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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 226-227/2012

High Court of Moneragala Case No. HC 96/2008

1. Maduwanage Francis Wimalaratne
2. Muhandiram Mudiyanselage Chandraratne
3. Muhandiram Mudiyanselage Premaratne
4. Dissanayake Mudiyanselage Chaminda Pushpa Kumara alias Gamini

Accused

AND NOW

1. Maduwanage Francis Wimalaratne
2. Muhandiram Mudiyanselage Chandraratne
3. Muhandiram Mudiyanselage Premaratne

Accused Appellants

V.

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

Complainant Respondent

BEFORE	:	**K.K. WICKREMASINGHE, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Anil Silva PC for the 1st Accused Appellant. Indica Mallawaratchy for the 2nd & 3rd Accused Appellants. P. Kumararatnam SDSG for the Respondent.
ARGUED ON	:	15.11.2019
WRITTEN SUBMISSIONS FILED ON	:	26.05.2017 by the 1st Accused Appellant. 26.05.2017 & 19.09.2019 by the 2nd & 3rd Accused Appellants. 11.07.2017 & 05.11.2019 by the Respondent.
JUDGMENT ON	:	17.01.2020

K. PRIYANTHA FERNANDO, J.

01. 1st, 2nd, 3rd Accused Appellants (Appellants) with 4th Accused were indicted in the High Court of Badulla with one count of murder punishable under section 296 to be read with section 32 of the Penal Code. After trial the learned High Court Judge convicted the Appellants as charged and sentenced them to death. 4th Accused was convicted for a lesser offence punishable under section 314 of the Penal Code. Being aggrieved by the said conviction, the Appellants preferred the instant appeal. Grounds of appeal urged by the Appellants in their written submissions and settled at the argument stage are;

    1st Appellant

    1. Prosecution has failed to prove the charge against the 1st Appellant beyond reasonable doubt.

2nd and 3rd Appellants

1. There appears a conflict of evidence between PW3 namely Rasika and PW5 namely Chandima with regard to the onset of the 2nd incident.

2. Evidence led at the trial necessarily negates common murderous intention on the part of A2 and A3.

3. Imputation of vicarious liability on A2 and A3 is legally and factually flawed.

4. Evidence led at the trial warrants a conviction against A2 and A3 on individual liability and not on common murderous intention.

5. Learned Trial Judge failed to address his judicial mind to the items of evidence favourable to A2 and A3 which would have played a pivotal role in deciding culpability.

02. Facts in brief are as follows. The deceased was a police officer. His wife was a school teacher and the deceased and the wife were living in the teacher's quarters inside the school premises. Two incidents had taken place on the day of the alleged incident. According to the testimony of the eye witness PW3, she was a student of the school where the wife of the deceased was a teacher. Although it was during school vacation, she had gone for band practices in the morning. According to her, 2nd and 3rd Appellants had gone to the quarters that the deceased was living and had tapped on the door. Deceased had opened the door. Then she had seen them fighting, and the deceased had gone inside the house. Then the 2nd and the 3rd Appellants had gone towards the road. That was the 1st incident.

03. Thereafter, the deceased had come out of the house, dressed in his police uniform and had gone towards the road. Then the 2nd and 3rd Appellants and the 4th Accused carrying poles (ඇල්බීසියා ලී) had come towards the deceased and had assaulted the deceased. She said that the *albesia* poles were taken from the fence. Deceased had fallen on the ground. Children who had come for band practices including *Chandima* had been there. One of the Appellants had trampled the deceased's legs and another had trampled the hands. Witness

and the other children had shouted not to assault, not to kill. Then one of the assailants had shouted, *'ළඟට එන්න එපා බෝම්බයක් ගහනවා' (page 86)*. Then due to the fear, they had not gone closer. When they were leaving the place, *Chandima* (PW5) had been standing close to the incident. *Chandima* had told her that the 1st Appellant stabbed the deceased.

04. PW5 *Chandima* has testified corroborating the version of PW2 on the 2nd incident took place near the road. She had seen the 2nd and the 3rd Appellants assaulting the deceased with *albesia* poles. Deceased had been in uniform unarmed. When the deceased fell down, the 1st Appellant had come with a knife and had stabbed the deceased. PW5 had been about 7 feet away from the incident. 2nd and the 3rd Appellants had been holding the deceased from his legs and the hands when the deceased was stabbed by the 1st Appellant. PW5 had given clear and consistent evidence about the incident.

05. Learned President's Counsel for the 1st Appellant submitted that the evidence of PW5 *Chandima* on stabbing the deceased was contradictory to what she had said in her statement to the police. Counsel referred to the contradiction marked as V1. Learned President's Counsel further submitted that the 1st Appellant is now disabled and to consider lesser culpability in terms of section 297 of the Penal Code, in the circumstances.

06. In her evidence at the trial, PW5 said that she saw the 1st Appellant stabbing the deceased. However, she had not told the police that she saw the Accused stabbing (contradiction marked as V1at page 259 of the brief).

07. At this stage, it is also important to note that the 1st Appellant in his allocution in terms of section 280 of the Code of Criminal Procedure Act, admitted stabbing the deceased. Appellate Court is entitled to take into consideration what the Appellant said in his allocution. An admission made by an Accused person in answer to the allocution in terms of the Criminal Procedure Code is part of the evidence in the case, and the Court of Criminal Appeal cannot ignore the effect of such admission ***(Periambalam V. The Queen 74 NLR 515)***.

08. In his allocution the 1st Appellant said that he had a scuffle with the deceased. When the deceased tried to stab him, when he tried to prevent, the deceased got stabbed, he said. Further, he said that acted in self-defence.

09. At the trial this position was never taken by the defence. It was not even suggested to the witnesses. The learned Trial Judge has considered all the evidence adduced at the trial, analyzed the same and rightly decided that the 1st Appellant stabbed the deceased that caused his death. There was no evidence of the 1st Appellant using his right of self-defence, at the trial. Hence, the sole ground of appeal urged by the 1st Appellant has no merit.

10. First ground of appeal urged by the 2nd and the 3rd Appellants is that the evidence of PW3 and PW5 with regard to the onset of the 2nd incident appears to be conflicting. The evidence of both witnesses was adequately considered and analyzed by the learned Trial Judge.

11. In case of ***State of Uttar Pradesh V. M .K. Anthony (AIR [1985] SC 48, [1985] Cri. L. J. 493*** it was held;

> *'While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies or trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn pot of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.'*

12. It is also important to note that a witness cannot be expected to narrate a story as if replaying a video recording. It is humanly impossible to remember every minute detail of an incident.

13. There is no conflict between the evidence of the PW3 and PW5 that would affect their credibility. They are independent witnesses who saw the incident when they were in school. Ground of appeal No.1 preferred by the 2nd and 3rd Appellants should necessarily fail.

14. Grounds of appeal 2 to 5 of the 2nd and 3rd Appellants will be discussed together. Learned counsel for the 2nd Appellant submitted that according to the evidence of the two eye witnesses, 2nd, 3rd Appellants and the 4th Accused had assaulted the deceased with *albesia* sticks. The 1st Appellant had come from nowhere and had stabbed the deceased. 2nd and 3rd Appellants therefore never shared a murderous intention with the 1st Appellant. Counsel further submitted that although there was no sudden fight, there was no murderous intention with the 2nd and 3rd Appellants. Hence, the evidence against the 2nd and 3rd Appellants was for lesser culpability of an offence under section 297 of the Penal Code on the basis of knowledge, counsel submitted.

15. Learned counsel for the 3rd Appellant associated with the submissions made by the counsel for the 2nd Appellant, other than to add that the 2nd and 3rd Appellants were unarmed when they came at the 2nd incident. Therefore, no murderous intention can be attributed to them.

16. It was the contention of the learned Deputy Solicitor General for the Respondent that it was a premeditated murder committed by all three Appellants. Assault and the stabbing that occurred during the 2nd incident cannot be separated. Evidence of the eye witnesses was consistent and they testified without any contradiction *per se* or *inter se* other than V1, counsel submitted.

17. In case of ***Sarath Kumara V. Attorney General (CA 207/2008) on 04.04 2014*** Court said;

> *'...Once a participatory presence in furtherance of a common intention is established at the commencement of an incident, there is no*

requirement that both perpetrators should be physically present at the culmination of the event unless it could be shown by some overt act that one perpetrator deliberately withdrew from the situation to disengage and detach himself from vicarious liability....'

18. In case of ***Queen V. Mahathun 61 NLR 540***, Court of Criminal appeal held;

'To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment.'

19. In the instant case it was clearly evident that 2nd and 3rd Appellants came to the house of the deceased and started a fight. That was the 1st incident. Thereafter, when the deceased went on to the road in his police uniform, the 2nd, 3rd Appellants and 4th Accused had come and assaulted the deceased. Evidence of PW3 was that 2nd and 3rd Appellants assaulted the deceased with *albesia* poles. 4th Accused had given the poles to the 2nd and 3rd Appellants (page 268 and 269 of the brief). Then the 1st Appellant had come and stabbed the deceased who was fallen. Accused persons also had threatened her not to give evidence. She could not remember which Accused threatened her. It is clear from the evidence that the deceased fell when the 2nd and 3rd Appellants assaulted him. 2nd and 3rd Appellants neither withdrew from the scene, nor prevented the 1st Appellant from stabbing the deceased. The evidence therefore clearly shows that the Appellants shared the common murderous intention at the time the deceased was assaulted and stabbed. Although there was only one stab injury, it was to the chest piercing the lung and the heart causing death. Therefore, the intention is clear that it was to kill the deceased when that injury was caused. There were 10 more injuries observed by the Medical Officer who conducted the autopsy on the body of the deceased. There were abrasions and contusions, may have caused by the assault as evident.

20. As contended by the learned DSG for the Respondent, on the clear evidence adduced, the 2nd incident of the assault on the deceased by the 2nd and 3rd Appellants cannot be separated from the stabbing by the 1st Appellant. The evidence suggests that the 4th Accused also shared the same common intention. However, the learned High Court Judge

found him guilty for a lesser offence, not murder, and State has not preferred an appeal against the said decision of the learned High Court Judge.

21. No evidence of lesser culpability can be derived from the evidence adduced, on the basis of knowledge or sudden fight as suggested by the counsel for the Appellants.

22. Learned High Court Judge has carefully analyzed all the evidence adduced at the trial and has come to the correct conclusion that the prosecution has proved the charge of murder against the 1st, 2nd and 3rd Appellants beyond reasonable doubt. In the above premise, I find that all grounds of appeal should fail and the conviction of the Appellants by the learned High Court Judge should be affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL