

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

In the matter of an appeal under and in terms of Article 138(1) of the Constitution of the read with Section 11 (1) of the High Court the Provinces Special Provisions Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

CA Appeal No. 369-370/2017

Complainant

High Court of Panadura

Case No: HC 2532/2009

Vs.

1. Walawadurage Asanka Alis Kovilaya

2. Walawadurage Amith Madushanka

(Currently incarcerated in Welikada

Prison)

Samarakkodi Arachchige Gamini Weerasinghe

Accused

And Now Between

1. Walawadurage Asanka Alis Kovilaya
2. Walawadurage Amith Madushanka
(Currently incarcerated in Welikada
Prison)

Accused – Appellant

Vs.

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

Complainant- Respondent

Before : Menaka Wijesundera J.
B. Sasi Mahendran J.

Counsel : Palitha Fernando P.C. with Harshana Ananda for the 1st
Accused-Appellant.
Neranjana Jayasinghe with Harshana Ananda for the 2nd
Accused- Appellant.
Maheshika Silva, D.S.G. for the State.

Argued on : 14.11.2023

Decided on : 29.11.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 11.10.2017 of the High Court of Panadura.

The accused appellants (hereinafter referred to as the appellants) had been indicted for 140, 146/296 and in the alternative 32/296 of the Penal Code.

Upon conviction the trial judge had found the appellants guilty for charges one and three which we think is very unusual and contrary to Law.

The evidence of the prosecution is that the incident had occurred on the Christmas day in 2005 in the evening at a hopper boutique and as such the place had been suitably illuminated for the purpose of identification.

The evidence is that the two appellants had come in a three wheeler to the hopper stand and had said to the brother of the deceased that they were going to kill the younger brother and to get ready to hang white flags.

But the witness had not mentioned the incident of the appellants coming in a three wheeler to the hopper boutique in the statement to police and the Magistrates Court. The said omissions had been brought to the notice of Court.

Another witness had seen the appellants loading the deceased to a three wheeler just prior to the incident at the hopper stand. He later claims that he had seen the appellants attacking the deceased.

But he had not taken the same stand in the police and the Magistrates Court.

The aforesaid contradictions and omissions had been brought to the notice of Court but we observe that the trial judge had decided the contradictions and the omissions in the prosecution case has not gone to the root of the case and as such had disregarded the same.

The appellants in their statements from the dock had said that they did not know anything about the murder of the deceased.

The main contentions for the Counsel for the appellants are that,

- 1) That the trial judge had errored in law when she had concluded that the appellants are found guilty for unlawful assembly and for murder under section 32 of the Penal Code.**
- 2) The weight of the contradictions and the omissions in the evidence of the prosecution not being considered sufficiently.**

With regard to the first ground of appeal we find that there is merit in the same for the simple reason that there is no evidence to say that there was an unlawful assembly at the time of the incident because ,the evidence whether believed or not had only said that it was the 1st and the 2nd appellants committing the offences and no one else and the others at the hopper stand had been having hoppers and talking and doing nothing offensive. Hence it is very surprising to find that the trial judge had found an unlawful assembly at time of the commission of the offence.

Hence, we find that the trial judge has grossly misdirected herself in finding the appellants guilty for the 1st offence. She had forgotten the basic requirements for an unlawful assemble which says as,

“An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly”

Hence if she had convicted the appellants on the basis of common object, we cannot see any logic in her concluding and finding the appellants guilty for the 3rd charge because it has been drafted on the basis of common intention.

Hence, we find that the trial judge had grossly misdirected herself.

But we found the Counsel appearing for the respondents strenuously trying to defend the findings of the trial judge which we find to be very surprising and disappointing because the role of the Attorney General is to be amicus to Court and not to be securing a conviction on any basis.

On considering the evidence of the prosecution also we find that it is contradictory and untrustworthy and lacking in clarity and continuity, which creates very serious doubts in the case for the prosecution because we see that the main witnesses to the crime have taken certain stands in evidence in Court which they have not done so in their statements to the police and their testimonios to the Magistrate Court.

As such we find the case for the prosecution not being proved beyond a reasonable doubt.

In the case of The Director General to Investigate allegations of Bribery and Corruption vs Kalinga Padmathillake SC Appeal 99-2007 decided on 30.7.2007 Aluvihare J had considered the term proving a case beyond reasonable doubt and has quoted John Woodroffe and Amir Ali in their book Law of Evidence had quoted page 325 of the book which says as” for a doubt to stand in the way of a conviction of guilt, it must be real doubt -a doubt which after full and fair consideration of the evidence- the judge really on reasonable grounds entertains”..

As such we are compelled to say that the trial judge has erred in law and has not considered the case for the prosecution with all its infirmities which has resulted in for us to conclude that there is merit in the submissions of the Counsel for the appellants and as such the instant appeals are allowed and the convictions and the sentences imposed on the appellants are hereby set aside.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL