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/106-108/2017

High Court of Vavuniya Case No. HCV/2635/2016

1. Kuttappan Velayutham
2. Velayutham Dinesh Kumar
3. Velayutham Manoraj

Accused

AND NOW BETWEEN

1. Kuttappan Velayutham
2. Velayutham Dinesh Kumar
3. Velayutham Manoraj

Accused - Appellants

V.

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

Respondent

BEFORE : **ACHALA WENGAPPULI, J**

K. PRIYANTHA FERNANDO, J

COUNSEL:		Indica Mallawaratchy for the 1st and 2nd Accused Appellants. K. Kugaraja for the 3rd Accused Appellant. P. Kumararathnam SDSG for the Respondent
ARGUED ON	:	21.10. 2020
WRITTEN SUBMISSIONS		
FILED ON	:	13.06.2019 by the Accused - Appellants. 06.08.2019 by the Respondent.
JUDGMENT ON	:	16.11.2020

K. PRIYANTHA FERNANDO, J.

01. The 1st 2nd and 3rd accused appellants (hereinafter referred to as appellants) were inducted in the High Court of Vavuniya on one count of Murder, punishable in terms of section 296 of the Penal Code and one count of causing grievous hurt, punishable in terms of section 317 of the Penal Code. After the trial, all three appellants were convicted for both counts. For count No. 1 all three appellants were sentenced to death. For count No.2 all three appellants were sentenced to 10 years rigorous imprisonment and a fine of Rs. 10000/- each with a default sentence of simple imprisonment for 1 month. In addition, the appellants were ordered to pay Rs. 500000/- as compensation to the injured with a default sentence of simple imprisonment for 1 year.

02. Being aggrieved by the above conviction and sentence the appellants preferred the instant appeal. The Counsel for the appellants urged the following grounds of appeal;

i. Conviction is untenable in view of the serious infirmities in the evidence of PW1 namely *Subramaniam Sinnarasa*.

ii. Learned Trial Judge has erred by relying upon the evidence of PW3 namely *Saraswathi Devi.*

iii. Rejection of the defences of Alibi of the 2nd and the 3rd accused appellants are legally flawed.

iv. Learned Trial Judge has failed to evaluate the evidence of defence witness *Rajeshwari* causing serious prejudice to the appellants.

03. The learned Counsel for the appellants submitted that the prosecution has failed to prove that the alleged incident took place on 21.07.2016 as mentioned in the charge. According to the evidence of witness *Sinnarasa*, who is the alleged victim in count No.1, the incident has taken place on 21.07.2006 and on the same day he had been admitted to hospital. The Counsel submitted that according to the medico legal report, he had been examined by the doctor on 27th July 2006. However, according to the history given by *Sinnarasa* to the doctor who examined him, the incident had taken place on 25th July 2006. It is also submitted that sole eye witness *Sinnarasa* had not testified in the non-summary inquiry and that he had made his statement to the police only 10 years after the alleged incident according to his own testimony.

04. The learned Senior Deputy Solicitor General conceded that the date of offence mentioned in count No.1 is 21st July 2016, and that it had not been corrected by amending the indictment.

05. The main eye witness to the incident is *Sinnarasa* (PW1). According to him, on his way back home after work on 21.07.2006 at about 3.30 pm this incident had occurred where he was stabbed and the deceased was also stabbed by the three appellants. However, according to the 1st count in the indictment it is alleged that the deceased was killed on 21.07.2016. It is alleged that the appellants caused grievous hurt on PW1 during the same transaction. Hence, prosecution has failed to prove that the alleged offences as charged in counts 1 and 2 in the indictment were committed on the date mentioned in counts 1 and 2.

06. On perusal of the Court record of the High Court it is observed that the indictment was amended on 05.10.2016. Name of the victim in count No.2 was amended to read as *Subramaniam Sinnarasa* instead of *Subramaniam*

Suganthan. This amendment was made even after the evidence of the medical officer who conducted the autopsy on the body of the deceased was recorded. Although the name of the victim on count No.2 was corrected on 05.10.2016, prosecution has failed to observe the difference in the date of offence in terms of the evidence led.

07. It is also important to observe that the learned High Court Judge has put his signature and the date by the side of count No. 2 in the indictment when the name of the victim was amended. It is also observed that in the original indictment filed of the original court record of the High Court, in count No.1, the year 2016 in the date of offence has been struck through to read as 2006. However, there is no date or signature by the High Court Judge to show that it was done by him. No journal entry speaks about such amendment. It is pertinent to note that in the written submissions filed by the Counsel for the appellants in the High Court at the end of the trial on 29th May 2017 which is filed of record (top page 333, bottom page 310 of the brief), it is mentioned that the date of the offence as stated in count No. 1 is 21.07.2016, although, in terms of the evidence led it occurred on 21.07.2006. It confirms that the date was not amended as correctly conceded by the learned Senior Deputy Solicitor General.

08. Hence, prosecution has failed to prove that the alleged incident had taken place on the date as mentioned in the charge, therefore, the conviction on both counts cannot be sustained and should be set aside.

09. I will now turn to consider whether a re-trial should be ordered. The Privy Council in case of ***Au Pui-Kuen V. AG of Hong Kong [1980] AC 351***, discussed the circumstances under which a re-trial can be ordered. It was held that it is in the interest of justice that the interests of the public be considered, that persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing-up to the jury. The strength of the evidence available against an accused and the likelihood of a conviction being obtained on a re-trial will be taken into account. The length of time that has elapsed from the time of the offence and the new trial, if one is ordered, is also a factor to be taken into consideration in certain cases. The prejudice that would be caused to an accused due to the non-availability of the evidence which was available at the first trial is also an important factor. The weaker the prosecution's case, the less likely a re-trial would be ordered.

10. The period from the sentence already served is also to be considered when deciding whether or not to order a retrial. In **Archbold Criminal Pleadings 2010 at page 1154** it is stated that;

"The decision whether to order a retrial requires an exercise of judgment, involving consideration of the public interest and the legitimate interests of the defendant. The former was generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution could be conducted without unfairness to, or oppression of the defendant. The legitimate interests of the defendant would call for consideration of the time which has passed since the alleged offence and any penalty already paid."

11. However, it must be noted that justice does not require a new trial for the purpose of enabling the prosecution to fill gaps in the evidence. This was accepted in the case of ***Nirmal V. The Queen (Privy Council Appeal No. 46/1970)***. In this case the Privy Council held that it would not be fair to the appellant to give the prosecution the opportunity of making a second attempt to secure his conviction, but that must be taken as relating to the case before them; as there would be no point in giving the courts power to order a retrial if it were never fair to exercise it.

"The argument for the appellant was that the interests of justice do not require a new trial in this case. The only object of a new trial would be to enable the prosecution to make a new case or at any rate to fill gaps in their evidence. The alleged confessions have been held to have been wrongly admitted on the evidence given at the trial. Without the confessions the prosecution had no case. In a second trial the confessions could not be admitted on the same evidence. Therefore, the prosecution would have to bring other evidence either to fill gaps or to make a new case. It would not be fair to the appellant if the prosecution were given this opportunity of making a second attempt to secure his conviction."

12. In the case of ***Weerasinghe V. Commission to Investigate Allegations of Bribery or Curruption [2013] 1Sri L.R. 359***, this Court referred to **Shony's Code of Criminal Procedure-19th edition Vol. 4 page 4133**;

"An order of re-trial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the Court trying the

proceeding had no jurisdiction to try it or that trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, the Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again, an order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a retrial should not be ordered when the Court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the Court is of the opinion that the prosecution will be put at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

13. The instant case is not a one where the Trial Judge has made a technical error. It is a clear lapse on the part of the prosecution where they could not prove that the offence was committed on the date as alleged. On the face of it the prosecution had been negligent when they failed to notice the mistake at least when they sought the permission of Court to amend the count No. 2 in the indictment to correct the name of the victim. It would not be fair by the appellants if the prosecution were given an opportunity of making a second attempt to secure a conviction. Therefore, a retrial will not be ordered.

All three appellants are acquitted of both counts in the indictment.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL