

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 Case No:
HCC / 307 – 309 / 2017

High Court of Panadura Case
No: **2774 /2010**

The Democratic Socialist
Republic of Sri Lanka.

Hon. Attorney General.

Attorney General Department
Colombo 12.

Complainant

Vs.

1. Illeperuma Arachchige Don Suraj Priyashantha.
2. Ranasinghege Nilantha Chaminda Perera.
3. Illeperuma Arachchige Don Manoj Nishantha.

Accused

AND PRESENTLY

Illeperuma Arachchige Don
Manoj Nishantha.

3rd Accused – Appellant

Vs.

The Democratic Socialist
Republic of Sri Lanka.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Nalin Ladduwohetty, P.C with Kavithri Ubeysekera for the 1st

and 3rd Accused Appellants.

Amila Palliyage appears with Sandee paniWijesooriya and

S.Udugampola for the 2nd Accused – Appellant.

Azard Navavi, DSG for the State.

Argued on: 23.03.2023

Decided on: 24.05.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 29.9.2017 of the High Court of Panadura.

The three accused appellants (hereinafter referred to as the appellant) had been indicted for committing murder and causing hurt on 6.5.2006.

The appellants had pleaded not guilty and the prosecution had led the evidence of three lay witnesses and the judicial medical officer and the investigative officers.

When the trial judge called the defense the 1st and the 2nd appellants had made dock statements and the third had given evidence and there had been a defense witness who had given evidence on behalf of the appellants.

Upon the conclusion of the trial the trial judge had convicted all three appellants for the charges in the indictment.

The grounds of appeal for the 1st and the 3rd are,

- 1)the lack of proper identity of the appellants at the scene,**
- 2) evidence of the prosecution not being properly considered,**
- 3)evidence of common intention not being properly considered.**

The grounds of appeal for the 2nd appellant are also the same as above.

According to the evidence of the prosecution witness **Susanga Gunatillake** who had said that there had been a wedding on the alleged

day and an argument had taken place at the wedding between two parties and after the wedding he had gone to drop Jayalath who had also been drunk, while he was in Jayalath's house he had received a phone call on his mobile around midnight stating that Kamal the injured had been entered to hospital and to inquire about the deceased because deceased and Kamal had been together at the wedding. The name of the caller has not come out in evidence but the witness had gone to the wedding house and on his way he had found the deceased in a puddle of water injured, and he had been rushed to hospital.

The evidence of **Kamal Prasad** who is supposed to have been injured says that at the wedding he had been with Priyantha the deceased and a scuffle had taken place between the 3 appellants and some others and he and everybody had consumed alcohol and he deceased and Upul had left the wedding house in the midnight and Upul had been dropped and thereafter the three wheeler had been stopped by the 1st appellant and he had stabbed the witness with a knife and he had been held by the 2nd appellant and when he tried to run the 3rd appellant had stopped him. The third appellant had stabbed the deceased and the witness had run off. He is supposed to have identified the appellants with the aid of the light which had been coming from the wedding house which had been about 75 feet away.

In cross examination the defense had brought to the notice of Court that the witness Kamal had failed to mention, to police that,

1)the 2nd appellant had held him, during the stabbing,

2)the third appellant had stabbed the deceased,

3)the appellants entering in to a fight with others at the wedding,

4)the second appellants name.

In cross examination he had said that apart from the three appellants there were about six to seven other people at the time of the incident. He does not say in evidence as to how he went to the hospital but the police had not recovered a three wheeler from the scene.

It had been suggested to him that the third appellant had been referred to as the thattya to police and not by name. The Counsel for the appellants pointed out that it is most unusual for the witness to refer to the 3rd appellant by a nickname when they had known each other.

He had said in evidence that he had been examined in hospital on the 7th morning around 10 am. But he does not speak as to how he got to the hospital but he says that he also ran after the stabbing and the deceased also ran towards the back of the three wheeler but the deceased had been stabbed by then, thereafter he does not speak as to what happened to the deceased.

The prosecution led the evidence of the fifth witness **namely Vithanage Roshan Chaminda** according to whom he had gone to the wedding on the date of the incident and thereafter there had been a scuffle between the appellants and another party and when he left the wedding house, he had met the appellants on his way out and the first appellant had been armed with a knife and had tried to stab him and at that place the second appellant also had been present but he had been referred to as the thattaya. **But in cross examination it had been**

brought to the notice of Court that all what had been mentioned above had not been told to police.

The doctor who conducted the postmortem had given evidence and he had recorded the time of death as 3.28 am on 7.5.2006 and had observed one fatal injury to the abdomen of the deceased and it had been classified as being the cause of death. A high level of alcohol had been identified in the deceased. .

According to the examination done on the injured he had given the assailants names as being **Suraj** and **Manoj** and his injuries had been classified as being non-grievous.

The evidence of the investigative officers had been that the first information had been received at 4.45.am on 6.5.2006 and the statement of the injured had been recorded at 12 noon on 7.5.2006 in hospital. He had made a further statement on the 10th of the same month, but yet there had been some glaring infirmities in the evidence of the injured person.

Thereafter the prosecution case had been closed and the defense had been called and the 1st and the second appellants had made statements from the dock and the 3rd appellant had given evidence on oath.

The first appellant had pleaded ignorance and had said that he went to the wedding with his wife and baby and he returned home with them around 10pm and he did not know anything about the incident.

The second appellant had said that he does not know anything and that he had lived at kiribathgoda on the day of the incident.

The third appellant has said that he went to the wedding and that there were several fights which had taken place and in one such fight he also had to get involved to settle, and around 10.45 pm he had left the wedding house.

The defense had called the bride-groom of the wedding and he had said in evidence that the 3rd appellant had been in a photograph with him and the bride and at that time which is also the day of the incident he had not been bold headed as stated by the witness Kamal and Chaminda of the prosecution and the said picture had been marked as Y in the defense case. He further says that all three appellants came for the wedding and later in the day he had got to know that the deceased and Kamal had been injured and the deceased had been found fallen near his house.

The trial judge had narrated the evidence given by the prosecution and the defense but had failed to consider the contradictions and the omissions which had been highlighted during the trial in the prosecution evidence.

In the case of Wickramasuriya vs Dedolina and others by Jayasuriya J 1996 2SLR 95 it has been held that “the issue is whether the contradiction or the inconsistency goes to the root of the case or relates to the core of the party’s case. If the contradiction is not of that character the Court ought to accept the evidence of witnesses who is otherwise cogent, having regard to the test of probability and improbability and having regard to the demeanor and deportment manifested by witnesses”.

In the instant matter the main eye witnesses have contradicted gravely in the identification of the appellants which the trial judge has failed at least to mention in the judgment leave alone consider the same which this Court is of the opinion has created a reasonable doubt in the prosecution evidence. Furthermore, it is the evidence of the prosecution that at the time of the incident the deceased the appellants and the rest of the crowd at the wedding have been heavily intoxicated and in fact at the place of incident that it is evidence that there were around seven or eight other people near the three wheeler which had been targeted by the appellants according to the prosecution evidence. Furthermore, according to the eyewitnesses of the prosecution the attack had taken place around midnight but the time of death had been according to the doctor around 3 45 am of the 7th of May and the deceased had been discovered by the prosecution well near midnight hence the question arises as to who may have attacked the deceased other than the appellants.

The Counsel for the appellants raised the position that the injured namely Kamal being the friend of the deceased after the attack leaves the deceased where he was and runs off and he is ambiguous as to how he came to the hospital which the prosecution also has failed to place before Court only raises a doubt as to the creditworthiness of the witness Kamal which in the opinion of this Court is worthy of consideration and raises a doubt in the case of the prosecution. In such a situation the benefit of the doubt has to be given to the appellants according to the fundamental principles of criminal law.

We also observe as raised by the appellant's Counsel that the trial judge had failed consider the case for the defense but instead, she had said that the defense in fact substantiates the position of the prosecution.

But it has been held in case of James Silve vs The Republic of Sri Lanka 1980 (2) SLR 167 that "it is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defense in the light of the evidence by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved, this is rooted in the concept of legal inviolability of every individual in our society, now enshrined in our constitution ". The trial judge had totally disregarded the position of the defense witness on the basis that the negative of the photograph marked has not been placed before Court which we think has no merit because in this day and age everything is digital and you do not anymore find negatives in photography. The evidence of the defense witness in fact totally cuts across the identification of the 3rd appellant by the witness Kamal and Cahminda.

Furthermore, we observe that the charges against the appellants had been preferred under the principle of common intention but we find that at some point the trail judge had considered the case of the appellants on the basis of common object which we think is a clear misdirection on the part of the trail judge.

It has been well said in the case of Alwis vs Piyasena Fernando 1993 (1) SLR 119 that "...primary findings by a trial judge who hears and sees

the witnesses are not to be disturbed lightly in appeal “ but in the instant case in view of the glaring contradictions in the prosecution case and the appellants had been denied a fair trial in view of the inadequate consideration of the case for the defense by the trial judge and the presence of others at the scene apart from the appellants creates a reasonable doubt in the case for the prosecution which according to the fundamentals of criminal law has to be given to the appellants.

As such the instant appeal is allowed and the conviction and the sentence of the trial judge is hereby set aside.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.