

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

In the matter of an Appeal in terms of
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

CA Appeal No:
CA 394-397/2018
High Court of Colombo
Case No.
HC 6876/2013

Complainant

Vs

1. Priyantha Senarath Abeynayake
2. Arumugam Kadirawel Jayashankar
3. Rizwarge Ajith
4. Kalu Arachchige Susantha Ajith
Kumara

Accused

And Now

1. Priyantha Senarath Abeynayake
2. Arumugam Kadirawel Jayashankar
3. Rizwarge Ajith
4. Kalu Arachchige Susantha Ajith
Kumara

Accused-Appellants

Vs

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

Complainant-Respondent

Before : **Achala Wengappuli,J**
Devika Abeyratne,J

Counsel : Neranjan Jayasinghe for the 2nd to 4th Accused-Appellants
Anil Silva PC, with Dileep Bhanu for the 1st Accused-Appellant

Written Submission on : 28.10.2019(by the 2nd to 4th Accused-Appellants)
27.11.2019(by the 1st to 4th Accused-Appellants)

Argument On : 18.02.2020

Decided on : 28.07.2020

Devika Abeyratne,J

The 1st and the 2nd to 4th accused-appellants by their respective petitions of appeal have preferred this appeal against the conviction and the sentence imposed on them by the learned High Court Judge of *Colombo*.

The four appellants were indicted on three counts for committing, with others unknown to the prosecution, being members of an unlawful assembly with the common objective of assaulting *Paranamanage Prasad Priyantha* thereby committing an offence under section 140 of the Penal Code; section 100 read with section 146 and section 300 read with section 32 of the Penal Code.

After trial, all four accused were found guilty of all the charges against them. Aggrieved by the conviction and the sentence, the first accused-appellant represented by one counsel and the rest of the appellants by another counsel have appealed against the conviction and the sentence.

At the commencement of the trial, the second accused has been absconding and after the conclusion of the evidence of PW 1 he has surrendered himself to Court. He has been afforded an opportunity to cross examine PW 1.

Some of the grounds of appeal adverted to by the appellants can be summarized as follows; the learned trial Court has failed to consider that the prosecution had not eliminated the possibility that the victim came by his injuries as a result of attempted suicide or accident; having come to a conclusion that the witness was prone to forgetting material matters after head injury, the learned judge has failed to consider the implication of such forgetfulness viz a viz the proof of the case beyond reasonable doubt; failed to apply the rules governing the applicability of circumstantial evidence; the trial Court failed to consider the applicability of section 146 and or section 32 of the Penal Code; the trial Court failed to consider that the identities of the accused was not established by the prosecution; the trial Court

failed to consider that PW 1 is not a credible witness; failed to comply with section 283 of the Code of Criminal Procedure.

The main and sole witness in this case is PW 1, the victim. According to the prosecution the victim *Paranamanage Prasad Priyantha*, was working at *Sirisanda Hotel Kolonnawa* since two weeks prior to the incident. The building consist of 4 floors, the Hotel is situated on the entry level 1st floor, the 1st appellant the owner of the hotel was occupying a room on the second floor, the employees of the hotel were occupying the 3rd floor and the 4th floor was an open area with a slab which had a 3 or 3 and a half foot high wall which enclosed the area.

According to the victim on 3.12.2006, at about 4 pm, about 8 people from the nearby boutiques, inclusive of the 2nd to 4th appellants who were his co-workers, were consuming liquor on the 4th floor of the building. When he was asked to join them he has declined as he has started work recently and was standing aside when he was assaulted by these persons. While he was being assaulted, the 1st accused '*mudalali*' is alleged to have come and said 'මිකට ගහල මරන්න' He has identified the second and the fourth accused as the persons who invited him to consume liquor (page 90) and has stated that all the accused and five others assaulted him. Later in page 91 he has said that the 3rd accused did not ask him to take liquor but assaulted him. It is important to note that on the day this evidence was given, the 2nd accused was absconding and there were only 3 accused in the dock. As such there is some confusion about the identification of the appellants as to who did what.

According to the victim, when he was assaulted he has become unconscious and thereafter, he has been pushed from the 4th floor by the accused. In the same breath he has stated that he **thinks** that is what happened. (emphasis added)

Page 91

ප්‍ර : ඉන් පසු මොකද සිද්ද වුනේ?

උ : ඉන් පසුව මට අතින් පයින් ගැහුවා..

ප්‍ර : කොහේ කොහේද ගැහුවේ?

උ : මුලු ඇගටම ගැහුවා ගහලා මට සිහි නැති වෙනකන් ගහලා තට්ටු 04 න් ඊට පස්සේ දාලා.

අධිකරණයෙන්

ප්‍ර : පළවෙනියා මොකද්ද කලේ?

උ : මෙතන ඉන්න ඔක්කොම ගැහුවා..

The victim has fallen near the railway line with serious injuries and the 1st appellant and witness *Mohamed Ismail Cader* (PW 3) and another employee of the hotel have taken the injured to hospital in a three-wheeler.

In cross examination, PW 1 has stated there was no issue or problem with the 1st appellant during the 13 days of employment. In fact he admitted that he was praised for his good work by the 1st appellant, and money has been paid which he sent home and he has been told that his request for leave will be considered.

It is noted that although the victim was saying he worked in the hotel for 13 days, he has categorically stated he started work on the 30th November (page 86, page 98) and the incident happened on the 3rd December, which will not amount to 13 working days. These facts may have made the learned judge to record an observation in page 107, as follows;

අධිකරණයෙන්

සාක්ෂිකරුට මෙම සිද්ධියෙන් පසුව අමතක වීමේ ප්‍රවණතාවයක් ඇති බව අධිකරණයට නිරීක්ෂණය කරයි.

However, I find it difficult to comprehend how Court could presume that it was after the incident that the witness was experiencing this forgetfulness.

Be that as it may, it appears from the victims own evidence that even he is unsure why he was assaulted and pushed over from the 4th floor, which he only assumes, when there was no issue with any of the appellants. (page 113)

ප්‍ර : කිසිම ආරවුලක් තමන් හා මුදලාලි අතර ඒ සේවකයන් අතර නොතිබුණානම් තමා මේ දෙන සාක්ෂිය තමා බොරු සාක්ෂියක් මේ අධිකරණයේ දෙන්නේ කියලා මම තමුන්ට යෝජනා කරනවා?

උ : පිළිගන්නේ නැහැ..

ප්‍ර : තමා කියන්නේ කිසිම ප්‍රශ්නයක් නැතිව එක සැරේම බොන්න කතා කලාම නාපු නිසා ඒ නිසාම තමන්ට සිහි නැති වෙනකන් පහර දීලා ඒ හෝටලයේ ඉදිරියේ තිබෙන රේල් පිල්ලට දැමීමා කියාද තමන් කියන්නේ?

උ : එහෙමයි ස්වාමිණි මට හිතාගන්න බැරි ඒකයි වරදක් නැතිව.

ප්‍ර : තමන්ට ගරු අධිකරණයට කියන්න පුළුවන්ද තමා රෝහලට අරන් ගියේ කවුද කියලා?

උ : සිහිය නැහැනේ.

ප්‍ර : තමාට පසුව හෝ දැන ගන්න ලැබුණද කවුද රෝහලට අරන් ගියේ කියලා?

උ : පසුව තමයි දැනගන්න ලැබුනේ මුදලාලි කියලා..

In pages 93 and 94 he has given contradictory evidence as follows.....

ප්‍ර : මෙම පළවෙනි විත්තිකරු කලේ මොනවාද මෙම සිද්ධියේදී?

උ : පළවෙනි විත්තිකරු තමයි මට ගහනකොට ගහලා මරන්න කිවුවේ.

ප්‍ර : දෙවනි විත්තිකරු මොකද්ද කලේ?

උ : දෙවනි විත්තිකරු ගැහුවා.

ප්‍ර : ඊට පස්සෙ තුන්වෙනි විත්තිකරු මොකද්ද කලේ?

උ : තුන්වෙනි විත්තිකරුත් ගැහුවා.

ප්‍ර : හතරවෙනි විත්තිකරු මොකද්ද කලේ?

උ : හතරවෙනියාත් පහර දුන්නා.

ප්‍ර : ඉන් පසුව තමන් ප්‍රකාශ කලා තමන්ට පහර දීලා මොකද්ද සිද්ද කලේ?

උ : තට්ටු 04 න් රේල් පාරට පහලට විසි කලා.

ප්‍ර : තමන් රේල් පාරට විසි කරනකොට මේ පුද්ගලයින් හතරදෙනාම හිටියාද?

උ : හිටියා.

ප්‍ර : එතකොට තමන්ව රේල්පාරට විසි කලේ කවුරුත් විසින්ද?

උ : ඒක මට සිහිය නැති වෙලාවේ තමයි සිද්ධ කරලා තියෙන්නේ.

ප්‍ර : ඉන් පස්සේ කුමක්ද සිද්ධ උනේ?

උ : ඊට පස්සේ මාව අරන් ගිහිල්ලා මුදලාලි ඉස්පිරිතාලේට ගිහින් දාලා ගෙදර අක්කාට කොල් කරල ඇහුවලු මල්ලි ගෙදර මොකක් හරි කලින් ප්‍රශ්නයක් තිබුණාද කියලා. අක්කා ඇහුවාලු නැහැ අපේ මල්ලි කිසි ප්‍රශ්නයක් තිබුනේ නැහැ මොකද ඇහුවාලු. එහෙම නම් අර තට්ටු 04න් පැනලා කොළඹ මහ රෝහලට ගිහින් දැමීමා කිවුවාලු. හොඳටම අමාරුයි කිවුවාලු.

According to PW 11, Dr Elvitigala, who has given evidence on a report prepared by Dr D.S.K Weerasinghe , it is revealed that injuries 1,2,and 3 could be a result of a fall, and with regard to injuries No 4 and 5 also these injuries occurring due to a fall cannot be ruled out.

From his evidence it appears that PW 11 could not say with certainty whether injuries No 4 and 5 were due to a fall or by other means.

The police have recovered a pair of slippers from the 4th floor from where PW 1 is said to have fallen, however, it has not been identified as belonging to PW 1 as it was not shown to him at the trial.

The 1st accused has given evidence denying the allegations made against him. He has been on the 2nd floor getting ready to go to the Kelaniya temple on 4.12.2006 between 10 and 11 in the morning, when he heard somebody shouting “ඔලු අමීමෝ” and heard a sound “චෑස්” and when he looked outside the window has seen someone fallen on the road. After he rushed outside he has identified it was PW 1 who was fallen. Together with another employee of the hotel has taken the injured to the hospital in PW3’ s three-wheeler. After admitting the patient he has given a statement to the *Wellampitiya* police at about 1 pm on the 4th. Thereafter, informed the wife of PW 1 of the incident.

It was his evidence that around 4.30 pm the police came to the scene and picked out some hotel workers who were present there and taken them to the police station along with the 1st appellant stating it was to get their statements. The 1st appellant was granted police bail, and the other three workers were detained and produced before a magistrate on the 7.12.2006. All of them were suspected of pushing the victim from the building.

According to the first appellant, the victim has assumed duties at the hotel on 19.11.2006. As evidenced by the victim that he was employed for 13 days before the incident, him assuming duties on the 19.11.2006 is probable. From the documents submitted by the appellant in his evidence, the victim has been paid some money by the 1st appellant. The victim has admitted that he received money.

The 2nd, 3rd and 4th appellant’s have given statements from the dock and denied any involvement in the incident and have stated they were sleeping at the time of the incident. It was stated by the 4th

accused that they were taken to the police station to get statements from them and were remanded and later named as the accused.

It is contended on behalf of the appellants that the prosecution has failed to rule out an accident or suicide and therefore, there is a reasonable doubt as to the guilt of the appellants and that the learned judge has failed to give the benefit of the doubt to the appellants.

There is some confusion about the date of the incident where the evidence of the victim is concerned. According to him the incident has taken place around 4 pm on the 3rd of December. The evidence of PW 3 who took the injured to the hospital, the 1st appellant and the Medical evidence establishes that the patient was admitted at 11.25 am on 4.12.2006, which support that the incident took place on the 4th, before noon. The police complaint and the scene visit were also on the 4th afternoon. The learned judge seem to have been led by the line of cross examination of the prosecution that the incident took place on the 3rd and the victim was kept in hiding somewhere and pushed from the 4th floor the following day. This seem to be mere conjecture in the absence of any cogent evidence, as there is not an iota of evidence to arrive at this conclusion. I am of the view that it is an erroneous conclusion arrived by the trial judge.

According to the evidence, the hotel functions even on a poya day. There is no evidence to the contrary. The business hours in the hotel according to PW 1 in page 98 is as follows;

ප්‍ර : දැන් මෙම සිරිසඳු හෝටලයේ රැකියාව කරන්න ගියේ කවදා ඉඳලාද ?

උ : 2008.11.30 වෙනිදා

ප්‍ර : එතකොට මහත්තයා රස්සාවට ගිහිල්ලා කොච්චර කාලයක් වැඩ කලාද මේ සිද්ධිය වෙත කාලය අතරතුර ?

උ : දවස 13ක්.

ප්‍ර : තමා සේවා වැඩ මුරය තිබුනේ උදේ වරුවේද, රාත්‍රී කාලයේද?

උ : රාත්‍රී කාලයේ.

ප්‍ර : කිය ඉදන් කිය වෙනකන්ද ?

උ : දවල් 2.00 ට විතර පටන් අරගෙන රැ 11.00 12.00 විතර වෙනකන් වැඩ කලා.

ප්‍ර : ඒ වෙලාවට අමතරව දවල් පටන් අරගෙන යෑ 11 00 12.00 විතර වෙනකන් වැඩ කරලා ඊට පස්සේ උදේ වරුවේ නමුත් මොකද්ද කරන්නේ?

උ : උදේ වරුවේ නිදාගන්නවා.

ප්‍ර : මේ සිද්ධිය වෙච්ච දිනය මතකද?

උ : එහෙමයි.

Even assuming that the incident occurred on the 3rd afternoon, which was not a holiday, how probable is the evidence of PW 1? If work starts at 2 pm in the hotel according to the victim, how can the employees gather and consume liquor at 4 pm in the afternoon? Thus, there is no valid explanation from the prosecution that the incident took place on the 3rd afternoon. The evidence of PW 1 in this regard is not probable.

According to PW 9, the statement of the victim has been recorded on 19.03.2007, approximately 3 months after the incident. Then the question arises on what basis were the 4 appellants taken in to custody and named as suspects on the day of the incident itself, when there was no material or probable reason before the police to name them as suspects.

In the circumstances, the evidence of the 1st appellant and the dock statement of the 4th appellant, where it was stated that the police randomly picked out the workers who were watching the scene inspection on the 4th of December and on the guise of taking them to record a statement, remanding them as suspects is more probable.

The victim's testimony is that he was assaulted until he was unconscious. Although he has shown some of the persons who are alleged to have assaulted him. (the identification of the accused in the Dock is not clear and is unsatisfactory.) As stated above in the judgment, as he is unaware who pushed him from the 4th floor, the victim's accusation is an assumption on his part.

The 1st appellant has heard someone shouting "බුදු අම්මෝ", if the victim was unconscious when being pushed, it could not have been

him who called out. If he was not unconscious, he would have named and identified the people who pushed him. Therefore, it would have been even a bystander who saw someone falling and shouted "ခင်ဗျား၊" or it could have been the victim if it was an accident or if he attempted suicide. These questions have not been addressed sufficiently by the trial judge.

The only evidence is of the victim, who has taken about 3 months to give a statement to the police due to his injury. The learned judge has made a comment that he seemed to be forgetful sometimes. The victim was unable to remember the date he came to work in the hotel. He cannot remember who pushed him over the building. He could not prove a motive why he was assaulted by so many people or why the *mudalali* coming suddenly to the scene ordering the workers to kill him. These facts do not add up. Even assuming that he was first assaulted, which is not proved by any medical evidence, it is fair to assume the assault would not have caused the injuries that has endangered his life. It appears that it is due to the injuries sustained from the fall that have endangered his life. In the circumstances, when there is no cogent evidence that it is the accused who pushed him over the building, could the trial court considering circumstantial evidence come to a finding that the inescapable and irresistible inference and conclusion is that it was the accused who committed the crime?. I cannot agree with that conclusion.

In ***Don Sunny vs The Attorney General*** 1998 (2) S.L.R. it was held that the charges sought to be proved by circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. The fact that the accused had the opportunity to commit the said murder is not sufficient. The prosecution must prove that the act was done by the accused alone and must exclude the possibility of the act done by some other person.

It is apparent that except the evidence of the victim which was not conclusive, there was no other evidence to prove the commission of the alleged offence beyond a reasonable doubt.

The police naming these particular suspects soon after the incident, without even a statement from the victim is questionable. Considering the evidence how these particular persons (the accused) were taken in on suspicion, when there is no valid explanation by the prosecution, it is unsafe to convict the accused appellants on the available evidence.

Accordingly, I acquit the accused appellants. The appeals of all the appellants are allowed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI,J

I Agree

JUDGE OF THE COURT OF APPEAL