SAMARAWEERA

v.

THE ATTORNEY - GENERAL

COURT OF APPEAL.
P. R. P. PERERA, J. AND W. N. D. PERERA, J.
C. A. 64/87 — H. C. MATARA 19/86.
MAY 7, 1990.

Criminal Law - Charges of murder and causing hurt - Penal Code, ss. 296, 314, 315- Credibility of witnesses- Applicability of the maxim falsus in uno falsus in omnibus.

Four accused were indicted for murder on charges under sections 296, 315, 314 of the Penal Code. At the end of the prosecution case the 1st and 4th accused were acquitted on the directions of the Judge to the jury. At the conclusion of the trial the 2nd accused was acquitted by the unanimous verdict of the jury while the 3rd accused-appellant was found guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation on the count of murder and acquitted on the other counts. The main challenge to the verdict was on the ground that it was unreasonable having regard to the fact that the same two witnesses who testified against the 3rd accused had testified against the 2nd accused who was acquitted. Having disbelieved the two witnesses as against the second accused, the jury should not have accepted their evidence against the 3rd accused - appellant. The maximum *falsus in uno falsus in omnibus* should have been applied.

Held :

The verdict was supportable in that the acquittal of the 2nd accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed. The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must 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.

Cases referred to :

(1) *The Queen v. Julis 65 NLR 585 (CCA).*

(2) *Francis Appuhamy v. The Queen 68 NLR 437, 443 (PC).*

(3) *Mohamed Fiaz Baksh v. The Queen 1953 AC 157 .*

APPEAL from Judgment of the High Court of Matara.

Godwin Perera for accused-appellant.

Anura B. Meddagoda State Counsel for the State.

Cur. adv. vult.

May 31, 1990.

P. R. P. PERERA, J.

The accused-appellant in this case together with three others were indicted in the High Court on the following charges :-

(1) that on or about 2nd October, 1981 they caused the death of one Reuben Samararatne, an offence punishable under section 296 of the Penal Code.

(2) that in the course of the same transaction they voluntarily caused hurt to Cyril Samarawickrema, with a sharp cutting weapon - an offence punishable under section 315 of the Penal Code.

(3) that they caused hurt to Police Constable Seneviratne Banda - an offence punishable under section 314 of the Penal Code.

At the end of the prosecution case, the learned Trial Judge, directed the jury to acquit the first and 4th accused of all the charges, and these two accused were discharged at that stage. Thereafter at the conclusion of the trial the jury by its unanimous verdict acquitted the second accused of all the charges. The jury also by its unanimous verdict acquitted the present appellant (who was the third accused at the trial) on counts (2) and (3) of the indictment, but found the appellant guilty of the lesser offence of culpable homicide not amounting to murder on the basis of grave and sudden provocation on count (1). The High Court Judge, sentenced the accused appellant on this count to a term of four years rigorous Imprisonment. The present appeal is against this conviction and the sentence imposed.

It was the submission of Counsel for the appellant that the verdict of the jury in the present case was unreasonable, having regard to the evidence and should not therefore be permitted to stand. Counsel however, did not have any criticisms to make in regard to the summing up of the learned trial Judge.

Counsel submitted firstly that the medical evidence in this case, was so contradictory, and was also at variance with the evidence of eye witnesses.

The main ground of appeal, however, relied on by Counsel, was that the verdict on count (1), against the accused-appellant was unreasonable in the light of the acquittal of the second accused, the case against whom

was also based entirely on the evidence of the same two eye witnesses Samarawickrema and P. C. Banda. Counsel complained that the jury having rejected the evidence of these two witnesses in respect of the second accused had acted upon the same evidence to convict the accused-appellant. Counsel submitted that the credibility of witnesses cannot be treated as divisible and accepted against one and rejected against the other. He relied upon the well known maxim *falses in uno falsus in omnibus* (he who speaks falsely on one point will speak falsely upon all). Counsel contended that there were no circumstances which excluded the application of this *maxim* in the present case as the sole testimony against the accused-appellant is that of the same two witnesses, Samarawickrema and Police Constable Seneviratne Banda. Counsel cited The *Queen v. Julis* (1) in support of this proposition.

The case for the prosecution as testified to by Samarawickrema and P. C. Banda, is to the effect that the deceased. Reuben Samararatne had made a complaint to the Agrarian Services office in September 1981, that the Ela at Udukumbara had been obstructed. The other parties to this dispute were the first and second accused in this case. The Officer-in-Charge of the Kamburupitiya Police station , had also inquired into this complaint and the first accused had undertaken to restore the Ela to its original state. On 02. 10. 81 Samarawickrema, who was a cultivation officer, had gone to Udukumbura Ela, around 9 a. m. with the deceased and P. C. Banda, to the Ela,. Before they commenced work Samarawickrema had met the first and second accused and had informed them of the purpose for which they had come there that morning. About ten persons had participated in this work. While they were in the process of clearing the Ela, the first, second and third accused had come there and there had been a dispute. The second accused had struck the Police officer with hands, and had run along the bund when Samarawickrema had attempted to apprehend him. According to Samarawickrema, at that stage the second accused had struck him with a sword. At around that time the third accused had also come running and had struck the deceased with a sword on the head. The first and fourth accused had come to the scene after the attack on the deceased armed with clubs, and shouting "attack".

According to the medical evidence injury No. (1) which had been inflicted on the deceased, was a necessarily fatal injury which had caused a fracture of the skull and severe injury to the brain. The Doctor has

expressed the opinion that this injury had been caused with a heavy sharp cutting weapon - like a sword. He has also stated in examination in chief that having regard to the nature of the head injury it was difficult to say that such an injury could have been caused with a mammoty. In cross examination however he had admitted that it was possible for such an injury to have been caused with a mammoty if the blade of the mammoty had a very sharp edge.

It is this medical evidence that Counsel complained was so hopelessly contradictory and should be rejected. I am unable to agree with this submission. It is the Doctor's evidence that the fatal injury inflicted on the head of the deceased could have been caused with a heavy sharp cutting weapon and he had expressed the opinion that if a mammoty which had a blade with a sharp cutting edge had been used, this injury could well have been caused. I see absolutely no contradiction in this medical evidence, but I must observe that the medical evidence in the case, strongly corroborates the evidence of the two eye-witnesses. I see no merit therefore in this submission of learned Counsel.

I will now proceed to consider the main ground of appeal, which was strongly urged by Counsel, that it was not permissible for the jury to act upon the evidence of the two eye-witnesses against the accused appellant when they have rejected testimony in regard to the second accused whom they acquitted at the conclusion of the trial. Counsel relied strongly on the *Queen v. Julis* (1).

Having regard to the evidence I am of the opinion that *falsus in uno falsus in ommibus* has no application to the instant case. In this case, it is in my opinion not permissible to infer that the jury considered the evidence of the two eyewitnesses to be false. The high probability is that they have rejected the claim of the prosecution that the second accused shared a common intention with the third accused in committing the offence set out in count (1) of the indictment, It is also significant that as regards count(2), the alleged attack on Samarawickrema by the second accused with a sword is not supported by the other eye-withess - P. C. Banda. Certainly, they have found on the evidence of the two eye-witnesses that the accussed appellent attacked the deceased on that day in the manner they have described.

Where however the maxim set out above is applicable it must be borne in mind that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points,

exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood. Nor does it apply to cases of testimony on the same point between different witneses. (Vide *The Queen v. Julis* (1) C. C. A.).

In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so.

As contended for by Counsel, even if this maxim is applicable in the present case, I am unable to agree with the contention that credibility of witnesses could not be treated as divisible and accepted against one and rejected against another.

I find support for this view in *Francis Appuhamy v. the Queen* (2) where having considered the circumstances in which the Privy Council [in *Mohommed Fiaz Baksh v. The Queen* (3) 1958 A. C. 157] made the observation that the credibility (of withesses) could not be treated as divisible and accepted against one and rejected against another the Supreme Court, stated thus:

> "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." Per **T. S. Fernando J.**-

I prefer with respect to follow this later decision of the Court of Criminal Appeal in Francis Appuhamy's case on this matter . This submission of Counsel for the appellant must therefore fail. I accordingly affim the conviction and sentence imposed on the accused-appellent. The appeal is dismissed.

W. N. D. PERERA, J.- I agree.

Appeal dismissed.