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

In the matter of an appeal terms of Section 331(1) of the Code of criminal Procedure Act No.15 of 1979 read with Article 154 P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Democratic Socialist Republic of Sri Lanka

Complainant

CA Appeal No: CA HCC 35/2015 **Vs**

High Court Gampaha Case

Case No. HC 20/2001

1. Malnaidege Pradeep
2. Udawatage Lionel Hector Jayasooriya
3. Ellawala Arachchige Sarathchandra Allewela

Accused

And Now Between

Udawattege Lionel Hector Jayasooriya

Accused-Appellant

Vs

The Hon.Attorney General,

Attorney General's Department

Colombo 12

Complainant-Respondent

Before : K.K.Wickremasinghe,J
Devika Abeyratne,J

Counsel : Amila Palliyage with Dumindada Alwis, Sandeepani Wijesooriyua, Hs. R. Dorulagoda,Shakya Fernando and Nihara Randeniya for the Accused-Appellant.

Argument On : 28.08.2020

Decided on : 30.09.2020

Devika Abeyratne,J

The accused appellant along with two other accused were indicted in the High Court of *Gampaha* on 13 counts, under the Penal Code as well as under the Offensive Weapon's Act.

At the conclusion of the trial the 1st accused *Malnaidelage Pradeep* was acquitted, and the 2nd and the 3rd accused were convicted of the offences of murder of *Subasinghe Arachchige Percy Subasinghe* and *Kailani Kaushalya Hapugoda* and causing injuries to ten others with a hand grenade (ten counts). The 2nd and the 3rd accused appealed against the conviction and the sentence, however when the appeals were being taken up the 3rd accused *Ellawala Arachchige Sarathchandra Allewela* who was a police officer, had withdrawn the appeal and the appeal of only the 2nd accused has been considered and by judgment dated 19.06.2009, on the preliminary issue that the jury option was not informed to the accused, the judgment was set aside and the accused appellant was acquitted.

However, the Supreme Court on 12.2.2010 directed that the matter be re-tried before the Gampaha High Court on the same indictment.

After the re-trial, the impugned judgment was delivered on 23.01.2015 against the second accused, finding him guilty on Count one and two for committing the death of *Subasinghe Arachchige Percy Subasinghe* and *Kailani Kaushalya Hapugoda* on or about 10.05.1996 and on count 13 for attempted robbery of money that was in the possession of *Palliyaguruge Somaratne Hapugoda* using a deadly weapon and was sentenced to death for count no 1 and 2 respectively, and seven years rigorous imprisonment for count no 13.

Aggrieved by the said judgment the second accused (hereinafter sometimes referred to as the appellant) has preferred this appeal.

The following grounds of appeal were urged by the counsel for the appellant

1. The learned trial Judge erred in law by failing to consider the vital contradictions of the prosecution's case.

2. Findings of the learned trial judge in the impugned judgement are contrary to the evidence led at the trial.

3. The learned trial judge has failed to consider the dock statement made by the appellant in the correct perspective.

4. In any event the conviction for murder is unsafe in the light of the evidence adduced at the trial court is concerned.

The main eye witness for the prosecution PW 1 *Somaratna Hapugoda* has testified that on 19.05.1996, around 8.30 at night when he was counting money inside the wine store that belonged to his son *Gamini Jayantha Hapugoda* PW 2, two people wearing helmets and jerkins had come on a motor cycle and stopped outside the store and the pillion rider has come near the counter and although the witness asked what he wanted there had been no answer .The rider had gone near the iron door and the witness had heard the sound of something being taken out of a bag and then part of a weapon has been noticed by him and he has slowly without drawing suspicion, had unlocked the latch from inside and has moved quickly opening the door and kicking the person to the ground and fell on top of him shouting out හොරෙක්,හොරෙක්. When grappling with the fallen person the helmet has been dislodged and he has seen the face and the eyes that were described as, "ඔකමූණෙක් වගේ" . These were the only distinguishing feature described by PW 1.

The son of PW 1, *Gamini* (PW 2*)* has come out running and the suspect on the ground had shouted "තියපන් තියපන්" to the other suspect who by this time had moved towards the road and he has shot at PW 2 *Gamini* with a pistol but missed, and then that person has fled on foot.

PW 2 had come and assisted PW 1 by taking the firearm away, however, the suspect who fell on the ground has taken a grenade and hurled which did not explode. Then he has escaped from PW 1 and while

getting away has thrown the second grenade to the crowd that had gathered in front of the shop and fled from there. The second grenade which exploded is what caused the death of *Kailani Kaushalya Hapugoda* the grandchild of PW1 and the daughter of PW 2, and *Subasinghe Arachchige Percy Subasinghe* a passerby. The explosion has caused injuries to about ten people. According to the prosecution witnesses the incident has taken about 10 to 15 minutes and the injured have been taken to the hospital and two deaths were confirmed to have been caused due to the explosion.

It is contended on behalf of the counsel for the appellant that the learned trial judge has not considered the infirmities relating to the identification of the accused. The counsel for the respondent contended that there was positive identification and the means of identification was also established by the prosecution.

PW 1 has very clearly stated that he saw the face of the appellant when the helmet was dislodged when they were grappling with each other on the ground for more than five minutes and at very close proximity. (page 231). He has described the appellant as having eyes like a බකමූණා in page 148 of the brief which seems to be the only special feature he remembers of the suspect.

ප්‍ර : ඔබට හැකියාවක් තිබුණාද චිත්තිකරුගේ මුහුණ බැලීමට ?

උ : ඇස් දෙක දැක්කා. බකමූණෙක් වගේ බැලුවා. හදුනා ගත්තා. හදුනා ගන්න පුලුවන් වුනා.

PW 1 and PW 2 have identified the appellant at the identification parade without any hesitation. There is no direct allegation that was established that the suspect was shown before the ID parade to the prosecution witnesses, however, the accused in his dock statement has made a general statement to the effect that many people saw him and that his photographs were taken at the police station.

From the evidence it was established that the inside of the wine store was well lit so was the outside. Adjoining the wine store was the grocery shop that the son of PW 1 was conducting business and their house was beyond that grocery shop a few feet away. On the opposite side of the liquor shop was the fish vendor and this area was also well lit. There is no doubt about the sufficiency of the available light at that time of the night, as the evidence discloses that it was a well illuminated place.

PW 15 *Upali Weerathunga* the owner of Honda Civic Motor Cycle No 138-136 CD has given evidence that on 10.05.96 around 3.00 pm his motor cycle was borrowed with the documents of the motor bike by *Lionel Jayasingha,*(the appellant) to go to *Veyangoda*, who has promised to return the motor bike in the night or the following morning . As it was not returned as promised he has gone looking for the motor cycle to the appellant' s house and found the house closed without anyone there. After discovering that the appellant has gone on the cycle with a person called Pradeep (the 1st accused), he has visited Pradeep and has ultimately traced the vehicle at the Gampaha police station. After several visits to the appellants house, the documents of the Motor Cycle has been collected from the mother of the appellant and subsequently he has collected the motor cycle from the Magistrate's Court of

Gampaha. The appellant has admitted borrowing the motor cycle from PW 15 in his Dock Statement.

PW 2 *Gamini* has testified corroborating the evidence of his father PW1. After hearing his father calling හොරෙක්,හොරෙක් he has come running to see the father on the ground with the appellant. He has taken the T 56 away from the father and has hit the suspect from the butt of the rifle and later he has witnessed the suspect biting the hand of Police Constable *Sunil* who has come to their aid and then the appellant has taken something out of the Jerkin he was wearing and there has been a loud explosion and he has seen his wife and daughter injured, he too had been hurt with injuries to his ears and legs. He had taken the injured to hospital where his child was pronounced dead.

It transpired that the identification parade was held a few months after the incident. However, PW 1 and PW2 both were able to identify the appellant as the person who was with the T 56 rifle and who threw the grenade and the special identification was the unusual size of the eyes of the suspect.

PW1 and PW 2 both have evidenced that they saw the face of the appellant when the helmet he was wearing was dislodged and under what circumstances it was dislodged. This evidence was uncontradicted. There is no doubt cast with the conclusion of the trial judge regarding the identification of the accused by the prosecution witnesses.

Another ground of appeal is the failure of the trial Judge to consider the contradictions of the prosecution case.

On a perusal of the contradictions and omissions in this case it is obvious that they are of a trivial nature that has not affected the credibility of the witnesses.

Some of the contradictions that were marked are as follows;

In page 178 it was the evidence of PW1 that the business for the day was not concluded in the liquor shop when the incident occurred, but the fact that it is recorded that the door of the store was closed and PW 1 was counting money ,was marked as a contradiction.(V 1).

In page 186, in the non summary inquiry PW 1 is supposed to have said that the two suspects who came to the shop **sat** near the counter, when in fact it was that they were **standing** near the counter.(V2) (emphasis added)

Some of the omissions highlighted are as follows;

In cross examination in page 400 of the brief PW 2 has stated that when he hit the appellant with the butt of the rifle, one shot landed on his face and when the helmet got dislodged, he saw the face and recognized the suspect. The fact that this being not recorded in his statement to the police is highlighted as an omission.

In page 183 the fact that there is no mention about a motor cycle being parked outside the shop in the police statement. In pages 390 to 392 PW 2 stating that he came through the grocery shop when he heard PW 1 shouting හොරෝ not being recorded in the police statement dated 12.05.1996.In page 410 the fact PW 2 stating that the distinct feature for him to remember the accused being the size of his eyes being bigger than a normal person, this fact not being recorded in the police statement. In page 416, in the police statement it is recorded that the grenade that was in the hand of the accused was thrown, whereas in evidence he has stated it was taken from inside the jerkin. In page 188 the fact that it is not recorded that it was the rider of the motor cycle who went near the iron door.

The Learned Judge has painstakingly considered the highlighted contradictions and omissions that were marked and concluded that they did not go to the root of the case and that it did not affect the credibility of the evidence of the prosecution witnesses.

On a perusal of the contradictions and omissions, which have been referred to in this judgment, I do not see any material contradictions that has affected the prosecution case. By these contradictions and the omissions the credibility of the evidence of the prosecution witnesses has not been affected. Thus, I find that the trial judge's conclusion is a sound evaluation.

It was contended that the appellant was not identified by the prosecution witnesses. PW 2 has corroborated the evidence of PW 1. Their evidence has sufficiently established the identity of the appellant

and the act of committing the offences which culminated in the deaths of the deceased and the offence pertaining to count no 13. Some evidence regarding the identification is as follows;

Page 426 of the brief

ප්‍ර : ඔබ කියන්නේ පැහැදිලිව හඳුනා ගත්තේ මතක නිසා?

උ : ඔව්.

ප්‍ර : උසාවියේදී කිවුවේ ඇස් දෙක ලොකු එක මතක තිබෙනවා කියලා?

උ : ඔව්.

ප්‍ර : ඒ හැර පොලීසියට කිවුව යම් ලක්ෂණය තිබුණා, මේ ආකාරයේ පුද්ගලයෙක් හිටියා කියලා?

උ : මහත නැති සාමන්‍යයෙන් හිටියා.

ප්‍ර : සාමාන්‍යයෙන් උස, මහත, මිටි, කියලා වර්ගීකරණය කරනවනේ. ඒ දෙයක් පැමිණිල්ල දෙනකොට කිවුවාද?

උ : මතකයක් හිතේ ඇඳිලා තිබුණා.

Pages 406-407

ප්‍ර : මූලික සාක්ෂි මෙහෙයවීමේදී පැමිණිලේ නීතිඥ මහතා මෙහෙය වූ සාක්ෂි පිළිබඳව තමාට මතකයක් තිබෙනවාද?

උ : මතකයක් තිබෙනවා.

ප්‍ර : තමාට මෙම විත්තිකරු හඳුනා ගැනීම සම්බන්ධයෙන් දීපු සාක්ෂිය සම්බන්ධයෙන් මතකයක් තිබෙනවාද?

උ : තිබෙනවා

ප්‍ර : විත්තිකරුගේ හෙල්මට් එකෙන් අඩක් ඉවත් වීමෙන් හඳුනා ගත්තා හැර වෙනත් ආකරයකින් තමා හඳුනා ගත්තද?

උ : හඳුනා ගත්තා. ඔහුගේ ඇස් සාමන්‍ය පුද්ගලයෙකුට වඩා ටිකක් ලොකයි. ඒකෙන් තමයි ගොඩක් හඳුනා ගත්තේ.

The evidence of PW 15 has also been considered by the trial judge which established that it was the appellant who took his motor cycle which was later found at the scene of the crime, and that the appellant who promised to return the motor cycle was absconding following the incident without any cogent reason.

Another ground of appeal is that the learned trial Judge has failed to consider the dock statement in the correct perspective.

It is correct that the learned judge has not specially, in detail, referred to the dock statement, which when perused shows that the appellant whilst admitting borrowing the motor cycle from PW 15, absolves himself of the incident ,stating that the motor cycle was borrowed by the 1st and 3rd accused to go to the liquor store. There is no explanation why an attempt was not made to locate the motor cycle and hand it back to PW 15, or why the accused was out of circulation and could not be located by the police officers after such a terrible incident when the motor cycle which he borrowed was also found at the scene of crime.

In ***P.P.Jinadasa V Attorney General*** CA 167/2009 decided on 21.11.2011 Sisira de Abrew,J set out the following guidelines when dock statements are to be evaluated.

1. *If the Court believes the dock statement it must be acted upon.*
2. *If the dock statement raises a reasonable doubt in the mind of the Court about the prosecution case, defence must succeed.*
3. *Dock statement should not be used against another accused.*

In the instant case, one cannot say that the learned trial Judge has not considered the dock statement, as it is seen that in page 43 of the Judgement it is clearly stated that although the accused denied the charges against him he has failed to create a doubt in the prosecution case, which establish that the Dock Statement was considered by the learned trial Judge.

On a perusal of the dock statement it is apparent that it has not made any adverse impact on the prosecution case. The learned High Court Judge has referred to the dock statement and correctly rejected it stating that it did not create a reasonable doubt in the prosecution case. Thus, it has not caused any injustice to the appellant nor has it created a doubt in the prosecution case. Therefore, as the trial judge has considered the dock statement, the ground of appeal that the dock statement was not considered by the learned trial judge is not tenable.

It is also noted that the delay in holding of the identification parade was due to the delay in taking the suspect into custody. The learned Trial Judge has stated that although there is an issue how the

identification parade was taken, there is no issue regarding the identification of the suspect by the witnesses, with which statements this court agree.

When considering the totality of the evidence it is clear that the trial judge has carefully evaluated and analysed the evidence and had concluded the guilt of the accused appellant.

For the above given reasons, there is no necessity to interfere with the judgement of the learned High Court Judge and accordingly, I affirm the conviction and the sentence. The Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,

I agree

JUDGE OF THE COURT OF APPEAL