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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No.- CA 180/2015

High Court of Matara Case No. 78/02

1. Nupe Arachchige Sirisena
2. Nupe Arachchige Charlis
3. Nupe Arachchige Aruna Jayantha
4. Nupe Arachchige Sarath
5. Nupe Arachchige Jayantha

Accused

AND NOW BETWEEN

1. Nupe Arachchige Sirisena
2. Nupe Arachchige Charlis

Accused Appellants

V.

Hon. Attorney General

Respondents

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Tenny Fernando for the Accused Appellant. Suharshi Herath SSC for the A.G.
ARGUED ON	:	04.06.2019
WRITTEN SUBMISSIONS FILED ON	:	04.12.2018 by the Respondent. 18.07.2018 by the Accused Appellant.
JUDGMENT ON	:	27.08.2019

K. PRIYANTHA FERNANDO, J.

01. 1st and the 2nd Accused Appellants (Appellants) were charged with another three accused in the High Court of Matara for the offence of murder. At the end of the prosecution case, the learned High Court Judge acting in terms of section 200 of the Code of Criminal Procedure Act, acquitted the other 3 accused and after conclusion of the defence case, found the Accused Appellants guilty of murder as charged, and sentenced them to death on 13.02.2004. In appeal, Court of Appeal set aside the said conviction and ordered trail *de novo*. After the fresh trial was conducted against the two Appellants, the learned High Court Judge delivering the Judgment on

16.09.2015, convicted both Appellants and sentenced them to death. The instant appeal is against the said judgment of the learned High Court Judge Matara, dated 16.09.2015. Appellants have urged the following grounds of appeal;

01. The learned High Court Judge misdirected himself by failure to judicially evaluate contradictions marked by the defence in the proper context, which cast a reasonable doubt on the prosecution case with regard to the credibility of the purported solitary eyewitness, and thereby the conviction is bad in Law.
02. Learned High Court Judge misdirected himself by failure to apply the established legal principles to evaluate the testimony of the solitary eyewitness, that was not a sterling quality but full of contradictions, which should not have been acted upon to convict the Accused Appellant for a capital punishment charge, and thereby caused miscarriage of justice.
03. Learned High court Judge completely misdirected himself by failure to evaluate the police evidence, which is completely in conflict with the police testimony and the documentary evidence marked before the court, and it clearly cast a doubt on the integrity of the police investigation, and thereby the conviction is bad in Law.
04. Learned High court Judge misdirected himself by failure to consider the defects in the police investigation, since the integrity of the police officers were assailed by the Accused Appellants and the accusations are well founded on the face of the record if duly observed by the Learned High Court Judge, and thereby caused a miscarriage of Justice.

05. Learned High court Judge misdirected by accepting the police version as true while rejecting the defence version, when there is visible conflict of evidence on the face of the record, and thereby the prosecution has failed to establish the case beyond reasonable doubt.

06. Learned High court Judge misdirected himself by failure to consider that the prosecution star witness was not corroborated by any evidence, except for the false police evidence which is clear from the record it self, and thereby the conviction is bad in Law.

07. Learned High court Judge misdirected himself by ignoring the contradiction on the basis that, those were made by typographical mistakes by the recorders, is not the legal mean to assess and evaluate the contradictions, when a prosecuting counsel is well within the law to correct if those were typographical errors or any other before reaching the judgment of the case, and thereby failure to have a legal approach on deciding the defects of the record caused miscarriage of justice.

02. Prosecution heavily relies on the evidence of the sole eye witness Nagodage Priyantha (PW1). According to his evidence, he had gone to his brother's (deceased) house with his family that evening. Deceased had wanted him to stay back to dinner. He then had accompanied the deceased to the boutique close by to buy 'papadam'. While the deceased had bought 'papadam', he had bought a cigarette. According to him, as he did not want the deceased to see him smoking, he had been following the deceased. The distance between him and the deceased had been about 45 feet. Time had been around 6.10 p.m. When he tried to unlock his push bicycle, he had heard the deceased shouting 'අයියෙ මට පිහියෙන් අනිනවා '. When he looked that side, he had

seen the 2nd Appellant holding the deceased from the neck, and the 1st Appellant stabbing the deceased once. He said that the lighting at that time was not very good, but he identified the Appellants. Then the Appellants had run away.

03. He had gone and held the deceased. He had shouted for his father. Then the father had come. When he wanted his father to get a vehicle, his father had told him that, three sons of the 2nd Appellant is not letting him go. Later he, with his father and one Nishantha, had taken the deceased to the hospital, where the deceased was pronounced dead.

04. Counsel for the Appellants submitted that, the testimony of the sole eye witness Priyantha is not credible and should not be relied upon. The learned Trial judge although has considered the contradictions marked in the evidence, the reasons for relying on his evidence cannot be accepted.

05. It is the contention of the counsel for the Respondent that, the learned Trial Judge has considered the evidence properly and given reasons for accepting the same. Counsel further submitted that, no contradictions were marked between the evidence given in this trial and the previous trial, but only on the police statement and this trial. There was no reason for the witness Priyantha to implicate the Appellants, as he did not have any enmity with the Appellants.

06. Evidence of a sole eye witness has to be given careful consideration. If the evidence of the sole eye witness is found to be credible, Court can convict an accused on the testimony of the single eye witness. However, on his

evidence, if the Court finds that his presence at the crime scene is doubtful, or if it is doubtful that he has seen the crime being committed, and then it is unsafe to record a conviction based on the testimony of such a solitary eye witness.

07. In case of ***Wijepala V. AG [2001] 1 Sri L.R. 46*** *at page 57* Ismail J. said;

> *'Senaratne who was the sole eye witness has thus been cross examined on vital aspects relating to the incident, and doubt has been raised in regard to his presence at the scene. ... Evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances with suspicion in the testimony of such witness, then corroboration may be necessary.'*

08. No particular number of witnesses shall in any case be required for the proof of any fact, and therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eye witness, it should be wholly reliable. (***Joseph V. State of Kerala, [2003] 1 SCC 465***).

In line of above case law precedents, the testimony of PW1, who is the brother of the deceased in the instant case, has to be subjected to deeper scrutiny.

09. There were six contradictions marked in the evidence of PW1. Contradiction V1 is where PW1 in his statement to the police had said that, the 2nd Appellant stabbed with a pole. There is no evidence to the effect that, any of

the Appellants were carrying a pole. It is obvious that, it may well be a mistake of the stenographer, although it had escaped the mind of the State Counsel to bring it to the notice of the Court, even at the time of the final submissions were made. The evidence of the PW1 was that, the 2nd Appellant held the deceased.

10. Contradictions V3 and V4, in my view, would not go to the root of the case. However, contradictions V4, V5 and V6 would affect the credibility of the witness. V5 and V6 are connected to each other, and can be considered together. The incident had taken place on 14th April 2000. PW1 had made a statement to the police on the same day at 11 p.m. Following day, on the 15th, PW1 had given evidence at the inquest before the learned Magistrate. In his statement to the police, PW1 had clearly stated that, after the Appellants stabbed the deceased, 3rd,4th and 5th Accused who were the sons of the 2nd Appellant, had come running to the 2nd Appellant and asked 'තාත්තේ, වැඩේ හරිද?'. Then they had gone towards their house. PW1 denied stating so to the police. PW1 in his evidence, while denying stating that to the police, said that, he did not see anyone other than the Appellants. When he was questioned about what he had told the police, to circumvent the situation, he said that he heard the 3rd, 4th and the 6th accused asking the 2nd Appellant, but did not see them. When the portion of his statement was read to him, he again changing his earlier position and said that, he cannot remember whether he said that to the police. Again, he denied telling that to the police.

11. It is obvious that, he did not see the 3rd, 4th, and 5th Accused, but had told the police as if he saw them, to implicate them. The learned Trial Judge has failed to appreciate that, and in his judgment has said that, the counsel for

the Appellants had not allowed the witness to answer, when it was obvious that PW1 had tried to implicate the 3rd, 4th and 5th accused by telling the police that they were there, which is far from the truth. Even in re-examination, the State Counsel had not even attempted to clarify the position. Therefore, PW1 is not a credible witness, on whose evidence alone it is unsafe to convict the Appellants. Recovery of a knife in terms of section 27 of the Evidence Ordinance from the 1st Appellant, cannot be considered as sufficient corroboration to convict the Appellants on the charge.

12. The best person to corroborate the evidence of PW1 is his father, who came immediately to the scene. PW1 in his evidence also said that, the sons of 2nd Appellant had prevented his father from getting a vehicle to take the injured to the hospital. However, Court on 03.12.2012, had released the father of PW1, who was PW2, on the request of the prosecution, that they would not call him.

13. In case of ***The Queen V. V.P.Julis 65 NLR 505,*** Court discussed the applicability of the maxim *'falsus in uno, falsus in omnibus'*. It was also followed in case of ***Samaraweera V. AG [1990] 1 Sri L.R. 256***. Court held in '*Julis*' that, in applying the maxim, it must be remembered that, all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses.

14. Court further said; '*The maxim falsus in uno, falsus in omnibus', is not an absolute rule which has to be applied without exception in every case, where a witness is shown to have given false evidence on a material point. But*

when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true, should not be resolved in his favour, unless there is some compelling reason for doing so. ..."

15. In the instant case as I said before, PW1 had given a false statement to the police to implicate 3rd, 4th, and 5th Accused. He denied giving such statement to the police. Further, I do not find any compelling reason to accept his evidence on other points, when he had clearly tried to falsely implicate some of the family members of the 2nd Appellant. Therefore, it is unsafe to convict the Appellant on the sole evidence of PW1, who is an unreliable witness. Hence, I find that the grounds of appeal 1, 2, and 6 have merit.

Appeal allowed.

1st and the 2nd Appellants acquitted of the charge.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL