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.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/149/2009

H/C Balapitiya case No. 306

1. Thuiyadura Lestan Silva
2. Appuwa Handi Premawardena

ACCUSED

And,

1. Thuiyadura Lestan Silva
2. Appuwa Handi Premawardena

ACCUSED-APPELLANTS

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Samadara P. Kumari Jayasinghe for the 2nd Accused-Appellant

Thusith Mudalige SSC for the Attorney General

Argued on: 13.11.2015

Written Submissions on: 10.12.2015, 15.12.2015

Decided on: 02.09.2016

Order

Vijith K. Malalgoda PC J

The two accused-appellants were indicted before the High Court of Balapitiya for causing the death of one Hikkaduwa Withanage Karunasiri along with one Udesiri an offence punishable under section 296 read with section 32 of the Penal Code and for committing the offence of Robbery of Gold Juwellary worth of Rs.6000/- from Bathagamage Kalyanawathy an offence punishable under section 383 read with section 32 of the Penal Code.

The two accused –appellants have elected to be tried before the High Court Judge without a jury and they were convicted of both counts after trial and imposed death penalty on count one and 20 years Rigorous Imprisonment for count two. Being dissatisfied with the said conviction and sentence imposed on the two accused-appellants, they have preferred the present appeal against the said conviction and sentence. After filing the appeal and while it was pending, the 1st accused-appellant had died inside the prison and it is only the appeal of the 2nd accused-appellant is being argued before this court.

As revealed before this court the deceased Karunasiri was residing in his house with his wife Kalyanawathy and six year old son namely Deshapriya when the alleged incident took place on 19.03.1993.

The entire case for the prosecution was mainly relied on the evidence of the wife and the son of the deceased Karunasiri since the incident had taken place at the house of the deceased during night when the inmates were in sleep.

According to the evidence of Kalyanawathy and Deshapriya they woke up when the front door was broken by the intruders. The deceased threw acid towards the intruders from the broken door but he was shot and died almost instantly.

As the intruders were unknown to the prosecution witnesses, identification parade was held to identify the accused when two out of three suspects involved in this incident were arrested after several months.

According to the evidence of Asiri Deshapriya son of the deceased, had stated that two persons entered the house while another was on the door frame. Of the two entered, one was armed with a gun while the other had a sword. Witness who is 14 years at the time he was giving evidence and was only 6 years at the time when the incident occurred identified the 1st accused (who is now dead) on the basis that he had come to their place on one occasion before, in order to borrow a helmet from the deceased. The witness had identified the 1st accused as the person who was armed with a sword. The witness had further identified the appellant as the person who was on the door frame.

However with regard to the identity of the 2nd accused-appellant by this witness, this court is mindful of the following facts,

a) The witness was only 6 years at the time the incident took place
b) The witness did not take part at the identification parade held at the Magistrate Court after the arrest at the 2nd accused-appellant and therefore the identification of the 2nd will amount to a dock identification only.

Even though it is unsafe to be relied on the dock identification made by witness Deshapriya, this court has no reason to reject his evidence with regard to the fact that,

a) Three people were involved in the attack and firing took place at his house on 19th March 1993
b) The 1st accused and a third person had entered the house, where as another person was on the door frame at the time of the incident
c) It is the 3rd person who fired at his father at that time

As observed by this court, the entire case with regard to the identity of the 2nd accused-appellant is based on the testimony of witness Kalyanawathy.

I will now proceed to analyze the evidence of Kalayanawathy before considering the position taken up by the Learned Counsel for the accused-appellant during her submissions.

According to the evidence of Kalayanawathy the intruders have broke opened the front door of her house and entered the house through the opening. At that stage her husband had thrown acid at the intruders and one of them had fired at her husband. After her husband received gunshot injuries and fallen the person who shot at her husband had removed the gold chain warn by the deceased. They ransacked the Almirah while the inmates were pushed to a corner. The intruders were inside her house for nearly 10 minutes.

According to the witness, her husband had switched on the tube light near the main entrance when they heard the noise from outside and therefore there was sufficient light for her to identify the intruders at that time. In addition to the light outside, there was another light burning near the Buddha Statue and that too had helped her to observe what was happening inside the house.

In the land mark decision on identification, ***Regina V. Trunbull and another 1977 (1) QB 224 at 228*** the question of visual identification in Criminal cases was discussed as follows,..... Secondly

the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded any way, as for example by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused.....

In the present case, according to the evidence of Kalayanawathy the 1st accused-appellant and the other person had stayed inside the house for nearly 10 minutes. With regard to the 2nd accused-appellant there was ample light to see him with the aid of the tube light which was near the main entrance.

If this evidence is accepted we see no reason to reject the identification made by witness Kalayanwathy with regard to both accused.

According to her, out of the two accused entered the house, the 1st accused who had the knife with him had stabbed her hand and she suffered an injury to one of her fingers. During this time the 2nd accused-appellant was standing near the door frame of her house.

The above position taken up by the witness Kalyanawathy was challenged by the defence under cross examination and several omissions were marked in her evidence.

Since the admissibility of the said omissions were challenged by the Learned Senior Counsel during the argument before us I would like to consider the argument raised by the Learned Senior State Counsel first.

It was the argument raised by the Learned Senior Counsel that the defence in the High Court Trial had failed to prove the contradiction and omissions as required by law. In this regard the Learned Senior State Counsel relied on the interpretation given in the Evidence Ordinance to the term proved and not proved,

Section 3 of the Evidence Ordinance provides interpretation to the said terms proved and not proved as follows;

Proved; a fact is said to be proved when, after considering the matters before it the court either believes it to exist or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists

Not proved; a fact is said not to be proved when it is neither proved nor disproved

However when going through the above interpretation given by the Evidence Ordinance, what we observe is that there is a requirement by court "after considering the matter before it, the court either believes it to exist or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that exists"

In this regard we are mindful of the decision ***in Keerthi Bandara V. Attorney General 2002 (4) Sri LR 251*** where the court held "thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is trial judge who should peruse the Information Book and decide on that issue.....

Therefore it is our view that when the trial Judge permits a contradiction or omission is marked after correctly putting it before the witness it is understood that he permitted the making of the said omission or contradiction as required under the provisions of the Evidence Ordinance.

Under these circumstances we see no merit in the argument raised by the Learned Senior State Counsel before us.

The Learned Counsel for the 2nd accused-appellant had placed before this court several omissions and contradictions marked at the High Court trial and argued that even though the said omissions

and contradictions are not evidence in the present case, it is the duty of the trial judge to consider them when considering the credibility of the witness.

In this regard we are also mindful of section 155 (c) of the Evidence Ordinance which reads thus;

155 The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him,

(c) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted

As observed above witness Kalynawathy was the sole eye witness, on whose evidence the identity of the 2nd accused-appellant is mainly relied upon. Therefore it is important to consider the credibility of the said witness before acting upon her evidence.

In this regard the Learned Counsel for the 2nd accused-appellant has brought to our notice the following contradiction and omissions marked in the said trial;

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ප්‍ර: මම තමන්ට විත්තිකරු වෙනුවෙන් යෝජනාකරනවා ස්වාමිපුරුෂයාගේ බෙල්ලේ තිබූ වේන් එක අහවල්කෙනා ගලවා ගත්තා කියනවක ගැන වචනයක්වත් කියලා නැහැ

උ: වේන් එක ගලවා ගත්තා (ඌනතාවයක් වශයෙන් අධිකරණයේ අවධානයට යොමු කෙරේ)

ප්‍ර: දැන් තමුන් කිවුවා මේ වේන් එක ගලවා ගත්තේ වෙඩි තැබූ කෙනා කියලා

උ: ඔව්

ප්‍ර: තමන් ගිය දිනයේ මුල්ම සාක්ෂි දීල කියලා තියෙනවා මෙහෙම,

ප්‍ර: කවුද එක ගැලෙව්වේ වෙඩි තැබූ කෙනාද?

උ: නැහැ අනිත්කෙනා

එදා තමුන් කියූ සාක්ෂියද හරි අද දින ගරු අධිකරණයට කියන වෙඩි තැබූ කෙනා ගලවා ගත්තා කියන එකද

උ: උත්තරයක් නැත

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ප්‍ර: තමන් අනික් අයගේ හැඩහුරුකමට කිව්වේ මිටියි මහතයි රතුයි කියලා

උ: ඔව්

ප්‍ර: තමන් ඒ බව පොලිසියට කිව්වාද?

උ: කිව්වා

ප්‍ර: පලමුවෙනි විත්තිකරු වෙනුවෙන් යෝජනා කරනවා ඒගැන වචනයක් පොලිසියට කියලා නැහැ කියලා

(මෙය ඌනතාවයක් වශයෙන් අධිකරණයේ අවධානයට යොමු කරමි)

Page 113,

ප්‍ර: දැන් තමන් කිව්වා 01 වන විත්තිකරු මේ ගේ ඇතුලට ආවා කියලා

උ: ඔව්

ප්‍ර: තමන් මෙහෙම කිව්වාද මහේස්ත්‍රාත් අධිකරණයේදී,

1 සහ 2 විත්තිකරුන් උළුවස්ස උඩ හිටියා එහෙම කිව්වාද?

උ: කිව්වා

ප්‍ර: එහෙනම් අදදින ගරු අධිකරණයට කියපු ගේ ඇතුලට ආව කියන එක බොරුවක්

උ: ගේ ඇතුලට ආවෙ 2වෙනි එක්කෙනා

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ප්‍ර: මම 1වන විත්තිකරු වෙනුවෙන් යෝජනා කරනවා 1වන විත්තිකරුගේ අතේ පිහියක් තිබුනා කියලා පොලිසියට වචනයක්වත් කියලා නැහැ කියලා

උ: පිලිතුරක් නැත

(එය ඌනතාවයක් හැටියට ලකුණු කොට අධිකරණයේ අවධානයට යොමු කරමි)

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ප්‍ර: මම තමන්ට යෝජනා කරනවා පොලිසියට කරනලද ප්‍රකාශයේදී තමන් තමන්ගේ ස්වාමිපුරුෂයාට වෙඩිතැබුවේ ඉදිරිපස පැත්තෙන් කියලා වචනයක්වත් කියලා නැහැ කියලා

උ: මම කිව්වා

ප්‍ර: තමන් පොලිසියට කල ප්‍රකාශයේදී මගේ ස්වාමිපුරුෂයාට ඉදිරිපස දොරෙන් වෙඩිතැබුවා කියලා කියුබව සටහන් වෙලා නැත්නම් පොලිසියට එසේ නොකියූ බවට පිලිගන්නවාද?

උ: මම එහෙම කිව්වා

(එම කොටස ඌනතාවයක් වශයෙන් ගරු අධිකරණයේ අවධානයට යොමු කරමි)

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ප්‍ර: තුවක්කුව තිබුන අය කලුයි උස මහතයි කලපාට කමිසයක් ඇඳ හිටියා කිව්වාද?

උ: ඔව්

ප්‍ර: අනික් අයගේ හැඩරුව මතකනැහැ කියලා කිව්වාද?

උ: නැහැ මම කිව්වා දැක්කොත් අඳුනගන්න පුලුවන් කියලා

ප්‍ර: අනික් අයගේ හැඩරුව මතකනැහැ කියලා කිව්වාද?

උ: කිව්වේ නැහැ

එම කොටස 2 වි 1 හැටියට පරස්පරතාවයක් වශයෙන් ලකුණු කරමි

In addition to the above contradictions and omissions marked through the evidence of witness Kalyanawathy the Learned Counsel had brought to our notice of certain omissions marked in the evidence of witness Deshapriya with regard to the identity of the accused.

As observed above, the identity relied upon by the 2nd witness Deshapriya was based on dock identification only and therefore we are not inclined to consider those omissions and contradiction as important in deciding the present case.

As observed by us, the omissions referred to above in the evidence of witness Kalayanawathy are mainly on the incident that took place at her house during night when she was sleeping with her husband and her 6 years old son.

The intruders who broke open the door of her house had fired at her husband killing him. In such a situation it is not fair to expect a witness to come out with each and every thing that took place during that unexpected event within few hours after the incident, when she is making her statement to police.

With regard to the main incident, there was no major contradictions intersay between the two eye witnesses.

As observed by this court the main issue left open is the question of identity of the remaining accused-appellant.

When considering the omissions and the contradiction marked, we observe that except for contradiction marked **2 වි 1** and the omission referred to in page 108 of the appeal brief, all the other omissions cannot be considered as important omissions which goes to the root of the case.

The contradiction 2 ඒ 1 and the omission referred to above, refers to the one and the same issue whether witness Kalyanawathy in her statement to police had after giving description of one person had said that she cannot identify any other or she had said that she could identify the other if seen.

As observed above this court cannot simply reject the evidence of an eyewitness who took the trouble to make a detailed statement after a tragedy of this nature. Even if the witness had failed to mention it in her statement, she had identified him at the parade in which no complaint was made by the 2nd accused-appellant with regard to the identity she made.

Even though the witness had denied, the counsel who represented the 1st accused-appellant had suggested to the witness that the 1st accused-appellant was shown to her at the police station. There was no such suggestion made to the witness from the counsel on behalf of the 2nd accused-appellant but the 2nd accused-appellant in his dock statement had said that he was shown to the witnesses at the police station prior to the identification parade.

In this regard we are mindful of the decision in ***Gunasiri and two others V. Republic of Sri Lanka (2209) 1 Sri LR 39 at 45-46*** where Sisira de Abrew J observed,

"Although the 3rd accused-appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses indicating the name of the priest. The trial commenced on 29.11.2001and the defence case was concluded on 19.09.2003. Thus during a period of 2 years he failed to move Court to get summons on the priest. Although the 3rd accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh V. State of Punjab

2002 AIR SC III 3652 at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew V. State of Karnataka, 2004 CR LJ 3003. Applying the principles laid down in the above judicial decision, I may express the following view. **Failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was a false one.** Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused-appellant is an afterthought."

When considering matters referred to above we see no merit in the argument raised by the counsel for the 2nd accused-appellant that,

a) It is unsafe to act on the evidence of witness Kalyanawathy in convicting the 2nd accused-appellant
b) The Learned Trial Judge had erred in law when he decided that the omissions and contradiction marked at the trial does not go to the root of the case.

The next important issue we have to consider at this stage is whether the 2nd accused-appellant had shared the common intention with the others, for the Learned High Court Judge to find the 2nd accused guilty of murder.

As revealed before this court, the incident had taken place in midnight when the 2nd accused-appellant with two others had gone to the house where the deceased and the witness had lived, armed with a gun and a knife. There is no evidence that the 2nd accused-appellant was armed with a gun or knife but the evidence was that the intruding party had first demanded the inmates to open the door, later brake open the door and when the inmates threw acid on them the person who was armed with the gun had fired at the chief occupant of the house and thereafter

ransacked the house for nearly10 minutes. All this time the 2nd accused-appellant was standing at the door step probably giving cover to the acts committed by the others inside the house.

From the evidence available before this court, the act of firing had taken place when the inmates resisted the entry in to the house. The intruders have come armed with deadly weapons, and when the inmates refused to open the door they broke the door. Even after the firing, the 2nd accused-appellant remained at the house of the deceased until the others fulfilled the mission. From these events it is clear, that each member who participated in the said incident had shared the common intention of each act committed by the other members as a result of a pre arranged plan. The act of firing cannot be considered as an isolated act committed just by one person.

In the case of ***Ram Jahal V. State of Uttar Pradesh (1972) 1 SCC 136*** Indian Supreme Court whilst referring to section 34 of the Indian Penal Code, held that

"Common intention denotes action in concert and necessarily postulated a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and very in character but must be actuated by the same common intention which is different from same intention or similar intention"

For the reasons discussed above we see no grounds to interfere with the conviction and sentence imposed by the Learned High Court Judge of Balapitiya on the 2nd accused-appellant. We therefore dismissed this appeal and affirm the conviction and sentence.

Appeal dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL