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.

Court of Appeal No:
CA/HCC/0174/2020
High Court of Galle
Case No: HC/2982/2007

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

COMPLAINANT

Vs.

Gajanayaka Pathirage Ranjith
Kumara alias Ali Kumara

ACCUSED

AND NOW

Gajanayaka Pathirage Ranjith
Kumara alias Ali Kumara

ACCUSED- APPELLANT

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Darshana Kuruppu with Rahul Jayathilaka and Sahan Weerasinghe for the Appellant.**
Dishna Warnakula, DSG for the Respondent.

ARGUED ON : **07/09/2023**

DECIDED ON : **12/12/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Galle as follows:

1. Being a member of an unlawful assembly punishable under Section 140 of the Penal Code;
2. Committing the offence of attempted murder on Thumbagoda Ganithage Wilson whilst being a member of an unlawful assembly punishable under Section 300 read with Section146 of the Penal Code.
3. Committing the offence of murder of Opatha Kankanamge Nandawathie whilst being a member of an unlawful assembly punishable under Section 296 read with Section 146 of the Penal Code.
4. Committing the offence of attempted murder on Thumbagoda Ganithage Wilson punishable under Section 300 read with Section 32 of the Penal Code.
5. Committing the offence of murder on Opatha Kankanamge Nandawathie punishable under Section 296 read with Section 32 of the Penal Code.

The trial commenced before the Judge of the High Court of Galle as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the Appellant had a made dock statement and called four witnesses on his behalf. After considering the evidence presented by both parties, the learned High Court Judge had acquitted the Appellant from 1st 2nd and 3rd charges and convicted the Appellant for 4th and 5th charges and sentenced him as follows:

4th count – 12 years rigorous imprisonment with a fine of Rs.5000/- which also carried a default sentence of six months.

5th count – sentenced to death.

Being aggrieved by the aforesaid convictions and sentence the Appellant preferred this appeal to this court.

The learned Counsels for the Appellant informed this court that the Appellant had given consent for this matter to be argued in his absence due to the Covid 19 pandemic restrictions. Also, at the time of argument the Appellant was connected via Zoom platform from prison.

Background of the Case.

PW1 is the husband of the deceased. On the day of the incident at about 7.25 p.m. while returning from Elpitiya, he was attacked by the Appellant with some unknown persons. After sustaining grievous injuries, when he managed to go to one of his neighbors PW5, Ariyadasa's house, his son PW2 had come rushing and informed that the Appellant had attacked his wife too. PW1 identified the Appellant with the aid of a torch he was carrying at the time of the attack. He could not identify the others as they had covered their faces.

The Appellant has been the neighbor of PW1 for about 8 years. There has been a land dispute existing between the parties and the Appellant used to scold the PW1's family in filth whenever he was drunk.

According to PW2, the son of PW1 and the deceased, he was 15 years old when this incident had taken place. Their house was under construction at the time of the incident. The main door was only fixed in the morning of the day of the incident. The house did not have electricity but had 3 oil lamps burning at the time of the incident. This witness had clearly identified the Appellant who forcibly entered their house. When the Appellant entered the house and chased and assaulted the deceased, the deceased had run out from the kitchen door. Due to fear, PW2 had hidden himself under the

kitchen table but clearly identified the Appellant with the aid of the bottle lamps burning at that time. When he went out to see his mother after hearing her cries, the witness had seen the Appellant assaulting the deceased on her head and her body. He could very well witness the incident with full bright moonlight. The defence could not mark any contradiction or omission on his evidence.

The Appellant had filed following grounds of appeal.

1. The Learned High Court Judge has failed to consider that the story of the prosecution is improbable and does not inspire confidence.
2. The Learned High Court Judge has failed to consider that the story of the Appellant is more probable.

Considering the grounds of appeal raised by the Appellant, it is apparent that the grounds raised are interrelated. Hence, the said grounds will be considered together hereinafter. The contention of the Appellant is that the stance taken by the prosecution is not tenable comparing to the defence taken by the Appellant.
In this case the Appellant had been acquitted from the unlawful assembly charge but convicted on the charges with common intention as the witnesses stated that the Appellant had come with less than five unknown persons.

The Section 32 of the Penal Code states:

> When a criminal act done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Hence, the prosecution has to prove that two or more persons who possessed the same intention got together for the purpose of achieving their common

target and they acted in furtherance of the common intention of all, participated in the commission of the act jointly.

In the first argument, the Learned Counsel for the Appellant contended with a hypothetical thinking that whether the Appellant would come to the scene of crime without covering his face when all other persons had covered their faces with black colored clothes.

In this case, PW1 had not witnessed the Appellant attacking his deceased wife. He only gave evidence what he had witnessed on that fateful day. PW1 had only identified the Appellant with his torch light when the Appellant and some others attacked him. He managed to escape from them and had run to the house of PW5, Ariyadasa. PW5 Ariyadasa had confirmed this in his evidence.

PW2, who was only 15 years old had witnessed the gruesome incident of killing his mother. He had clearly identified the Appellant who entered into the house, chased and assaulted the deceased. Hence, voice identification is not an issue in this case.

Proper identification of the accused person is a fundamental point that needs to be determined at the beginning of a criminal trial. In this case it is very important to discuss whether the prosecution has established the identity of the Appellant beyond reasonable doubt even though the Appellant had not contested. If the identification is compromised, the net result would be the acquittal of the accused person from the case. Hence evidence of identification should be considered very seriously due to its delicate nature. In this case, an identification parade had not been held in respect of the Appellant.

The following judgments are very important as it elaborates the vitality of identification evidence and discusses how the fate of a case depends upon it.

In **Karunaratne Mudiyansege Madduma Bandara v. The Attorney General** CA/190-192/11 decided on 15/03/2013, the court acquitted the accused on the ground that the identification of the accused persons have not been proved beyond reasonable doubt because the prosecutrix failed to divulge

the names of the accused persons to the police who was known to her prior to the incident.

Gorle S. Naidu v. State of A.P. [1997] Appeal (Crl) 232-234. In this case the facts related to the murder of two individuals. In the FIR, the prosecution witness merely mentioned that the assailants were followers of one of the appellants, but none were specifically named. However, later in court, they stated the name of the assailants. The Court held that such omission was a vital omission.

In **R v. Turnbull** [1977] QB 224 the court held that:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused-which the defence alleges to be mistaken-the judge should be cautious before convicting the accused in reliance on the correctness of the identification(s). The judge should take into consideration that:*
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> - *Caution is required to avoid the risk of injustice;*
> - *A witness who is honest may be wrong even if they are convinced, they are right;*
> - *A witness who is convincing may still be wrong;*
> - *More than one witness may be wrong;*
> - *A witness who recognizes the defendant, even when the witness knows the defendant very well, may be wrong.*

In this case PW1 and PW2 had clearly identified the Appellant as he was their neighbour.

PW2 had clearly stated that the Appellant had assaulted his mother with a pole. But he is not sure as to whether his mother was assaulted with a sword.

This witness was only 15 years of age, all alone at home when the incident had taken place. Further, he had given evidence in the High Court after about 8 years of the incident. It is obvious that one cannot expect to give a perfect account of the incident considering the traumatic experience he has faced. In this case, PW2 is a child witness and he cannot be expected to give evidence regarding the incident in detail.

In **Daradala Ganage Chandralatha Jayawardena alias Shantha v AG CA 85/2013** decided on 25.05.2018 the Court held that:

> *"Time and again courts have discussed the acceptance of evidence of children of tender ages. Our judges are not there to test the memory of the witness, they are expected to find the actual fact and the truth. Witnesses are human beings; they are not memory machines nor robots to repeat the incident as it was. Further the natural behaviour of human beings is to forged incidents, especially sad memories. No one wants to re-visit painful moments and keep detailed memories with them".*

Further, PW2 immediately after incident shouted and informed that the Appellant had assaulted his mother has been corroborated by the evidence of PW3, PW4 and PW6.When these witnesses have rushed to the house of PW2, they had seen the deceased was lying fallen in the garden with injuries. They have then dispatched the deceased to the hospital in a three-wheeler.

At the same time, PW5 Ariyadasa corroborates the fact that PW1 came rushing to his house with an injury on his fingers. At that time PW1 had implicated the Appellant for causing the injuries on him. When PW5 and PW1 were coming down from PW5's house to catch a three-wheeler to dispatch PW1 to the hospital, PW2 came shouting saying that the Appellant has assaulted his mother.

The Conduct of the Appellant has been highly suspicious in this case. According to PW10, Kumara the Appellant wanted him to be taken to the hospital in a three-wheeler. However, the Appellant and his family who were in the three-wheeler did not go to the hospital, instead they got into the truck belonging to one Lal halfway through.

Further, the Appellant and his family were not at their house after the incident and the Appellant was arrested only after 14 days of the incident at Elpitiya area.

Section 8(2) of the Evidence Ordinance states:

> The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

According to the evidence given by PW1, the Appellant used to scold witness and his family that he would not allow them to exist. This incident had happened after one year of that threat. The witness had lodge a complaint with the police regarding this threat. The relevant portion is re-produced below:

Page 115 of the brief.

ප්‍ර : මොනවා කියල ද බනින්නේ ?

උ : කුනුහරුප කියා කියා බනිනවා.

ප්‍ර : කාටද එහෙම කුනුහරුප කියන්නේ ?

උ : මට කියන්නෙ. බොලාට ඉන්න දෙන්නෙ නැහැ කියනවා. ආණ්ඩුවෙන් සීට් හමු වුනා කියලා බනිනවා.

ප්‍ර : ඔය සිද්ධියට ඉස්සර වෙලා ඔය සිද්ධියට ආසන්න කාලයක විත්තිකරු ඔය වගේ කරදර කරලා ප්‍රශ්ණ වුනා ද?

උ : එහෙම කරදර කරලා අවුරුද්දට විතර පස්සේ මේ සිද්ධිය වුනේ.

ප්‍ර : කුනුහරුප කියලා බීලා කෑ ගහහා බැන බැන යනවා කිව්වානේ. ඒ සම්බන්ධයෙන් පොලිසියට පැමිණිලි කළා ද ?

උ : ඔව්.

ප්‍ර : කවුද පැමිණිලි කලේ ?

උ : මම පැමිණිලි කළා.

ප්‍ර : ඒ අන්තිමට පැමිණිල්ල කලේ මෙම නඩුවට අදාල ලොකු සිද්ධියට කොච්චර ඉස්සර වෙලාද?

උ : අවුරුද්දකට දෙකකට විතර ඉස්සර වෙලා.

ප්‍ර : ඒ පැමිණිල්ල කලේ තමුන් ?

උ : ඔව්.

As such, the suspicious conduct of the Appellant previously and immediately after the incident is highly relevant to this case.

In his dock statement, the Appellant took up the position that PW1 and some others had assaulted him due to a land dispute that had existed between them. However, nothing has been stated regarding the death of the deceased or at least the fact that a 3rd party may have committed the death of the deceased had not been contemplated by the Appellant at the High Court trial.

Though, initially the Appellant took up the position of total denial, towards the latter part of his cross examination he took up the position that the 1st incident was commenced by PW1 due to a land dispute. Nothing had been suggested that there were others along with the PW1 at the time of the incident.

In this case, the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He has properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellant fails to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted.

As discussed under the appeal grounds advanced by the Appellant, the prosecution had adduced strong and incriminating evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and has come to a correct finding that the Appellant was guilty of committing attempted murder of PW1 and committing the murder of the deceased in this case. Therefore, I affirm the conviction and dismiss the Appeal of the Appellant.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL