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

In the matter of an Appeal under Section 331(1) and (4) of the Code of Criminal Procedure Act No.15 of 1979 read with Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

C.A.No. HCC No.130-132/2017

H.C. Puttalam No. HC 22/2009

01. Mohamed Siddik Mohamed Rauf
02. Mohamed Rauf Mohamed Ishnas
03. Mohamed Rauf Mohamed Inpas

Accused-Appellants

Vs.

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

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

DEVIKA ABEYRATNE, J.

COUNSEL : Dulindra Weerasuriya P.C. with Pasan Malinda for the Accused-Appellants.

Sudarshana de Silva D.S.G. for the respondent

ARGUED ON : 20th February 2020

DECIDED ON : 28th August, 2020

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ACHALA WENGAPPULI, J.

The 1st to 3rd accused-appellants (hereinafter referred to as the 1st to 3rd Appellants respectively) were indicted by the Hon. Attorney General before the High Court of *Puttalam* for committing murder of one *Mohammed Anwar* on or about 08.07.2006.

After trial they were convicted of culpable homicide not amounting to murder by the trial Court and sentenced each of them to serve a ten-year term of imprisonment with imposition of a fine of Rs.5000.00 which carried a default sentence of six months of imprisonment.

Being aggrieved by the said conviction and sentence, the Appellants have invoked appellate jurisdiction of this Court seeking to set them aside.

Learned President's Counsel at the hearing of their appeal raised the .following grounds of appeal;

a. the trial Court had failed to properly analyse the evidence of the 1st prosecution witness,
b. the trial Court had erroneously rejected the defence evidence,
c. the trial Court had erroneously acted on hearsay evidence as to the motive,
d. the trial Court had misdirected itself when it held that the Appellants have failed to offer an explanation,
e. there was no proper adoption of proceedings.

In support of the first ground of appeal, it was contended by the learned President's Counsel that the trial Court had failed to properly analyse the evidence of the 1st prosecution witness in two important aspects. Firstly, the trial Court failed to note that the prosecution had brought in a "new" witness, by substituting the witness, who had already been listed on the back of the indictment with the one who eventually gave evidence. Secondly, it was contended that the 1st prosecution witness is a belated witness, who made no statement to Police and has contradicted himself with the medical evidence.

It was highlighted by the Appellants that the prosecution had listed one *Iras Munaf Mohammed Grahunia* of 75, "වාන" Road, *Puttalam,* at the back of its indictment but instead called one *Abdul Munaf Mohammed Safran* of 75, Spill Road, *Puttalam* before the trial Court to give evidence. It was also highlighted that ASP *Piyasiri Fernando* has admitted that no statement of *Iras Munaf Mohammed Grahunia* or *Abdul Munaf Mohammed Safran* was recorded during investigations into this incident.

Learned Deputy Solicitor General, in his reply has referred to the proceedings of 27.09.2010, where the prosecution has made an application to the

trial Court to amend the indictment to change name of its 1st prosecution witness from *Iras Munaf Mohammed Grahunia* to *Abdul Munaf Mohammed Safran* . Learned prosecutor indicated that the said name is mentioned in the further report filed in Court on 09.07.2006. The trial Court, having noted that *prima facie* it is so, however had directed the prosecution to confirm this position. On 28.09.2010, the prosecution presented the passport of the said witness and the Court had amended the name of the witness on 06.10.2010, as *Abdul Munaf Mohammed Safran.* His evidence was led immediately thereafter by the prosecution. At the time of administering oath, the witness *Abdul Munaf Mohammed Safran* gave his address as 75, Spill Road, *Puttalam* and, during examination in chief said it is "වාන" Road. The witness claimed that he made a statement to Police over the incident. During cross examination, the witness said that he made his statement on the day of the incident itself and it was never suggested by the Appellants that he never made a statement or he is introduced to the case belatedly.

The investigating officer ASP *Piyasiri Fernando,* during his further cross examination twice admitted that the statement of *Abdul Munaf Mohammed Safran* of 75, "වාන" Road, *Puttalam,* was recorded during his investigations as an eye witness to the incident. He was unable to clarify as to who gave evidence during the non-summary proceedings. Strangely, the witness replied in the negative when he was questioned whether a statement is recorded under the "amended name" but admitted that statement of *Ayuruf Munaf Mohammed Susnia* is recorded under paragraph 109.

This obscure position regarding the name of the eye-witness was considered by the trial Court as revealed by the proceedings of 30.06.2016.

It is clear that the witness *Abdul Munaf Mohammed Safran* was sometime referred to in the proceedings as *Abdul Munaf Mohammed Susnia* and *Ayuruf Munaf Mohammed Susnia* provided they were recorded accurately. But the fact remained that his statement was recorded by the Police on the day of the incident itself and was treated as an eye-witness to the incident. The Appellants have cross examined him on the footing that he made a statement to Police.

Thus, the material available does not support the claim of the learned President's Counsel that the prosecution had "introduced" a new and a "belated" witness for the first time in the High Court, who never made any statement. This seeming ambiguity into the name of the eye witness could have been easily avoided during the trial, if the prosecutor in leading evidence and the Court recording that evidence, were more attentive when references were made to his name in the proceedings.

Moving on to the second aspect of the Appellant's challenge on the evidence of the said witness on the basis that it contradicts the medical evidence, it is noted that what the witness said in evidence is that he saw the three Appellants at a distance and at about 7.00 p.m.. According to the witness it was the 3rd Appellant who struck the deceased on his head and back of his chest. He did not see any weapon in the 3rd Appellant's hand. The medical evidence is to the effect that the deceased had suffered two stab injuries and an abrasion. The 1st stab injury was located on the left side of the head, above the lobe of left ear while the 2nd stab injury located about six inches from the neck, on the back of his chest. Internally the 1st stab injury had lacerated the brain tissues causing internal bleeding and therefore is termed as a necessarily fatal injury. This injury could have been caused by a sharp pointed weapon.

The mere absence of a reference to a weapon seen in the hands of the 3rd Appellant by the witness could not have resulted in an adverse impact on the truthfulness and reliability of the eye witness's account solely due to that factor.

It is evident that the witness had seen the incident which took place around 7.00 p.m. with limited light and from a distance of about 38 meters. He saw the 1st and 2nd Appellants holding the deceased from either side and the 3rd Appellant, who arrived at the scene from a by lane, striking the latter twice on the head and back of his chest. With that the three Appellants have dispersed and the deceased had merely collapsed thereafter.

Clearly the witness's description as to the locations, where the 3rd Appellant had struck the deceased, matches with the location of the injuries as observed by the medical witness during the post mortem examination.

The Appellants, during their cross examination of witness *Piyasiri Fernando,* have questioned him as to whether it was revealed during investigation that the weapon that had been used in this crime is a carpenter's chisel and the witness replied in the affirmative. That being the evidence before the trial Court, it is reasonable to assume that the witness may not have seen the chisel in the 3rd Appellant's hand owing to its small size since he saw the incident from a distance and in limited light. On the contrary the failure of the witness to observe any weapon with the 3rd Appellant, strengthens his credibility as he spoke truthfully only of what he saw without adding to his narration upon hearing what was told by others.

In view of the above considerations, this Court holds that the 1st ground of appeal raised by the Appellants is devoid of any merit.

The complaint by the Appellants that their evidence was wrongly rejected by the trial Court is based on the conclusion reached by the Court on the testimonial trustworthiness of the witness called by the 2nd Appellant namely, *Mohammed Badurdeen Mohammed Infas.* The defence witness said in his evidence that news of the attack on the deceased had reached him while he was chatting with the alleged eye witness, while munching peanuts. At that point of time, they were some 7 kilo meters away from the place where the incident took place.

It was submitted by the learned President's Counsel that the said witness did not make any statement to Police, confirming the fact that the alleged eye witness was with him at the time of the incident and therefore had no opportunity to witness the incident, simply because, the said defence witness came to know of the fact that the alleged eye witness gave evidence against the 2nd Appellant only when he returned from his foreign employment in March 2016 and therefore the rejection of his evidence on the basis of belatedness by the trial Court is clearly wrong.

The trial Court, in evaluating credibility of the defence witness, had considered his testimony by applying several tests of credibility on his testimony. The trial Court had applied not only the test of spontaneity but also the tests of probability and interestedness or disinterestedness. It also had the advantage of observing the demeanour and deportment of the defence witness in assessing credibility.

In applying the test of interestedness or disinterestedness, the trial Court had considered the evidence that the witness was invited by the 2nd Appellant to give evidence on his behalf and that the witness wanted to travel abroad again for employment but his passport is kept by the 2nd Appellant.

The evaluation of the defence witness's evidence for credibility and the conclusion reached by the trial Court upon such evaluation is based on the application of several tests. In addition, this Court notes that the evidence of the 2nd Appellant was in fact belated. The reason given by the learned President's Counsel even if it is accepted, the delay of the defence witness in coming forward as a witness could not be accepted due to the reasons stated below.

The evidence of the sole eye witness was led by the prosecution on 06.10.2006. Obviously, if the defence witness was discovered only in March 2016 by the 2nd Appellant, the eye witness could not have been confronted during cross examination with the fact that he was elsewhere when the incident happened. The 2nd Appellant made his statement from the dock on 07.11.2016 and he called the defence witness on 24.01.2017 .

According to the said defence witness, he had told the 2nd Appellant that the eye witness was with him at the time of the incident, munching peanuts, in March 2016, when the latter casually mentioned to the former that he was implicated by the eye witness for the death of the deceased. By March 2016 the 2nd Appellant knew that his witness had seen the eye witness some 7 kilometers away when the incident of stabbing took place. Surprisingly, the 2nd Appellant did not make even a passing reference to what he had learnt from his witness, a mere seven months ago, in his dock statement. He was content with the already suggested general position of all the Appellants that the eye witness is lying in Court. The silence on the part of the 2nd Appellant over the discovery of his witness and the circumstances under which he had found this important witness

had rendered the evidence of the defence witness not credible due to its inconsistency and belatedness.

As the trial Court noted the defence witness admitted that he was reluctant to come forward as a witness but due to persistent efforts of the 2nd Appellant only he had decided to disclose what he know of the eye witness. He also admitted in cross examination that his passport is in the custody of the 2nd Appellant and as he wanted his passport back in order to travel abroad, he came to give evidence at the insistence of the said Appellant ("මට ඇවිත් මේ නඩුවට සාක්ෂි දෙන්න කිව්ව. එයා ලඟ තමා විදේශ ගමන් බලපත්‍රය තිබුනේ. ඒ නිසා විදේශ ගත වෙන්න කියල මට අවශ්‍යතාවය තිබුනු නිසා තමා මේ නඩුවට සාක්ෂි දෙන්න ආවෙ.").

This indicates that the 2nd Appellant had retained the witness's passport as a security and thereby compelling him to give evidence on his behalf. This fact seriously challenges the truthfulness of the witness's claim of seeing the eye witness at some distance away from the scene, a position that had been advanced belatedly. Thus, in the circumstances it is evident that the trial Court's decision to reject the defence witness's claim was based on the reasonable inferences that had been reached upon the available evidence and therefore is amply justified. Accordingly, this ground of appeal also fails.

The Appellants have also raised a ground of appeal on the basis that the trial Court had erroneously acted on hearsay evidence as to the motive. This complaint is founded upon the evidence of the investigating officer. During cross examination of the witness *Piyasiri Fernando,* the Appellants have questioned him as to what he had learnt from the "evidence" in relation to this crime. It is in answer to the said question, the witness had repeated what he learnt during investigations. According to the witness, the deceased had an affair with the

daughter of the 1st Appellant and there had been an exchange of words between the two sides just before the incident. There was no challenge to that item of evidence of the witness by any of the Appellants.

In considering the evidence the trial Court had arrived at the finding that the Appellants had entertained an intention only to cause injury which is sufficient to cause death in the ordinary course of nature, in spite of the clear medical evidence that it is a necessarily fatal injury and thereby had reduced their culpability from murder to culpable homicide not amounting to murder. Clearly the trial Court had not utilised the said item of hearsay evidence elicited through the witness by the Appellant themselves to impose criminal liability on them.

The complaint that the trial Court had shifted burden on the Appellants when it observed that when a *prima facie* case is established against the Appellants, in the absence of an explanation it could draw an inference of guilt, should be considered by this Court now.

In the impugned judgment the relevant portion where the Court had held so, appears as follows;

> " ... විත්ති කරුවන්ට විරුද්ධව බැලූබැල්මට නඩුකරයක් ඉදිරිපත් වී ඇති අවස්ථාවක විත්තිකරුවන් විසින් ඒ සම්බන්ධව පැහැදිලි කිරීමක් නොකිරීම හේතුවෙන් අධිකරණයට විත්තිකරුවන් සිද්ධිය සිදුකර ඇති බවට අනුමිතියකට එළඹීමට හැකියාවක් පැන නගී."

In ***Ajith Fernando v Attorney General*** (2004) 1 Sri L.R. 288, a bench consisting of five judges of the Supreme Court, has considered a similar contention advanced by the appellant before their Lordships.

Their Lordships have stated that;

> *"While urging further that the judges of the High Court at Bar erred in law by attributing guilt on the basis that the accused failed to offer any explanation in regard to the prima facie evidence led against them, it was contended that the burden did lie on the prosecution to prove its case beyond reasonable doubt, independent of any explanation required to be offered by the accused.*

In rejecting the said contention advanced by the appellant, their Lordships have quoted Lord *Ellenborough* and stated that;

> *"The failure of the accused to give or offer evidence in respect of these matters justify the application of the following dictum of Lord Ellenborough in* ***R v Lord Cochrane and Others*** (1814) Guruey's Reports 479.
>
> > *"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from his conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

Thus it is clear that the trial Court had merely stated the said principle of law that had been recognised in Sri Lanka in its impugned judgment. But the trial Court had omitted one important part from the said statement. That is there should be a "*strong prima facie*" case already established by the prosecution for the said dictum to apply and the trial Court in this instance speaks of establishing only of a "*prima facie* case". When the said sentence is considered in the proper context it is evident that the said statement was made after considering the several items of evidence that had been presented by the prosecution, by which it had established a strong *prima facie* case. The mere absence of the word "strong" would not therefore render the judgment of the trial Court invalid as it is clearly evident the trial Court was mindful of the requirement of a strong *prima facie* case for the said dictum to apply. This ground of appeal therefore fails.

Lastly this Court proceeds to examine the validity of the complaint by the Appellants that there was no proper adoption of evidence under Section 48 of the Judicature Act. Learned President's Counsel invited attention of Court to the proceedings of 21.05.2013, where the succeeding trial Judge had proceeded to hear evidence of the medical witness but no reference was made regarding any adoption of proceedings that had already taken place, under Section 48 of the Judicature Act.

The trial against the Appellants has commenced before a different trial Judge, who was succeeded by the 2nd trial Judge, who in turn had proceeded from the point the trial was adjourned by his predecessor on 21.05.2013. It is correct that there is no record confirming of any adoption of proceedings before the said succeeding judge. He too had been succeeded by a third trial Judge on 17.11.2015, who eventually delivered the impugned judgment. What is important

here is that the proceedings were properly adopted before the 2nd succeeding trial Judge, and in fact a witness, whose evidence had already been led before his immediate predecessor, was recalled by the said trial Judge, upon an application of the Appellants made under Section 48. On 01.06.2017, the said trial Judge delivered his judgment, after the defence case was heard by him in its entirety. Hence, this Court is of the view that there is proper adoption of evidence by the trial Court, as mandated by Section 48 of the Judicature Act (as emended). This ground of appeal too therefore fails.

In view of the fact that none of the grounds urged by the Appellants have succeeded, the conviction and sentence imposed on the Appellants are affirmed by this Court.

The appeals of the 1st to 3rd Appellants are therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL