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

In the matter of an appeal against an order of the High Court Section 331 of the Code of Criminal Procedure Act No 15 of 1979.

The Democratic Socialist
Republic of Sri Lanka

Complainant

Court of Appeal
Case No:
HCC 315-316/2018

VS.

HC Panadura
Case No:
HC 2406/07

1. Ukwattage Don Thilakaratna alias Kaduru Lokka
2. Ukwattage Don Pushpakumara

Accused

AND NOW BETWEEN

1. Ukwattage Don Thilakaratna alias Kaduru Lokka
2. Ukwattage Don Pushpakumara

Accused-Appellant

VS.

The Attorney General
Attorney General's Department
Colombo 12

Complainant-Respondent

Before : **K.K.Wickremasinghe,J**

Devika Abeyratne,J

Counsel : Anil Silva ,PC for the Accused-Appellants

P.Kumararatnam, SDSG for the AG

Written Submission On : 23.08.2019 (by the 1st and 2nd Accused- Appellants)
11.09.2019(by the Respondent)

Argument on : 07.07.2020

Decided On : 31.08.2020

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Devika Abeyratne,J

The accused appellants were convicted and sentenced for committing the murder of *Senadeera Pathirage Jayasiri* on 15.08.2004, an offence punishable under section 296 read with section 32 of the Penal Code and death sentence was imposed on them.

Aggrieved by the conviction and sentence they have preferred the appeal on the following grounds of appeal.

1. Has the Learned High Court Judge misdirected himself in analyzing the evidence pertaining to the dying declaration?

2. Has the Learned High Court Judge misdirected himself when he believed the purported eye witness notwithstanding the various discrepancies in his evidence?

3. Has the Learned High Court judge misapplied the judgment in *Ajith Samarakoon Vs State* to the facts of the present case and there has been a miscarriage of justice?

4. Has the Learned High Court Judge unreasonably and contrary to law rejected the defence evidence and thereby has the accused appellants being deprived of a fair trial?

5. Has the Learned High Court Judge not properly considered the defence evidence whereby the accused appellants explained their absence from their residences soon after the incident?

6. Has the Learned High Court Judge misdirected himself when he convicted the Accused Appellants notwithstanding the fact that the prosecution has failed to prove the case beyond reasonable doubt?

Out of the six witnesses who have testified, PW 2 *S.P Dushantha Lakmal* the son of the deceased has given evidence as a purported eye witness who has been 13 years of age at the time of the incident. He was 27 years old when he gave evidence before the High Court.

He has given an account of what he saw on the fateful day when he was returning home with the father (the deceased) around 3.30 pm after attending to work on a land, and when they were walking on a path on the rubber land in close proximity to their house as well as the houses of the accused (about 500 meters), the two accused have confronted them, and seeing them, the deceased father has advised him to run . He has explained that he went back a few feet and then described the process which he saw at a distance of 4,6 to 8 feet. (in page 137 of the Brief the distance he has shown is recorded as 16 feet).

The 2nd appellant has dealt a blow on the head and the 1st accused he identified as *Kaduru Lokka* has stabbed with a spear on the right side of the stomach and he has seen the father pulling away the spear (*hella*) and throwing it away, he has also witnessed the 1st appellant attacking the deceased with a sword and the fathers attempts to ward off the blows and then he has run home to inform, first his brother then to his grandfather's house, where he informed his uncle PW 1 *Maddumage Don Bandula* that his father was fallen after being attacked by a *hella* by *Kaduru Lokka.*

PW 1 *Maddumage Don Bandula* who is the brother-in-law of the deceased is not an eye witness, but on being informed by his nephew PW 2 *Senadira Pathiranage Dushantha Lakmal* , he has immediately rushed to the scene and had seen the injuries on the head, stomach and hand of the deceased, who is purported to have said that it was *Kaduru Lokka* and his son who attacked him with the spear and sword, but not to worry that he was alright and to take him to hospital. The witness has also testified that when he was rushing to the place of incident he saw the two accused, the first accused with the spear and the second with a sword in his hand, leaving that area about 200 to 300 meters from the place of the incident. PW 1 has taken the injured to the hospital with the wife of the injured and has lodged a complaint with the police.

In the evidence-in-chief of PW 1 he has admitted that he has not mentioned the fact about seeing the two accused leaving the vicinity of the scene or the purported dying declaration in the police statement. But in cross examination he has explained that what he stated to the police is what was informed by PW 2 to him initially and that he only answered the questions put by the police. However, that he has mentioned these facts at the non summary inquiry.

The learned trial judge has analysed this evidence and referring to the authority in *Banda and others vs Attorney General* (1999) 3 SLR 168-174 where his Lordship *Justice Jayasuriya* has stated...

" ...The right to mark omissions and proof of omissions to the right of the judge to use the information book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency is not strictly applicable to omissions."

There were omissions and a contradiction marked in the evidence of PW 1 and PW 2. With regard to the omissions pointed out by the defense in the evidence of PW 1 and PW 2, on a perusal of them it is apparent that they do not affect the overall evidence of the witnesses. Some such omissions are PW 2's failure to state that the father pushed him back telling him to run which are in pages 151 and 153 of the brief. In page 110 of the brief that PW 1 has not informed the police that he tried to raise the injured to a sitting position with the help of PW 2's brother and that he failed to mention that *Ravindra* his own brother is the one who brought the three wheeler.

The contradiction V1 in page 111 relates to the fact that although it was said that the injured was taken to the hospital in a three wheeler, it transpired that after taking him in a three wheeler for about 3 miles, thereafter, he was transferred to a van and taken to hospital.

The trial judge has concluded that the case for the prosecution has not suffered due to these omissions.

At the appeal the learned President's Counsel contended that the omissions are serious which the learned trial judge has failed to consider which has affected the credibility of the evidence of the PW 1. With regard to the purported dying declaration, that it has not been corroborated and that even if it is admitted that it does not affect the 2nd accused appellant. And further, the evidence that the two accused leaving the area of the incident although stated in evidence has not been in the statement of the witness to the police.

However, It is noted that in page 519 of the brief in the non summary proceedings, *Bandula* has stated "ජයසිරි කිවුවා මට හෙල්ලෙන් ඇන්නා කදුරු ලොක්කයි එයාගේ පුතයි කියලා" thus in the purported dying declaration both the 1st accused and the 2nd accused are mentioned as per the evidence of *Bandula.*

The statement of *Bandula* has been made soon after the injured was entered to the hospital, in fact on the way back after admitting the injured who died later in the night and thus, his explanation that he told the police what was stated by PW 2 can be plausible.

Taking in to consideration the Doctor's evidence that the deceased would have been able to speak with the injuries , and

with the evidence of PW 1 describing the injuries he has seen and being told not to worry but to take him to hospital by the injured and the fact that at the magistrate inquiry he has evidenced about the purported dying declaration, the trial judges' conclusion cannot be faulted.

Although PW 1 was questioned at length, his testimonial creditworthiness has not been affected with which conclusion of the trial judge who saw the demeanour of the witness, this court can agree . Therefore, this Court cannot agree that the learned trial judge has misdirected himself in analysing the evidence pertaining to the dying declaration.

Furthermore, the learned trial judge disregarding the omissions and the contradiction and the reason why they were not considered as important as it did not affect the root of the case, cannot be considered as a misdirection of evidence.

The counsel for the accused has stated that the accused were deprived of a fair trial as PW 3 was not called. It has been held over and over again that there is no necessity to summon all the witnesses who have been named. It is the learned President's Counsel's contention that as the State Counsel in the evidence in chief of the witness *Bandula* has led some evidence referring to an incident where the first accused is said to have come to PW 3's house (father in law of the deceased) and made some utterances,

threatening his relations , that evidence should have been either struck off or the witness should have been called. It appears that, that evidence was not considered in the judgment of the learned judge as he has not referred to this evidence in any manner, therefore, it is apparent that this fact has not affected the case for the appellants in an adverse manner, and no injustice has been caused.

The counsel for the accused has commented on the learned Judge applying the principle of *Ajith Samarakoon vs the State* to the instant case where it is stated that when there is incriminating evidence against the accused , the burden shifts to the accused to explain away the incriminating evidence against them when they had the opportunity to do so and that the failure of the accused to do so in the instant case. The learned Counsel for the State has conceded that it is a wrong conclusion in the instant case. However, on that ground alone a conviction cannot be vitiated.

It is also to be contended that even if the evidence of PW 1 is not considered that he saw the two accused leaving the scene of the crime carrying a spear and a sword , there is still the strong and unchallenged evidence of PW 2 that it was the two accused who attacked the injured. The injuries are corroborated by medical evidence.

PW 11 *Dr Attygala* has given evidence based on the post mortem report of *Dr Haregedera* who was dead at the time of the trial. Five injuries on the body has been noticed and injury No 3 is stated as the injury that may have caused death, which is the injury in the abdomen. PW 1 and PW 2 both have evidenced to the injury in the abdomen. PW 1 expressed "උඩුබැලි අතට වැටිලා සිටියා. ලේ පෙරාගෙන බොකු එළියට ඇවිල්ලා තිබුණා. (බඩ පෙදෙස පෙන්වා සිටී). අත කැපිලා තිබුණා. නළලේ තුවාලයක් තිබුණා." which may have been caused by stabbing using a sharp weapon and the cause of death in the post mortem report is Hemorrhagic shock due to damage to right side kidney II Multiple stabbing to transverse colon and small bowel.

The learned President's Counsel argued that it is not probable for a 13 year old boy to be watching this incident and that two views are possible, that is either that he ran as requested and watched or if he ran could not have seen the incident.

PW 2 was 27 years old when he gave evidence and no contradiction was marked in his evidence. He has been clear and concise in his evidence.

Being a young boy seeing the father attacked in broad day light in the above described manner would have been very traumatic and difficult to witness and observe exactly how, when and where the blows from the two accused landed.

In Page 151 of the brief some omissions that the father said to run, and in page 152 the father pushing him to run was highlighted. But apart from these not very vital omissions, the evidence has been steadfast and no doubt was created regarding his evidence.

It is seen that there was no immediate reason for the attack although it is in evidence that the two parties were not on talking terms for a long period of time , it is contended by the appellants that this case is fabricated against the appellants and that the learned trial judge not considering that aspect is a miscarriage of justice.

The defence is a plea of alibi. It is correct that the accused do not have to prove anything. It is on the prosecution to prove beyond reasonable doubt that it was the accused who were there at the scene of the crime and no one else. The prosecution evidence PW 2 placed the two accused at the scene of the crime. PW 1 who came soon after the incident gives evidence that he saw the two accused leaving the area. Even if the evidence of PW 1 is disregarded the evidence of PW 2 is sufficient to place the accused at the scene of the crime.

On a perusal of the judgment it cannot be said that the learned judge has not considered the Dock Statement of the 1st accused, where he has stated that on the particular day around

4.30 he was attending to his boat with the help of his son the second accused. The learned judge has stated the reason why he is rejecting the dock statement.

According to PW 1, although the deceased and his family were not good with the family of the accused, he had no issue with them . It did not transpire in the evidence of the second accused that *Bandula* PW 1 had some animosity with their family to have given false evidence incriminating them.

After hearing of the death of the deceased without going to the *Horana* Police they have surrendered to the *Horana* Courts three days after the incident on 18.08.2004.

In the Dock statement the 1st accused has clearly stated that they heard shouts from the house of the deceased saying he and his son assaulted him. And as the deceased family had so many family members close by fearing they will be attacked they have left their house. The police evidence establish that the two accused were not in the vicinity soon after the attack.

PW 8 is the police officer who was first on the scene with two other officers and were shown the scene of the incident by PW 1 and PW 2. On the information received although the police have visited the house of the suspects he was unsuccessful in taking them to custody.

PW 9 the officer in charge of the crime division has visited the scene around 8.00 pm that night after being informed of the death of the injured and PW 8 were still at the scene of the crime when he visited. He too has searched for the suspects without any success.

It is established that soon after incident the police were unable to find the suspects until they surrendered themselves to Courts through an Attorney without going to the police.

From the evidence of the 2nd accused also it transpired that there was previous personal disputes between the families. According to the 2nd accused in his evidence in chief the two families were not good with each other based on an incident of his mother being assaulted long time ago, and that there was no animosity during the time of the incident. However, this is difficult to believe when considering the totality of his evidence, as admittedly since his mother's palm was injured long ago, the two families have never made up their differences and were not in talking terms although they were immediate neighbours.

Neither the dock statement nor the evidence of the second accused have created a doubt in the prosecution case.

Although contended on their behalf by the Learned Counsel there is no material before court that the accused were deprived of a fair and impartial trial.

Considering the totality of the evidence before Court , the learned trial judge has come to a finding that the prosecution has established a strong and incriminating evidence against the two accused, and that the prosecution has proved its case beyond reasonable doubt.

In the circumstances, we see no merit in the contention advanced on behalf of the accused appellants and see no reason to interfere in the conviction or the sentence imposed by the learned trial judge. Accordingly, we dismiss the appeal of the appellants.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J

I Agree,

JUDGE OF THE COURT OF APPEAL