IN THE COURT OF APPEAL OF THE DEMOCRATIC 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: Democratic Socialist Republic of Sri Lanka

CA/HCC/0302-306/2016 **COMPLAINANT**

High Court of Colombo **Vs.**

Case No: HC/2254/2005

1. Thiruchelvam Nixon *alias* Ramesh
2. Jeyaraj Mahalingam Mahendran *alias* Ravi
3. Wadivel Ravindra Kumar *alias* Ragu
4. Dinesh Kumar
5. Sinnathambi

ACCUSED

AND NOW BETWEEN

1. Thiruchelvam Nixon *alias* Ramesh
2. Jeyaraj Mahalingam Mahendran *alias* Ravi
3. Wadivel Ravindra Kumar *alias* Ragu
4. Dinesh Kumar
5. Sinnathambi (deceased)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Indica Mallawaratchi for the 1st Accused Appellant.

: Rienzie Arsekularatne, P.C. with N. Karunaratne, Thilina Punchihewa and P. Gamage for the 2nd to 4th Accused Appellants.

: Madhawa Tennakoon, DSG for the Respondent

Argued on : 06-12-2022

Written Submissions : 17-06-2019, 18-06-2018, 23-03-2018 (By the 1st Accused Appellant)

: 19-11-2019 (By the 2nd to the 5th Accused-Appellants)

: 22-08-2022 (By the Respondent)

Decided on : 30-01-2023

Sampath B. Abayakoon, J.

This is an appeal by the accused appellants (hereinafter sometimes referred to as the appellants) on being aggrieved by their conviction and the sentence by the learned High Court Judge of Colombo.

The appellants were indicted before the High Court of Colombo on following counts.

(1) For being members of an unlawful assembly on 14th March 2001 with the common object of causing harm to one Rajgopal Wijeratnam and thereby committing an offence punishable in terms of section 140 of the Penal Code.

(2) At the same time and at the same transaction, in furtherance of the above common object, committing the murder of the above mentioned Wijeratnam, an offence punishable in terms of section 296 read with section 146 of the Penal Code.

(3) At the same time and at the same transaction, acting with a common intention, and thereby committing the murder of the above mentioned Wijeratnam, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the appellants were found guilty as charged by the learned High Court Judge of Colombo by the judgment dated 31-10-2016.

Accordingly, they were sentenced to a term of six months rigorous imprisonment and to a fine of Rs. 5000/- on count one preferred against them. In default of paying the fine, they were sentenced for six months simple imprisonment.

On count two, all of them were sentenced to death.

No order was made on the third count for which they were convicted, apparently on the basis that it was an alternative count to the second count.

At the hearing of this appeal, it was informed to the Court that the 5th accused appellant had passed away while in prison.

The Grounds of Appeal

The learned Counsel for the 1st accused appellant formulated the following grounds of appeal for consideration at the hearing of the appeal.

(1) The evidence led at the trial does not support the contention that PW-02 Roshani was an eyewitness to the incident of murder, and the conviction reached on such a basis was bad in law.

(2) The inherent weaknesses of the evidence of PW-01 Veronica with regard to the culpability of the 1st accused at the time of the incident crates a reasonable doubt.

(3) The learned High Court Judge has erred by certifying with regard to the demeanor and deportment of the prosecution witness PW-02, when the learned High Court Judge was not the Judge before whom the evidence was taken.

(4) The provisions of section 114 (f) of the Evidence Ordinance operate against the prosecution because of the failure to lead the evidence of PW-06, who was an important and a vital witness for the prosecution.

(5) The appellants were denied of a fair trial by the refusal of the learned High Court Judge, the application made by the defence for an order to call PW-06 as a witness for the prosecution.

The learned President's Counsel for the 2nd to 4th accused appellants formulated the following grounds of appeal.

(6) The learned High Court Judge was misdirected by concluding that the evidence of PW-01 and PW-02 can be believed.

(7) The learned High Court Judge, prior to considering the defence evidence has accepted the evidence of PW-01 and PW-02 and thereby compartmentalized the evidence.

(8) The learned High Court Judge misdirected herself by mixing up the liability based on common object with that of vicarious liability.

(9) The learned High Court Judge misdirected herself in law by construing the evidence of the 2nd and the 4th accused appellants as taking up an alibi.

(10) The learned High Court Judge was misdirected as to the question of proof beyond reasonable doubt.

(11) The learned High Court Judge failed to call PW-06 to give evidence in Court in the interests of justice, and thereby acted in violation of section 199(4) of the Code of Criminal Procedure Act.

The Facts in Brief

This is an incident that had taken place on the 14th of March 2001, where the deceased was brutally murdered in the broad daylight in Maradana area.

PW-01, the wife of the deceased and PW-02 the daughter of him, were the persons who have given evidence at the trial Court as eyewitnesses to the incident.

There had been a previous incident of murder where one Anton Croos, who is the brother of Nesamuller, the immediate neighbour of the deceased was suspected. He was in remand custody at the time this incident happened, and according to the witnesses, the appellants had a grudge with the deceased for visiting the mentioned Croos in remand prison. Around 11.30 in the morning of the day of the incident, while at the kitchen of her house, the PW-01 had heard someone shouting outside of the house and when inquired, she has seen the 1st and the 2nd accused appellants shouting at the direction of the house of the earlier mentioned Nesamullar, threatening that there will be a blood revenge before the evening. Seeing the PW-01, the 1st accused appellant has threatened saying that this is a warning to your husband as well.

While returning with her daughter from school in the afternoon, the witness has seen the four accused appellants and the now deceased fifth accused near their house.

Around 4.45 in the evening, while attending to her daily chores in the house, she has been alerted by her daughter that the earlier mentioned persons are coming again. She has seen the 4th accused appellant with a sward in his hand and others with knives. They have started attacking the house of Nesamullar. It had been her evidence that when the house of Nesamullar was attacked by the appellants, all the members of Nesamullar's household were at their home.

While this was taking place, she has seen her husband (the deceased) coming towards the house and although she had attempted to alert the husband of the imminent danger, it has failed. The appellants, after seeing the deceased, had chased after him. PW-01 and her daughter PW-02 also had run behind the pursuers of her husband. She has then seen all five of them attacking and stabbing the deceased and getting into a three-wheeler and fleeing the scene of the crime. The deceased had succumbed to his injuries at the hospital.

During the cross examination of the witness, a contradiction has been marked to establish that what she has stated at the postmortem inquiry was that after the incident, she sent a message to her children and got them down to the place where her husband had fallen. (The contradiction marked 1V1), which indicates that her children were not with her when this incident of stabbing took place. On behalf of the appellants, several discrepancies and omissions of her evidence in relation to her previous statements and evidence has been highlighted as well. It had been the position of the defence that she was not an eyewitness to the incident as claimed by her, and uttering falsehood, which she has denied.

The daughter of the deceased (PW-02) was the only other eyewitness called by the prosecution to substantiate the evidence of PW-01. She has given evidence on the basis that when this incident happened, she too went behind her mother and saw the appellants attacking her father, which appears to corroborate the version of events as stated by her mother.

However, during the cross examination of the witness the defence has brought to the notice of the Court several omissions in relation to her statement to the police, and had marked the following relevant contradictions.

- 02V-2(2): - "ඇතිවූ බය නිසා මා ගෙදරට වෙලා සිටි අතර"
- 02V-2(3): - "පැය 1/2 පමණ ගිය පසු අපේ වත්තේ පදිංචි පිංකි කියන ගැහැණු

ළමයෙක් පැමිණ මට කිව්වා අන්න ඔයාගේ අම්මා ඔයාට අඬගහනවා"

- 02V-2(4):- "එවිට මමයි මල්ලියි පාර දෙසට දුවගෙන ගියා"

The position taken up by the defence had been that she never saw the incident and was uttering falsehood in that regard. Although the witness has denied, it has been suggested to her showing photographs taken together with the 2nd accused appellant that they had a love affair even after the alleged involvement of the murder of her father, because he was not involved in it.

The prosecution has decided not to call the earlier mentioned Nesamullar who was listed as prosecution witness number 06 in the indictment to give evidence on its behalf. The application made by the defence to the Court urging that the said witness be called on behalf of the prosecution in the interests of justice had been rejected, as the prosecution has informed the Court that it is not relying on her evidence to prove the case, and on the basis that the defence can call her if they so wish.

When called for a defence at the conclusion of the prosecution case, the 1st and the 2nd accused appellants have given evidence under oath, while the 3rd, 4th and the 5th have made dock statements. The 2nd and the 5th accused appellants have called witnesses on their behalf as well.

The 1st accused appellant, in his evidence has stated that the earlier mentioned Nesamullar was his father's elder sister Susei Mary's daughter, and earlier mentioned Anton Croos and another called Peter were members of that household. It was his position that he had an issue with the members of their household for not handing over of his driver's license delivered to that house, and there was an altercation over that in the morning, and also in the afternoon with Nesamullar and Peter. He has claimed that after that incident was also over, the earlier mentioned Peter came and attempted to attack him with a knife and the deceased got hold of him from behind while he was near a

three-wheeler. He has claimed that in the melee, both he and the deceased fell to the ground and the knife which was in the hand of the mentioned Peter fell too. It was his position that since the deceased attempted to attack him with a club found nearby, he got hold of the knife and stabbed the deceased and later fled the area.

It appears that the position of the 1st accused appellant had been that this was a result of a sudden fight and only he was involved in it, and none of the other accused appellants.

The 2nd accused appellant was a three-wheeler driver during the time relevant to this incident. In his evidence, he has claimed that on the day of the incident, he went on a hire with one Joseph to Wellawatta area and returned only at about 4.45 in the evening and was never involved in the murder of the deceased. He has stated that he even had a love affair with the daughter of the deceased (PW-02) in 2003 or 2004, because he was not involved in the murder.

The Joseph mentioned by the 2nd accused in his evidence has also given evidence on behalf of him and had stated that in fact he engaged services of the 2nd accused appellant around 4.00-4.15 p.m. on the day of the incident to go to Wellawatta.

The other accused appellants making dock statements had denied any involvement in the incident. The 4th accused appellant has claimed that he was not living in that area during the time relevant to this incident.

The 5th accused appellant has called Krishnadas Rameshkumar, who was the 8th witness listed in the indictment to give evidence on behalf of him. He was the person who has identified the body of the deceased at the postmortem and a close relative of the deceased. It had been his evidence that when the daughter and the son of the deceased came and informed him that their farther had been murdered, they only informed that some persons have murdered

their father, and did not name any of the persons involved. However, he had admitted that he never questioned them in that regard either, because he rushed to the scene of the incident.

Consideration of the Grounds of Appeal

The grounds of appeal urged by the learned Counsel for the 1st accused appellant and the learned President's Counsel on behalf of the 2nd to 4th accused appellants will be considered together as they are somewhat interconnected.

The main contention taken up in this appeal was that the evidence of PW-01 and PW-02 was highly unreliable and the learned High Court Judge was wrong to have convicted the appellants based on their evidence.

It had been the evidence of the PW-01 that when she saw her husband being chased after by the appellants, she along with her daughter went after them and saw the appellants attacking the deceased with sharp cutting weapons. Her daughter, the PW-02 has given evidence similar to her mother claiming that she followed her mother and saw the appellants attacking her deceased father.

It has been pointed out in the trial Court on behalf of the appellants that PW-01 has never stated that her daughter was with her when this incident happened in the statement she made to the police after the incident.

In her evidence at the inquest, what she has stated had been to indicate that her children were asked to come to the scene of the crime afterwards.

The relevant contradiction marked 1V-01 from her evidence at the inquest reads as follows;

"මහත්තයා කපලා පාරේ වැටුනට පසු පොඩි ළමයෙක් අතේ දුවට හා පුතාට එන්න කියලා පණිවිඩයක් යැව්වා. ඒ අයත් මම ලඟට ඇවිල්ලා කෑගහගහ හිටියා"

This contradiction in her evidence becomes relevant in considering what the daughter (PW-02), has stated in her evidence before the trial Court, and what she has stated in her statement to the police.

Although she has claimed that she saw the incident in her evidence before the trial Court, the earlier mentioned contradictions marked as 02V-2(2), 02V2(3) and 02V2(4) clearly establishes that PW-02 was not an eye witness to the incident, but had gone there after it happened. The PW-02 was a 12-year-old minor at the time of the incident. I find no reason for her to tell the police when she was making her statement that she and her brother waited at home through fear, and came towards the place of the incident after they were informed by a neighbour that their mother was calling for them, if she was an eyewitness to the incident.

Besides that, although the PW-02 has denied that she had a love afire with the 2nd accused appellant some years after the murder of her father, it appears that the PW-02 has had some kind of a relationship with him, because of the admitted photograph produced in the Court, where it appears that it has been taken in a studio setting with the 2nd accused appellant and the PW-02 standing together.

I find that the two witnesses, being the mother and the daughter have decided to give evidence claiming that both of them saw as to what happened, without realizing the consequences of it, whereas they have not.

I am in no position to agree with the learned High Court Judge's consideration of the said witnesses' evidence as cogent and trustworthy. Under the circumstances, I am of the view that relying solely on their evidence to convict

the appellants was not safe in the absence of any independent corroboration of the facts that led to this incident.

I find that the evidence of PW-06, if called, would have given a clear insight as to the events that unfolded on that day and the incident of stabbing of the deceased.

The evidence clearly suggests that all the previous incidents had been in relation to the members of PW-06 Nesmullar's household. Although the PW-01 has claimed that the appellants had a grudge against her husband because he visited Croos in remand prison, who was a murder suspect, there is no evidence to suggest that it was the reason for the incidents that took place on the day of the incident.

According to the evidence, the appellants focus had been the household members of PW-06 on that day. When the house of PW-06 was attacked, she had been at home. She was the next-door neighbour of the deceased. In my view she would have been the best independent witness that should have been called by the prosecution in order to clarify doubts in relation to the evidence of PW-01 and PW-02 as alleged eyewitnesses to the incident of stabbing of the deceased. Had she given evidence, the fact that whether all the five accused were participants of the crime would have been clearly established independently to the evidence of PW-01, and the fact that whether PW-01 and PW-02 went after the assailants as they claimed in Court.

I am of the view that without sufficient corroboration of the evidence of PW-01 and 02, there was no basis for the learned High Court Judge to conclude that the prosecution has proven the charges against the appellants beyond reasonable doubt given the considered infirmities in the evidence of the alleged eyewitnesses.

In this matter, when the prosecution closed the case without calling PW-06, the learned Counsel for the defence has made an application to Court to call that witness as a witness for the prosecution in the interests of justice.

However, I find that the prosecuting State Counsel has vehemently objected to the said application insisting that the prosecution has led sufficient evidence to prove the charges against the appellants and if the appellants wanted, it was opened for them to call the said witnesses as a defence witness. The prosecution has relied on the decided cases of our superior courts which says that it was up to the prosecution to decide on the number of witnesses they rely on to prove a case against an accused person.

I find that although that may be so, in the instant appeal under consideration, the prosecution should have known the infirmities in the evidence of PW-01 and 02. Under the circumstances, rather than being adamant in not calling PW-06 as a prosecution witness, the prosecution should have called PW-06 in the interests of justice, and in order to uncover the truth. It is the duty of a prosecuting State Counsel as an officer of the court, to assist the Court in dispensing justice rather than attempting to secure a conviction at any cost.

I am of the view that as argued correctly by the learned Counsel that the presumption as envisaged in Section 114 (f) of the Evidence Ordinance shall become applicable in the instant case.

Section 114 (f) reads as follows;

> **114 (f). The evidence which could be and is not produced would if produced, be unfavourable to the persons who withholds it.**

For the reasons mentioned above, I find that this is not a case where the conviction based on unlawful assembly and murder can be allowed to stand.

I am of the view that even a conviction in terms of section 32 of the Penal Code cannot be allowed to stand under the circumstances. Hence, this Court has no option but to acquit the first accused appellant and the second to fourth accused appellants of the charges of unlawful assembly, murder and committing the murder with a common intention.

Therefore, the appellants are acquitted of the charges preferred against them.

However, although the first accused appellant is now stand being acquitted of the charge of murder punishable in terms of section 296 of the Penal Code, he has admitted by giving evidence in Court that it was he who stabbed the deceased which caused his ultimate death.

It has been his evidence that all the incidents that took place on that day revolved around him and the members of the household of PW-06. He has admitted that he went to the house of PW-06 on that day and there was an altercation. It has been his evidence that, after the altercation and when he was near a three-wheeler stand, another member of the PW-06's household named Peter came and attacked him, and the deceased also took part in the said altercation. According to his evidence, it was he who stabbed the deceased using a knife brought by the earlier mentioned Peter, and fled the crime scene, he has claimed that no one else was involved in the incident.

It appears that his position had been that the incident happened as a result of a sudden fight in terms of exception four of section 294 of the Penal Code. The said exception four reads as follows;

Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation- It is immaterial in such cases which party offers the provocation or commits the first assault.

When taking the evidence as a whole, I am of the view that the evidence of the 1st accused appellant that this was a result of a sudden quarrel in the heat of passion is the only inference that can be drawn when it comes to the incident where the deceased was stabbed to death, in view of the unreliability of other evidence to the contrary.

Therefore, although the 1st accused appellant is acquitted of the charge of murder, I convict him for the offence of culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

Given the facts, the circumstances, and the number of stab injuries found in the body of the deceased, I find that this is an offence that falls under the second limb of section 297 where the act has been done with the knowledge that it is likely to cause death. Therefore, I sentence the 1st accused appellant for a term of 15 years rigorous imprisonment for the charge he is now convicted and order him to pay a fine of Rs. 50000/-. In default of paying the fine, he shall serve a period of 18 months simple imprisonment.

Considering the fact that the 1st accused appellant has been in incarceration, since his conviction and the sentence on 31-10-2016, I order that the sentence imposed upon the first accused appellant on his conviction for culpable homicide not amounting to murder shall deem to have commenced from his date of original conviction, namely, 31-10-2016.

Although it was not necessary for the determination of the appeal, I would like to comment on the submission made by the learned President's Counsel in relation to the way the learned High Court Judge has considered the defence taken up by the 2nd and the 4th accused.

It has been determined that they have taken up an alibi and that they have failed to prove the same. This Court has reiterated again and again that an alibi is not a defence in its strict sense but a question of fact. When an accused person takes up an alibi, it is settled law that he has no burden of proof of the alibi taken.

I am in agreement with the learned President's Counsel on his submission that the position of the 2nd and the 4th accused appellants was not an alibi and the learned High Court Judge was misdirected when it was determined so.

The position of the 2nd accused appellant had been that he went on a hire with another person to Wellawatte and returned during the time relevant to the incident and he was not involved in the murder. The position of the 4th accused appellant had been that he did not live in the area and was living elsewhere when this incident happened and he too was not involved in the crime.

In order to consider a position taken up by an accused person that he was not involved in a crime and he was elsewhere as taking up an alibi, the position taken should be a position that there was no possibility with certainty for him to be present and to commit the crime. The time of the crime also needs to be a time that can be definitely fixed. For an example, if there is evidence to show that the crime was committed at a certain time, on a certain day of a certain month and a year at a certain place, and if the accused person takes up the position that he was in a different country at the alleged time and the day, and it was not humanely possible for him to be present at the scene of the crime as alleged, such a stand only can be taken up as an alibi.

In the instant action, the stands taken up by the two accused appellants does not fall into the category of taking up an alibi under any circumstance. The learned High Court Judge was clearly misdirected as to the law in that regard when it was determined that the accused had taken up an alibi and it was up to them to prove the same.

The appeals of the 2nd to 4th accused appellants are allowed.

The appeal of the 1st accused appellant is partly allowed to extent as stated in the judgment.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal