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

In the matter of an appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Thamil Chelvam Nagarajhe alias Thamil Chelvam Suresh.

2. Rajendran Rajinkanth

Accused

Court of Appeal Case No:

CA / HCC / 191 / 2015

High Court of Nuwara Eliya Case No:

HC / NE / 020 / 2011

AND NOW BETWEEN

1. Thamil Chelvam Nagarajhe alias Thamil Chelvam Suresh.

2. Rajendran Rajinkanth

Accused – Appellant

Vs.

Hon. Attoreny General

Attorney General's Department

Colombo 12

Complainant – Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Amila Palliyage with S. Udugampola, Sandeepani Wijesooriya and T. Ratwatte for the 1st Accused – Appellant.

U. R. de Silva with Hiru Rubera for the 2nd Accused – Appellant.

H. Jayasundera, A.S.G. for the State.

Argued on: 24.05.2023

Decided on: 20.06.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 2.12.2015 of the High Court of Nuwara-Eliya.

The two appellants had been indicted along with the dead accused for murder and upon the conclusion of the trial the appellants had been convicted for the same and had been sentenced to death.

The story of the prosecution is that the incident had taken place in an estate and the deceased had been known for brewing illicit liquor and the two appellants and the deceased accused had been in a campaign on the estate to stop the same and the deceased had not been too happy about it.

On the day of the incident , around 5 pm in the evening (there had been plenty of light) two of the prosecution witnesses state that the deceased was cut by the deceased accused and the appellants, and after the injuries had been caused the appellants had shouted to say that anybody else also would be cut if they come forward.

The JMO had said that there had been 12 cut injuries but most of them have been identified to be defensive injuries but he had said that more than one had participated in causing the injuries and one of the said injuries had been identified as being the cause of death.

On the statements of the appellants and the deceased accused the police had recovered three knives.

The two appellants had made dock statements and they had spoken to about the deceased being a person who had been involved in brewing illicit liquor had the villagers had been angry with him and on the day of the incident they had seen the deceased accused cutting the deceased and the defense witnesses called by the appellants have reiterated the same position.

The Counsel appearing for the appellants stated as grounds of appeal that the trial judge had not evaluated the defense case in the proper perspective and had in fact laid an un due burden on the appellants.

But we observe that the trial judge had been mindful of the basic principle in criminal law that the prosecution has to prove its case beyond a reasonable doubt and he had considered the evidence of the prosecution witnesses and had concluded that their evidence was without any glaring contradictions and omissions which creates a reasonable doubt in the case for the prosecution and had considered the evidence of the defense and had concluded that the prosecution had placed its case on cogent and acceptable evidence.

The trial judge had observed that the defense had been wavering in their position in cross examination and the dock statements and had not been consistent.

A submission made by the Counsel for the appellants was that the two eye witnesses of the prosecution had been contradicting each other but we observe that the two eye witnesses had seen the incident at different stages of the incident which does not mean that they have contradicted each other, and the trial judge had very wisely analyzed the same in that spirit.

The Counsel appearing for the respondents had cited the case of Bhajinbai Hirijbai vs. the State of Bujarat AIR 1983 SC 753 which is very much cited in our Courts and which has been cited by the former Chief Justice Priyasad Dep in the case of SC\TAB\2A-D/2017 and has cited the relevant portion in the Indian Judgment which says that,

"Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
2. Ordinarily is so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the

main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5. In regards to exact time of an incident, or the time duration of an occurrence, usually, people make their estimate by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimate in such matters. Again, it depends on the time – sense of individuals which varies from person to person.
6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
7. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.

Discrepancies which do not go to root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance."

Furthermore, the Counsel for the appellants urged that the trial judge by stating in his judgment that "**in weighing the evidence of the defense he finds that the prosecution had proved its case beyond a reasonable doubt**" had caused grave prejudice to the appellants. But we do not see any merit in the said submission and also we wish to state that it has not been laid down in law nor has it been

decided in cases as to any specific style of judgment writing. It all depends on each individual judge's style of writing. But since of late as pointed out by the Counsel for the respondents that the counsel seem to be objecting to certain formations of phrases being used as being prejudicial to their clients. But we are of the view that phrases and terminology cannot be considered in isolation but instead it has to be considered in the backdrop of the facts of the individual case.

As such we are unable to agree with the grounds of appeal raised by the learned counsel for the appellants; therefore we affirm the conviction and the sentence of the trial judge and dismiss the instant appeal.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.