UDAGAMA

v.

ATTORNEY GENERAL

COURT OF APPEAL.
YAPA, J.
KULATILAKE, J.
CA 57/98.
HC KALUTARA 39/97.
15TH, 16TH NOVEMBER, 1999.

Penal Code Ss.32, 140, 146, 296, 351 - Unlawful Assembly - Common Object - Common intention - Abduction - Dock statement - Importance of considering same - Omissions and contradictions - Belated statement to police - Infirmities in evidence.

Held :

(1) Evidence is infirm. unsafe and unreliable to act upon considering the following :

(i) the belated statement made to the Police with delay not explained with acceptable reasons.

(ii) material questions and contradictions go to the very root of the prosecution case.

(iii) failure to evaluate and consider the dock statement of accused.

APPEAL from the High Court of Kalutara.

Case referred to :

Punchirala v. Queen 75 NLR 174 at 176

Dr. Ranjith Fernando with *Ms. Anoja Jayaratne and Ms. Sandamali Munasinghe* for accused appellant.

Vijith Malalgoda, S.S.C for Attorney General.

Cur. adv. vult.

November16, 1999.

HECTOR YAPA, J.

The accused-appellant (7th accused) was indicted along with seven other accused in the High Court of Kalutara. They

were indicted on nine counts and these offences were committed on 27th January 1989. In the first count, all the accused were charged with having being members of an unlawful assembly, the common object of which was to abduct Hewage Siriwardana Karunatilake and Kammanthige Chandradasa in order to cause their deaths, and thereby committed an offence punishable under Section 140 of the Penal Code. The second and third counts related to the said abduction of Karunatilaka and Chandradasa in the prosecution of the common object and thereby commited offences punishable under Section 355 read with Section 146 of the Penal Code. Fourth and fifth counts related to the commission of murder by causing the deaths of the said Karunatilake and Chandradasa in the prosecution of the common object and thereby committed offences punishable under Section 296 read with Section 146 of the Penal Code. Sixth and seventh counts were common intention counts in respect of the abduction of the said Karunatilake and Chandradasa which were offences punishable under Section 355 read with Section 32 of the Penal Code. Eighth and ninth counts were also common intention counts for committing the murders of the said Karunatilaka and Chandradasa, which were offences punishable under Section 296 read with Section 32 of the Penal Code.

It would appear from the proceedings that the 6th accused Mawathage Samson Maddonsa had died prior to the commencement of the trial. The 8th accused H. S. Wickramapala was absconding and therefore the trial proceeded against him in *absentia*, in terms of Section 241 of the Code of Criminal Procedure Act No. 15 of 1979. After the prosecution case the 1st and 4th accused were acquitted by the learned High Court Judge without calling for their defence. At the conclusion of the trial, the High Court Judge acquitted the 2nd, 3rd and 5th accused in respect of all counts, and convicted the 7th accused i. e. the accused-appellant in this case, in respect of 8th and 9th counts in the indictment, and thereafter sentenced him to death. The present appeal is against the said conviction and the sentence.

The prosecution in this case led the evidence of Piyaseeli, Karunadasa, Ajith Premasiri, the medical evidence and the police evidence. According to witness Piyaseeli, a sister of the deceased Chandradasa, on 27. 01. 1989 she had returned home from school at about 7.00 p. m. and was sleeping in her house. At about 8.00 p. m. she got up from her sleep, when she was suddenly pulled out from the bed and at that stage she had seen a crowd of people in the house. The crowd was about 60 persons and about 10 persons from the crowd had gone to the room where her bother Karunadasa was studying. Since there was a bottle lamp burning in her brother's room, she had identified the 1st, 2nd, 3rd, 4th, 5th, 7th (accused appellant) and the 8th accused. She stated that the 7th accused, (accused-appellant) 8th accused and one Cyril Premaratne were armed with guns. Thereafter the crowd which had gone to Karunadasa's room, taken hold of him, tied him with a wire and dragged him towards the road. She further testified that about half an hour later, her brother Karunadasa returned home and told her that the crowd had released him after he had told them that his brother Chandradasa had gone to a funeral house. On the following day she came to know that her brother Chandradasa and her brother-in-law Karunatilake had been murdered. She admitted making her statement to the police on 22. 03. 1990, nearly 15 months after the incident.

Witness Karunadasa gave evidence and stated that, on the night of 27. 01. 1989 when he was studying, a crowd of about 15 persons had come and threatened him with death by pointing a gun at him. Thereafter they had tied his hands with a wire, taken him out and questioned him about his brother Chandradasa and his brother-in-law Karunatilake. When he had told them his brother Chandradasa had gone to Piyasena's funeral house and that brother-in-law Karunatilaka may be in his house, he was release by the crowd. According to this witness he had identified the 2nd, 3rd, 5th, 6th, 7th (accused-appellant) and 8th accused as being present in the crowd. Finally he testified that on the following day, he came to know that his brother Chandaradasa and his brother-in-law

Karunatilake and been murdered and he had made his statement to the police on 28. 01. 1989.

Witness Premasiri stated that at about 7.00 p. m. on 27. 01. 1989, he had gone to the funeral house of Ariyadasa's father. There was a crowd of about 30 to 40 persons and the two deceased persons, Karunatilake and Chandradasa had been there. A petrol max lamp had been burning in the compound of the funeral house. At about 10.30 or 11.00 p. m., a crowd of about 10 persons, some armed with clubs and guns, had come there and got hold of the two deceased persons, Chandradasa and Karunatilake. The people who were in the compound of the funeral house, were locked inside the house. At that stage the witness through fear had run to the jungle, and when he was there, about one or two hours later, he had heard two gun shots. Witness Premasiri had identified the 3rd and the 7th accused (accused-appellant) and according to him the 7th accused had been in the crowd armed with a gun. He had made his statement to the police 15 months after the incident, i. e. on 12. 04. 1990.

According to the medical evidence, the two deceased persons Chandradasa and Karunatilake had died of gun shot injuries. Chandradasa had received one gun shot injury on the chest, causing three lacerations on the back of the chest which were probably exit wounds. Cause of death was due to the damage to the right lung causing haemorrhage into the chest cavity. Deceased Karunatilake had received two gun shot injuries, causing two entrance wounds on the right side of the chest and on the head just in front of the right ear. In addition he had one exit wound on the left side of the head and five exit wounds on the back of the chest. Cause of death was due to laceration of the brain resulting from a firearm injury. According to the doctor, two deceased persons had received close range gun shot injuries which were necessarily fatal and that, they would have died shortly after the receipt of the injuries. Chief Inspector Sundarapala gave formal evidence with regard to the conduct of the post-mortem examinations by the doctor, the recording of statements of witnesses and arrest of some of the accused.

At the end of the prosecution case, when the defence was called, 3rd accused and the 7th accused (accused-appellant) made dock statements. In his statement 3rd accused denied any involvement with the incident and said that he was innocent. 7th accused (accused-appellant) in his dock statement said that, during the relevant period there was fear psychosis in the county. At that time he was working as a teacher in the village Daham school and since he received death threats, he proceeded to his elder sister's house at Mihintale and stayed there. He said that he knew nothing about this incident, till the police questioned him and therefore he was innocent.

At the hearing of this appeal, it was submitted by learned Counsel for the accused-appellant, that the evidence of the three main prosecution witnesses Piyaseeli, Karunadasa and Premasiri was unreliable and therefore cannot be acted upon to convict the accused-appellant. Counsel contended that the witness Piyaseeli had made a belated statment to the police, 15 months after the incident. The explanation given by her that the delay was due to the situation that prevailed in the country is unacceptable, for the reason that her own brother Karunadasa who gave evidence at the trial and her mother Alisnona, had made statements to the police on the very next day after the incident. Another observation that was made by Counsel was that, even though Piyaseeli had identified 1st, 2nd, 3rd, 4th, 5th and 7th accused as being present in the crowd, the learned trial judge had not acted on her evidence, and decided to acquit all the accused mentioned by her at the trial, except the accused-appellant (7th accused). Counsel further referred to the fact that witness Piyaseeli had mentioned for the first time at the trial that the 7th accused who was in the crowd was armed with a gun, a fact not referred to by her, in her statment to the police.

In relation to witness Karunadasa, it was submitted by Counsel that, this witness had not mentioned in his police statement made on the following day and also in his evidence

before the Magistrate, that the accused-appellant (7th accused) was present in the crowd which came to his house on 27. 01. 1989. It was at the trial before the High Court, 9 years after the incident, that for the first time, witness had referred to the presence of the accused-appellant (7th accused) in the crowd. This omission was proved at the trial. In addition certain other omissions were proved at the trial namely, that the witness Karunadasa who had failed to refer to the presence of the 2nd, 3rd and 5th accused in the crowd that came to his house on 27. 01. 1989, in his statement to the police, had testified to their presence in the crowd, at the trial before the High Court. Therefore it is very clear that witness Karunadasa had implicated the 2nd, 3rd, 5th and the 7th accused (accused-appellant) several years later at the trial. Besides, it would appear that the acquittal of the 2nd, 3rd and 5th accused at the trial would indicate that the learned High Court Judge has disbelieved the evidence of this witness.

In respect of witness Ajith Premasiri it was submitted by Counsel that this witness also had made a belated statement to the police, namely on 12. 04. 1990, 15 months after the incident. Further having mentioned in his police statement that he had seen the accused-appellant (7th accused) in the crowd, which had taken away the two deceased persons, testified at the trial before the High Court nearly 9 years later stating that, the accused-appellant (7th accused) was not only present in the crowd, but he was also armed with a gun at that time. This vital omission was proved by the defence at the trial. There was another omission proved at the trial, in respect of this witness namely that, he having omitted to mention to the police that the 3rd accused was present in the crowd on the date in question, gave evidence at the trial stating that the 3rd accused was present in the crowd which had come to the funeral house to take away the two deceased persons.

Therefore taking into consideration the serious infirmities in the evidence of the three witnesses Piyaseeli, Karunadasa

and Premasiri, it is our view that it would be unsafe to act on such unsatisfactory evidence to base the conviction of the accused-appellant. When one examines the judgment of the learned High Court Judge, it would appear that he has relied heavily on the evidence of witness Premasiri. However Premasiri's evidence is also subject to very serious infirmities as referred to above. Unfortunately, the learned High Court Judge has failed to give his mind to the vital infirmities in the evidence presented by the prosecution. We are therefore in agreement with the submission of the learned Counsel that the evidence of the three main witnesses for the prosecution is unreliable and it, would be unsafe to act upon such evidence, to convict the accused- appellant.

Another submission that was made by the learned Counsel for the accused-appellant was that the learned High Court Judge has failed to consider the dock statement made by the accused-appellant. It was contended that the learned High Court Judge has not even made mention of the dock statement. The accused-appellant had taken up the position that during the relevant period he was living at Mihintale. Therefore it was incumbent on the trial Judge to consider whether the dock statement has created a reasonable doubt on the prosecution case. In the case of *Punchirala vs. The Queen at 176 G.P.A. Silva, S.P.J.* highlighted the importance of considering the dock statement. In the course of his judgment it was observed as follows: **"While it was necessary to point out to the jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused being that statement, it was the duty of the trial Judge to leave the considerations of that statement, entirely to the jury untrammelled by an expression of opinion by him."**

Therefore, in our view, the failure of the High Court Judge to consider the dock statement, which was the only material in this case on behalf of the accused appellant, had caused serious prejudice to the accused-appellant.

Another matter that was raised by Counsel in this appeal was that, this being a case of circumstantial evidence, there was a failure on the part of the High Court Judge to consider the principles governing the evaluation of circumstantial evidence. In relation to this matter, all that the High Court Judge had to consider was, whether the available evidence was totally inconsistent with the innocence of the accused and must only be consistent with his guilt. However in this case since the conviction has to be set aside due to the unreliability or the unsatisfactory nature of the evidence presented by the prosecution, it is unnecessary to examine this argument in detail. Suffice to state here, that the High Court Judge has not considered this case as a case of circumstantial evidence, since he has made no such reference in his judgment.

Therefore, we are of the considered view that the learned High Court Judge was in serious error, when he decided to act upon such unreliable and unsafe evidence as referred to above, to convict the accused-appellant. Learned Senior State Counsel very fairly conceded that there were serious infirmities in the prosecution evidence. Taking into consideration all these infirmities and the other matters referred to above, we set aside the conviction and the sentence of death passed on the accused-appellant and acquit him. Appeal is allowed.

KULATILAKA, J. - I agree.

Appeal allowed.