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

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

V.

1. Dissanayaka Gedara Jayasinghe Dissanayake alias Kiri Ayya
2. Weerasuriya Arachchilage Gamini Ajith Kumara
3. Nanayakkara Atharage Priyantha

Accused

Court of Appeal Case No. HCC 132/2003

High Court of Anuradhapura Case No. HC 42/2000

AND NOW

Dissanayaka Gedara Jayasinghe Dissanayake alias Kiri Ayya

1st Accused Appellant

V.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Sanjith Senanayake with Upul Dissanayake for the 1st Accused Appellant. Azard Navavi DSG for the Respondent.
ARGUED ON	:	27.11.2019
WRITTEN SUBMISSIONS FILED ON	:	08.10.2019 by the 1st Accused Appellant. 07.11.2019 by the Respondent.
JUDGMENT ON	:	31.01.2020

K. PRIYANTHA FERNANDO, J.

01. 1st Accused Appellant (Appellant) with two other Accused persons was indicted in the High Court of Anuradhapura for committing murder of one Galatharalage Dharmaratne punishable under section 296 of the Penal Code. After trial, the learned High Court Judge convicted the Appellant and the other two Accused persons for the offence of culpable homicide not amounting to murder and sentenced the Appellant for 10 years rigorous imprisonment. Being aggrieved by the said conviction and sentence the Appellant preferred the instant appeal.

At the argument stage, counsel for the Appellant pursued the following grounds of appeal.

1. On the evidence of 'PW2', there is a serious doubt whether PW2 saw the incident.
2. The learned Trial Judge was wrong in rejecting the defence.

3. Learned Trial Judge failed to consider the fact that the prosecution failed to call 'PW3' to give evidence, because if called his evidence would have been unfavourable to the prosecution.

Ground of Appeal No. 1

02. The only eye witness who testified in court was PW2. He had been about 18 years old at the time of the incident. According to his testimony, on the day of the incident he had gone to the temple as it was the full moon Poya day. As he heard someone shouting, he had run towards the road. He had seen 2nd and 3rd Accused holding the deceased and the Appellant had stabbed the deceased.

03. Learned counsel for the Appellant contended that the testimony of the PW2 should not be relied upon as there were so many contradictions were marked in his evidence. It is the submission of the learned DSG for the Respondent that all the marked contradictions do not go to the root of the case.

04. Contradiction marked as V3 was on the place where the tube light was placed. Whether it was on the tree or the lamp post? It was evident that the tree and the lamp post were close to each other. The learned Trial Judge has considered the above evidence and rightly found that the above contradiction would not affect the credibility of the witness. Contradictions marked as V4 and V5 are also the same, and would not have any adverse impact on the testimony of the witness as rightly concluded by the learned Trial Judge.

05. Counsel for the Appellant further submitted that PW2 had been inconsistent in his evidence on the time of his taking the weapon from the Appellant. That aspect was also considered by the learned Trial Judge in his Judgment.

06. The Indian Supreme Court in ***State of Uttar Pradesh V. M. K. Anthony [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499*** held;

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

07. This was referred to and followed in case of ***Oliver Dayananda Kalansuriya V. Republic of Sri Lanka CA 28/2009 (13.02.2013)***.

08. The learned High Court Judge has carefully analyzed the evidence of PW2 as a whole and found him to be a credible witness. This court has no reason to interfere with the above finding. Therefore, ground of appeal No. 1 should necessarily fail.

Ground of Appeal No.2

09. Learned Counsel for the Appellant submitted that the learned Trial Judge has not properly considered the evidence given in the court by the Appellant. It was the contention of the learned DSG that the rejection of the evidence of the Appellant is justified. In his Judgment, at page 235 of the brief, the learned Trial Judge has carefully considered the defence version and given good and sufficient reasons for rejecting the same. It was conceded by the counsel for the Appellant that the suggestion made to the prosecution witness at page 116 of the brief was quite different to what the Appellant said in evidence on oath.

10. It is the Trial Judge who has the opportunity to see the demeanor and deportment to assess the credibility of a witness. In case of ***Fradd V. Brown & company Ltd. (20 N.L.R. Page 282)*** Privy Council held;

> *"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance."*

11. Hence, this court will not interfere into the decision on the facts of the Trial Judge unless there is a glaring error made by the Trial Judge. After seeing the witnesses giving evidence and after giving careful consideration, the learned High Court Judge has rejected the version of the Appellant, this court has no reason to interfere. Ground of appeal No.2, therefore, has no merit.

Ground of Appeal No. 3

12. Learned counsel for the Appellant submitted that the prosecution failed to call PW3 who had been an eye witness. Counsel contended that the prosecution failure to call the PW3,

creates a significant doubt as to the version of the prosecution. He referred to the presumption that would create in terms of section 114 illustration 'f' of the Evidence Ordinance.

13. In case of ***R. V. Russel Jones [1995] 1 Cr. App. R. 538,*** the issue of witnesses the prosecution chooses not to call was discussed at length. In *Russel* (supra) Court observed that the prosecution enjoys a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered. The discretion must be exercised in the interest of justice. Prosecutor must direct his mind to his overall duty of fairness.

14. Court also observed that the prosecutor is the primary Judge of whether or not a witness for the material events is incredible, or unworthy of belief.

15. In the event the prosecution is reluctant to call a particular witness the defence may call him if they so desire. (***R.V. Thompson [1876] 13 COX 181, R. V. Oliva 49 Cr. App. R 298***)

16. This principle was also adopted in Sri Lanka in several cases by this court. In case of ***Sinnathamby Ganeshan and another V. Republic of Sri Lanka C.A. Appeal No. 57-58/2003*** referred to what was held in case of ***Walimunige John V. The State 76 N.L.R 488;***

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross examination Further, it is not incumbent on the trial judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all."*

> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative that is withheld by the prosecution and the failure to call such a witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn*

from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative."

17. The above principle in case of ***Walimunige John*** was also followed in ***Kumara de Silva V. A.G. [2010] 2 S.L.R. 169*** *and* ***Ajith Fernando alias Konda Ajith and others V. A.G. [2004] 1 S.L.R. 288.***

18. In the instant case the defence has not even requested the court to order the prosecution to call PW3 as a witness. It was also open for the defence to call the witness if they so wished.

19. Therefore, in the above circumstances I am of the view that it was not incumbent upon the Trial Judge to draw an adverse presumption against the prosecution in terms section 114(f) of the Evidence Ordinance. Hence, this ground of appeal has no merit.

20. In the above premise, this court has no reason to interfere with the conviction of the Appellant by the learned High Court Judge for an offence punishable in terms of section 297 of the Penal Code based on a sudden fight. Appeal against the conviction is dismissed.

21. Learned High Court Judge, after considering the aggravating and mitigating factors, had imposed on the Appellant a sentence of 10 years rigorous imprisonment. In his Judgment at page 244 of the brief, the learned High Court Judge rightly concluded that the Appellant caused the injuries on the deceased with the intention of causing such bodily injury as is likely to cause death. Therefore, in terms of section 297 of the Penal Code, the prescribed punishment is imprisonment of either description for a term which may extent to twenty years and shall also be liable to a fine. However, it has escaped the mind of the learned Trial Judge that in addition to the sentence of imprisonment, the law also prescribes a mandatory fine. Hence, in addition to the 10 years rigorous imprisonment, the Appellant is ordered to pay a fine of Rs.5000/-, in default the Appellant is ordered to serve another 6 months simple imprisonment.

Subject to the above variation to the sentence (added fine of Rs. 5000/=), the appeal against the conviction and sentence is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL