

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

In the matter of an Appeal made under
Section 331(1) of the Code of Criminal
Procedure Act No.15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

The Democratic Socialist Republic of
Sri Lanka.

COMPLAINANT

Vs.

Court of Appeal No:

CA/HCC/148/20

High Court of Colombo

Case No.HC 3621/2007

Mahamaddumage Don Eranda Suresh
Kumara

ACCUSED

AND NOW BETWEEN

Mahamaddumage Don Eranda Suresh
Kumara

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Neranjana Jayasinghe for the Appellant.**
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **07/02/2024**

DECIDED ON : **03/06/2024**

JUDGEMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the offences as mentioned below:

1. On or about the 04th of August 2001, at Borella, by causing death of Vidana Silvisthirige Dhammika Fonseka committed an offence punishable under Section 296 of the Penal Code.
2. In the course of the same transaction for causing hurt to Upali Perera by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.
3. In the course of the same transaction causing hurt to Tilak Perera by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.
4. In the course of the same transaction causing hurt to Pradeep Hemantha by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.
5. In the course of the same transaction causing hurt to Upali Perera by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.
6. In the course of the same transaction causing hurt to Pradeep Jayantha alias Samantha by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.
7. In the course of the same transaction causing hurt to Channa Ayeshmantha by using an offensive weapon and thereby committed an offence punishable under Section 4(2) of the Offensive Weapon Act No.18 of 1996.

The trial commenced before the High Court Judge of Colombo as the Appellant opted for a non-jury trial. The prosecution had led 11 witnesses and marked productions and closed the case.

The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. The Appellant had made dock statement and closed his case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant for charges 01,05,06 and 07 and sentenced him as follows on:

- Count No. 01. - Death Sentence.
- Count No. 05 - 10 years Rigorous Imprisonment and fine of
Rs.10,000/- with a default sentence of 01 month
Simple Imprisonment.
- Count No. 06 - 10 years Rigorous Imprisonment and fine of
Rs.10,000/- with a default sentence of 01 month
Simple Imprisonment.
- Count No. 07 - 10 years Rigorous Imprisonment and fine of
Rs.10,000/- with a default sentence of 01 month
Simple Imprisonment.

The Learned High Court Judge in his judgment dated 29.05.2020 further ordered that the sentences imposed on Count No. 05, 06, and 07 to run concurrent to each other.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant had preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given his consent to argue this matter in his absence due to the Covid

19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

The background of the case *albeit* briefly is as follows:

According to PW1, Nilanka Kumara, on the date of incident when he was going to the playground, he had met the Appellant and a person referred to as son of “Bomba Sunil”. An argument erupted which ended up in a fight between them. This was the first incident.

Secondly, when PW1 and other prosecution witnesses were in the playground, the Appellant with the son of “Bomba Sunil” and the son of “Siripala” had gone there and PW1 was attacked by the son of Siripala with a hockey stick. At that time PW1 had seen a bomb was in the possession of the Appellant. Due to this assault, he had run away from that place.

Third incident which led the death of the deceased and injuring several people had taken place when PW1 with 12-15 persons got together and went in search of the Appellant in retaliation to “Bosevena Watta” where the Appellant resides. When the mob entered the “Bosevana Watta” according to PW1, the Appellant had hurled a bomb at the mob which exploded and injured several persons in the mob and caused the death of the deceased.

PW2, Tilak Perea who was a member of the mob went in search of the Appellant and gave evidence and said that a person resemble to the Appellant had thrown the bomb at them.

PW3, Pradeep Hemantha also gave evidence but not mentioned as to who threw the bomb at them.

PW4, Upali Perera owner of a boutique stated that he had seen a mob shouting in front of his house and had seen a bomb was thrown from direction where the Appellant was but he did not see as to who threw the bomb. He admitted that two groups were facing each other at that time.

PW16 Channa Ayeshmantha also gave evidence but did not see as to who threw the bomb.

The Learned High Court Judge had considered the judicial dicta relating to acting upon the evidence of a solitary witness concluded that the evidence given by PW1 is convincing and acted upon the said evidence under Section 134 of the Evidence Ordinance to convict the Appellant.

The Appellant had raised following grounds of appeal.

1. The Learned High Court Judge erred in law by convicting the Appellant on the uncorroborated evidence of PW1.
2. The Learned High Court Judge had failed to take into consideration that the prosecution had failed to prove the identity of the dead body.
3. The Learned High Court Judge had failed to take into consideration whether the Appellant could be convicted for a lesser offence under one of the special exceptions to Section 294 of the Penal Code.
4. The Learned High Court Judge had failed to evaluate the dock statement according to the law and had failed to give proper reasons in rejecting the dock statement.

The Learned High Court Judge in his judgment had come to the conclusion that the evidence of PW1 is convincing and proved the charge beyond reasonable doubt.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

“It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.

Under the 1st ground of appeal, the Counsel for the Appellant contended that the Learned High Court Judge failed to scrutinize the testimony of sole eyewitness according to the principles established in law and failed to evaluate the creditworthiness of the said witness.

Eyewitness testimony stands as one of the paramount types of criminal evidence, posing a challenging yet pivotal task for judges in evaluating criminal cases. This often entails scrutinizing whether the witness's narrative aligns with established facts of the case. However, direct verification or falsification of such accounts may not always be feasible. Consequently, judges must assess the reliability of the source.

Moreover, while an eyewitness's testimony holds significant sway in court proceedings, its accuracy in numerous cases remains questionable. Evidence suggests that erroneous eyewitness accounts can result in wrongful convictions, leading individuals to serve extended prison sentences, and in severe cases, facing capital punishment for crimes they did not commit.

When deliberating on eyewitness evidence, the court should consider various factors, including the demeanour of the witness, the inherent plausibility of the account, internal consistencies, consistency with prior statements, potential biases, the compatibility of the account with crime scene evidence, and corroboration from other witnesses. These considerations hold great significance, especially considering that the burden of proof lies with the prosecution in all criminal cases.

The Learned High Court Judge in considering the evidence given by PW1, stated that his evidence was corroborated by the evidence given by PW2. Although While PW2 initially stated that he witnessed the Appellant throwing a bomb at them, he later mentioned observing a person resembling the Appellant throwing the bomb.

The relevant portion is re-produced below:

Page 115 of the brief.

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ප්‍ර : එරන්ද වගේ තමා දැක්කේ ?

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Page 121 of the brief.

ප්‍ර : සාක්ෂිකරු මම තමුන්ගෙන් ඇහුවේ තමුන්ට හරියට ම කියන්න පුළුවන් ද කවුද බෝම්බය ගැහුවේ කියලා ?

උ : එරන්ද වගේ තමයි දැක්කේ .

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උ : එම ස්ථානයේ කට්ටිය ගොඩක් සිටියා.

According to PW2, the reason he could not identify the person who threw the bomb was due to presence of number of people at that time.

PW4 had said that he saw the bomb thrown from the direction where the Appellant was. This was due to presence of number of people at the place of incident. According to him there were two groups facing each other at that time. This evidence directly contradicts the testimony provided by PW1, the purported eyewitness, as he claimed to have only seen the Appellant at the entrance of "Bosevana Watta" and no one else. This evidence is a clear contradiction of the evidence given by PW1, as the prosecution had not framed charges under unlawful assembly or common intention. Further, PW16, also not sure as to who threw the bomb at them at that time.

In **Sumansena V Attorney General** [1999] 3 Sri L.R. at 137 Justice Jayasuriya observed that;

“In our law of evidence, the salutary principle is enunciated that evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a court of law. Section 134 of the Evidence Ordinance sets out that no particular number of witnesses shall, in any case, be required for the proof of any fact”.

His Lordships in the above judgement is of the view that a person may be convicted even on the evidence of one witness.

Witnesses are evaluated based on their credibility and reliability. Credibility pertains to whether a witness is sincere and making genuine efforts to tell the truth, or if they are trying to deceive or mislead the court. Reliability, on the other hand, concerns whether the witness's memory or perception is trustworthy and accurate.

In this case, a group people with PW1 had gone to “Bosevena Watta” in search of the Appellant and his friends who had assaulted PW1. No one other than PW1 had seen who had thrown bomb at them. Further, PW1’s evidence had been contradicted by other Prosecution witnesses on material points which, in my view which certainly affects the root of the case. Therefore, I am unable to agree with the Learned High Court Judge who delivered the judgment as PW1’s evidence is not cogent and impressive to act upon his evidence only, to convict the Appellant. In the case, considering all the circumstances, I conclude that the evidence of PW1 should be corroborated with other witnesses as they went in a group to attack the Appellant. Hence, I conclude that the prosecution had failed to establish as to who threw the bomb at the time. As this ground is a substantial issue which cannot be disregarded in this case.

Considering that the first ground of appeal raised is a significant issue that undoubtedly impacts the outcome of the case, I hereby grant the appeal and acquit the Appellant of all charges.

Since the first appeal ground presents a significant issue that unquestionably alters the case's outcome, I will not consider the other grounds raised in this appeal.

As the prosecution had not proven this case beyond reasonable doubt, I quash the conviction and the sentence imposed by the Learned High Court Judge of Colombo dated 29/05/2020 on the Appellant. Therefore, his appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL