have no merit.

In the 2nd ground of appeal, the Counsel for the 2nd Appellant contended that the rejection of the dock statement based on Lucas Principle is wrong in law. The Learned Additional Solicitor General admitted that the application of Lucas Principle is not appropriated in this case. I too agree with both Counsels. Hence, this ground has merit.

In the third ground of appeal, the Counsel for the 2nd Appellant argued that the law relating to evaluation of a dock statement had not been considered.

Treating unsworn statement of an accused from dock as evidence has been recognised and consistently followed in our courts despite the fact that statement not being subjected to cross examination. It has to be treated as other evidence which had been subjected to cross examination. Acceptance of dock statement as evidence has been recognised in several land marked cases in our jurisdiction.

In **Kathubdeen v. Republic of Sri Lanka [1998] 3 SLR 10** the court held that;

> *"It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt".*

Although the law relating to evaluation of a dock statement had not been considered, in the judgment, the Learned High Court Judge considered the dock statement of the 2nd Appellant in his judgment. The relevant portion is re-produced below:

(Page 389 of the brief.)

03 විත්තිකරුගේ විත්ති වාචිකය වෙත අවධානය යොමු කරමි. 03 විත්තිකරු විත්ති කූඩුවේ සිට කරන ලද ප්‍රකාශයේ ඔහු විසින් ප්‍රකාශ කරන ලද්දේ 2001.06.24 වෙනි දින ඔහු රද්දොළුගම නිවසේ දරුවන් දෙදෙනා සමඟ සිටි බවත් යන කරුණු විත්තිය විසින් විත්ති වාචකයෙන් ප්‍රථම වතාවට කියනු ලබන අතර, ඒ පිළිබඳව පැමිණිල්ලේ සාක්ෂිකරුවන්ට ප්‍රශ්න කර යෝජනාවක් ද කර නැත. එබැවින් එම කරුණ 03 විත්තිකරු විත්තිකූඩුවේ සිටි ගනු ලබන නව ස්ථාවරයක් වන අතර එබැවින් එම කරුණු පිළිගත නොහැක. ඒ අනුව විත්තිකරුගේ විත්ති වාචිකය පිළි ගැනීමට හැකියාවක් නොමැත.

Therefore, it is incorrect to argue that the law relating to evaluation of a dock statement had not been considered in the judgment by the Learned High Court Judge. Hence, this ground has no merit.

In the final ground of appeal, the Counsel for the 2nd Appellant contends that the Learned High Court Judge had failed to consider the law relating to common intention in the judgment.

Common Intention is depicted under Section 32 of the Penal Code of Sri Lanka. It reads:

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Common Intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common Intention comes into being prior to the commission of the act, but a long gap in time need not be present. To bring this section into effect a pre-concert is not necessary to be proved, but it may well develop on the spot as between several persons and could be inferred from the facts and circumstances of each case.

In **The Queen v. Mahatun 61 NLR 540** the court held that:

> *"Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such as if it were done by him alone.*
>
> *To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment".*

In **S. Fernando v. H. De Silva 68 NLR 166** the court held that:

> *"In order to sustain the charge based on common intention it is essential that both the accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence".*

Although the accused did not commit any physical act, yet liability could be imposed on him on the basis that his presence was a participatory presence. All these are generally established through circumstantial evidence.

In this case, when 2nd and 4th accused held the deceased, the 1st Appellant had shot the deceased. At that time, the 2nd Appellant went on to swing the sword on PW2 which was missed twice. This reiterates that the 2nd Appellant was an active participant to the crime.

Although the Learned High Court Judge did not discuss the law pertaining to common intention in the judgment but had considered and satisfied the participation of the Appellants and the accused in committing the murder of the deceased. The relevant portion is re-produced below:

(Page 391 of the brief.)

පැ. සා. 02 විසින් ලබා දී තිබෙන සාක්ෂිය සමස්ථයක් වශයෙන් සලකා බලන විට 03 වන චූදිත සහ මේ වන විට අධිකරණය මග හැර ගොස් ඇති 1,2,4 චූදිතයන් පොදු චේතනාව සහිතව එකට ක්‍රියා කරමින් 2001 ජුනි 24 වෙනි දින මොහොමඩ් ලියාඛ්දීන් මොහොමඩ් තකිඛ්දීන් යන අයගේ මරණය සිදු කළ බවට ඉදිරිපත් වී ඇති සාක්ෂිය සම්බන්ධයෙන් කිසිදු සාධාරණ සැකයක් ජනිත වී නොමැති බවට තීරණය කරමි.

As this has not caused any prejudice to the 2nd Appellant, this ground of appeal also devoid any merit.

In this case, although the Learned High Court Judge had wrongly used the Lucas Principle to reject the dock statement of the 2nd Appellant, it has not caused any prejudice to his right to a fair trial.

The evidence presented by the prosecution has clearly established the charge beyond reasonable doubt against the Appellants. The highlighted discrepancies are not forceful enough to vitiate the conviction.

In the circumstances, I am of the view that, as there is no merit in the appeal grounds of the Appellants and therefore their appeals ought to be dismissed. Hence, I affirm the conviction and the sentence of the Appellants and proceed to dismiss their appeals.

The Registrar of this Court is directed to send a copy of this judgment to the High Court of Negombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL