SIRIWARDENA AND ANOTHER
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
TAMBIAH, J.
SENEVIRATNE, J. AND
G. P. S. DE SILVA, J.
C.A. NOS. 111 - 112/81
H.C. KALUTARA NO. 228
M.C. HORANA NO. 5127
12TH JANUARY, 1983

Penal Code – Conviction of grievous hurt – S. 317 of the Code – Indivisibility of the credibility of a witness – Applicable principle.

Four accused were indicted with murder. At the trial the 1st accused was not present. He was tried in absentia along with the 2nd, 3rd and 4th accused who were present. The case for the prosecution rested to a very large extent on the testimony of the sole eyewitness Mahipala. The defence of the 2nd, 3rd and 4th accused was in each case, an alibi which was supported by other evidence. After trial the 4th accused was found not guilty by the unanimous verdict of the jury whilst the 1st, 2nd and 3rd accused were found guilty of causing grievous hurt. The 2nd and 3rd accused appealed.

Held:

The verdict of the jury was unreasonable.

Per G. P. S. de Silva, J.

> "The principle is that the testimony of a witness which is identical and which *is exactly of the same weight* as against two or more accused persons, cannot be found to be unacceptable against one accused and acceptable against others."

Cases referred to:

1. *Baksh v. The Queen* (1958) AC 167 (P.C.)
2. *R. v. Margulas* (1922) 17 Criminal Appeal Reports 3.
3. *Francis Appuhamy v. The Queen* 68 N.L.R 437.

APPEAL against a conviction at a trial before the High Court.

A. A. de Silva with *Haputhantri* for the 2nd accused-appellant.

A. A. de Silva with *Ifthika Hashim* for the 3rd accused-appellant.

Rohan Jayetilake Senior State Counsel for the Attorney-General.

Cur. adv. vult.

February 7, 1983

G. P. S. DE SILVA, J.

Four accused persons, together with a person unknown to the prosecution, were indicted on a charge of murder of one Sirisena on 16th October, 1972. At the trial, the first accused Piyadasa was not present and the trial against him proceeded in his absence. The jury by their unanimous verdict, convicted the 1st, 2nd and 3rd accused of causing grievous hurt, an offence punishable under section 317 of the Penal Code. The 4th accused Dharmapala, however, was found not guilty of any offence by the unanimous verdict of the jury. The 2nd and 3rd accused have now appealed to this court against their conviction and the sentence of 5 years' rigorous imprisonment.

The case for the prosecution rested to a very great extent upon the testimony of the sole eyewitness, Mahipala. Mahipala's evidence, in brief, was that, the deceased had invited him to see a film show which was due to commence at 6.30 p.m. The two of them set out together. The deceased was pedalling his bicycle while Mahipala was seated on the crossbar of the cycle. As they were proceeding in this fashion to see the film show, according to Mahipala, he saw the 1st, 2nd, 3rd and 4th accused along with an unknown person, standing on either side of the road, opposite the house of the 4th accused. All four accused persons and the unknown man were armed with clubs. Mahipala first saw these persons about 10 or 15 ft. ahead of him while he was seated on the crossbar of the cycle. According to Mahipala, there was no enmity whatever between the accused persons and the unknown man on the one hand and the deceased and himself on the other. Mahipala's position is that he and the deceased took no notice of these persons who were armed with clubs and as they were proceeding just past the bridge, the deceased received a blow on his head with a club. Mahipala was unable to identify the person

who dealt that blow. On receipt of the blow, the deceased and Mahipala fell on the ground. According to Mahipala, he got up and ran in the direction of his house. Mahipala's evidence is that he ran about 200 ft., turned back and looked, and then he saw the 1st, 2nd, 3rd and 4th accused and the unknown person, surrounding the deceased and assaulting him with clubs. He ran home and informed his father as to what had happened. Within 10 or 15 minutes, he and his father came to the spot where the assault took place. According to the evidence of Mahipala's father, there was nothing to indicate that any incident had taken place at that spot. Mahipala admitted in evidence that he did not raise cries although there were houses close to the place of the incident. Nor had he, in any way, endeavoured to go to the assistance of the deceased.

The evidence is that the deceased was admitted to the Horana hospital at 5.35 p.m. on 16th October, 1972. Mahipala had not sustained even an abrasion. The deceased, however, had abrasions suggestive of a fall. The deceased had also injuries on his head consistent with having been caused by a club. The medical evidence shows that the deceased had received at least five blows with a club.

Besides the evidence of Mahipala, the other item of evidence incriminating all four accused persons is a statement alleged to have been made by the deceased to his elder sister, Piyawathie, that evening in hospital. According to Piyawathie, the deceased had told her that the 1st, 2nd, 3rd and 4th accused and an unknown man, had assaulted him with clubs. Piyawathie stated in evidence that the deceased uttered these words with difficulty and that thereafter he could not speak further. Piyawathie's statement, however, was recorded by the Police only on the following day at 7.10 a.m. although her evidence was that she was present at the hospital when Sub-Inspector Wickremanayake who conducted the investigations, came to the hospital that night.

Having regard to the fact that the deceased was admitted to hospital at 5.35 p.m., the incident must have taken place prior to that point of time. The state of light therefore at the time of the incident, could not have militated against a proper and accurate identification of the assailants by Mahipala. Moreover, Mahipala's evidence in that all four accused were persons of the same village, and he had known them for many years prior to the date of the incident. It is, therefore, clear

that Mahipala could not have made a mistake in regard to the identity of the persons who participated in the attack upon the deceased. The absence of any motive for the attack upon the deceased is also a matter which is not without significance in this case.

The 2nd, 3rd and 4th accused gave evidence and their defence was an alibi. The 2nd and 4th accused are brothers while the 3rd accused is a close relation. In his evidence, the 2nd accused stated that on the day of the incident, at about 3.45 p.m., he went to the house of police constable Kodippily and helped him to put up a fence. The house of the police constable is half a mile away from the place of the incident. According to the 2nd accused, it was dark by the time he had finished his work. The police constable himself gave evidence and corroborated the evidence of the 2nd accused. His evidence was that the 2nd accused worked on his land from about 3.45 p.m. till 6.00 or 6.15 p.m. and the two of them went thereafter together for a bath.

The 3rd accused was a night watcher at a saw mill which was about quarter mile away from the place of the incident. The 3rd accused in his evidence stated that on the day in question, he had come to work at about 5.00 p.m. and he denied having assaulted the deceased. The evidence of the 3rd accused was supported by one Seneviratne who is also a person who works at the saw mill. Seneviratne's evidence was that the 3rd accused remained in the premises of the saw mill between 5.00 p.m. and 7.30 p.m. on the relevant date.

The 4th accused Dharmapala who was found not guilty of any offence, in his evidence stated that he works at a branch of the Co-operative Wholesale Establishment in Homagama, which is about 13 miles away from the place of the incident. According to Dharmapala, he left home on the day in question at about 6.00 or 6.15 a.m. He reached his place of work at about 9.00 a.m. and he worked that day till 5.00 p.m.. It takes about one hour for him to return to Horana by bus. His evidence was that he reached Horana at about 6.00 or 6.15 p.m. The attendance register at the C.W.E., was produced marked '$4D_3$'. This document clearly supported the evidence of Dharmapala in regard to the time of arrival at the place of work and the time of departure. The relevant entries had been initialled by the Stores Manager who gave evidence on behalf of the 4th accused.

The position of the 4th accused was that having left Homagama at 5.00 p.m., he could not possibly have reached the place of incident by 5.30 p.m.

Mr. A. A. de Silva, learned counsel for the 2nd and 3rd accused appellants, made no complaint against the charge to the jury. Indeed, the summing-up is comprehensive, fair and contains no misdirections (or non-directions) either on the facts or on the law. Mr. de Silva, however, argued with much force that the verdict of the jury against the appellants is illogical and unreasonable. The basis for this contention was that the evidence against the appellants and against the 4th accused was identical but the jury while finding the 4th accused not guilty of any offence, proceeded on the self-same evidence to find the appellants guilty of causing grievous hurt.

The case for the prosecution had to stand or fall, on the testimony of Mahipala. It could hardly be said that the statement the deceased is alleged to have made to his own sister, carried the case for the prosecution any further. Having regard to the time at which the incident occurred and the circumstances in which Mahipala claimed to have identified the assailants, **it is clear that he could not have made a mistake in regard to the identification of the 4th accused whom he had known from his childhood.** In fact, his evidence was that the incident took place on the road opposite the house of the 4th accused at about 5.30 p.m. Considering the verdict of "not guilty" in respect of the 4th accused, it is manifest that the jury had either rejected the testimony of Mahipala as against the 4th accused or at least, had a reasonable doubt as to the truth of his evidence in so far as the 4th accused was concerned, having regard to the alibi set up by him. In other words, the conclusion is inescapable, that the jury found themselves unable to act with confidence upon the evidence of Mahipala as against the 4th accused. The question then arises as to how the jury could have acted with confidence on the testimony of Mahipala as against the appellants, when no distinction could reasonably have been drawn between the case against the appellants on the one hand and the 4th accused on the other.

Mr. Rohan Jayetilake, senior state counsel, submitted that the verdict of the jury is not unreasonable because the jury may have found that the "alibi" put forward by the 4th accused credible whereas, the "alibi" of the appellants unacceptable. Even so, it seems to me

that the moment the jury had a reasonable doubt as to the truth of Mahipala's evidence implicating the 4th accused, the jury could not have on the very same evidence acted with confidence as against the appellants. The doubt in regard to the veracity of Mahipala's evidence, created by the alibi of the 4th accused, must necessarily have an impact on the rest of Mahipala's evidence. The principle is that the testimony of a witness which is identical **and which is exactly of the same weight** as against two or more accused persons, cannot be found to be unacceptable against one accused and acceptable as against the others. In this context, the view of the Judicial Committee of the Privy Council, expressed in *Baksh v. the Queen*[1], as regards the indivisibility of the credibility of a witness is very relevant:

> "Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and reopen it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases."

Another case that is relevant is *R v. Margulas*[2], where the alleged eyewitnesses claimed to have identified two accused jointly committing the offence of burglary. The jury convicted the 1st accused and acquitted the 2nd accused. The Court of Criminal Appeal quashed the conviction of the 1st accused on the ground that the evidence against him cannot be considered sufficient if those against the man whom the jury acquitted **"was exactly of the same weight".** As in the present case, in *Margulas's case* too, no complaint was made of the summing-up. On the other hand, Mr. Rohan Jayetilake strongly relied on the case of *Francis Appuhamy v. The Queen*[3] in an effort to support the convictions. Senior state counsel referred to that part of the judgment where T. S. Fernando, J., discussed *Baksh v. the Queen (Supra)* and the principle of the indivisibility of the credibility of a witness. Counsel relied particularly on the following dicta:

> "The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience

to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation, the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true (at page 443)."

In this case, the Crown relied on the evidence of a single eye-witness named Irene Rodrigo. It was a case of shooting by night and hence the possibility of mistaken identity could not be discounted. Having referred to *Baksh's case,* T. S. Fernando, J. proceeded to state in the course of his judgment:

"In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false. *The high probability is that they concluded she was merely mistaken in regard to the identity of the fifth man, the man with the pistol* . . . References were made also to the case of *Harry Margulas* (17 Cr. A.R. 3) and cases which have purported to follow it. *In all those cases, however, the jury on evidence of the same weight* had in the case of one or more of the accused persons returned a verdict of guilty while acquitting another or others. *Such a result would, of course, be unreasonable:* but that is *not the position in the instant case where the distinction drawn by the jury can be shown to be based on sufficient reason."* (The emphasis is mine.)

Thus, it is manifest the learned judge was there dealing with a case where the facts were entirely different from the facts of the instant case. It is equally clear that *Francis Appuhamy's case* has not departed from the principle laid down in *Margulas's case (Supra).*

Accordingly, I am of the opinion that Mr. A. A. de Silva's submission that the verdict of the jury is unreasonable, is entitled to succeed. The appeals of the 2nd and 3rd accused-appellants are allowed, their convictions and sentences are quashed, and they are acquitted.

TAMBIAH, J. – I agree.

SENEVIRATNE, J. – I agree.

Appeals of 2nd and 3rd accused-appellants allowed;

Their convictions and sentences quashed.