

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

1. SNM Samarakoon Banda (1st accused)
2. RM Nimal Ratnayake (2nd accused)
3. IP Ajith Kumara (3rd accused)
4. SN Wijeratne (7th accused)

Accused-Appellants

Vs

2 CA 35-38/²⁰¹⁰~~2009~~
HC Kurunagala 40/2005

The Attorney General.

Respondent

Before : Sisira de Abrew J &
Sunil Rajapakshe J

Counsel : Weerasena Ranheawa with P Karunaratne
for the 1st appellant(1st Accused)
Jeffrey Zainudeen for the 2nd appellant (2nd accused)
Senarath Jayasundara for
the 3rd and 4th appellants (3rd and 7th accused)
Sarath Jayamanne DSG for the Respondent.

Argued on : 20.11.2012 and 21.11.2012
Decided on : 31.1.2013

Sisira de Abrew J.

Fourteen accused in this case were indicted on seven counts. The 1st count was an offence under section 140 of the Penal Code for being members of an unlawful assembly common object of which was to inflict injuries to Sumathipala who is the deceased person in this case.

The 2nd count was causing the death of said Sumathipala whilst being members of the said unlawful assembly which is an offence under sections 146/296 of the Penal Code.

The 3rd count was causing injuries to Premawathi whilst being members of the said unlawful assembly which is an offence under sections 146/314 of the Penal Code.

The 4th count was causing mischief to premawathi's house whilst being members of the said unlawful assembly.

The 5th, 6th and 7th counts were respectively for causing the death of Sumathipala, causing mischief to Premawathi's house and causing injuries to Premawathi on the basis of common intention.

At the end of the prosecution case learned trial judge discharged 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th and 14th accused persons of all the charges. The learned trial judge after considering the prosecution and the defence evidence convicted 1st, 2nd, 3rd and 7th accused persons on 1st, 3rd, 4th, 6th, and 7th counts. He did not convict them on the 2nd count (296/146 of the Penal Code) and 5th count (296/32 of the Penal Code) but convicted on the offence of culpable homicide not amounting to murder (297/146 and 297/32 of the Penal Code). He imposed the following terms of imprisonment on each accused (1st, 2nd, 3rd and 7th accused).

On the 1st count - 6 months rigorous imprisonment (RI).

On the offence of culpable homicide not amounting to murder (297/146 of the Penal Code) - 8 years RI. No sentence was passed on the offence of 297/32 of the Penal Code.

On the 3rd count – 6 months RI.

On the 4th count – one year RI.

The learned trial Judge did not sentence the above convicted accused on the 6th and 7th counts. Being aggrieved by the said convictions and the sentences the 1st, 2nd, 3rd, and 7th accused persons have appealed to this court.

Facts of this case may be briefly summarized as follows. On the day of the incident around 9.00 p.m. the deceased person Sumathipala started scolding his sister's daughter Navarathne Manike in filth. She was living in Sumathipala's mother Premawathi's house which was almost adjoining Sumathipala's house. At this stage villagers who were angry about bad behaviour of Navarathne Manike started pelting stones on Premawathi's house. Premawathi went to her garden and questioned the people as to why they were pelting stones. She says all fourteen accused pelted stones. But she has not identified them one by one. At this stage the 7th accused assaulted her with a club. When the deceased person from the adjoining house was coming to this place she requested him not to come. However at this stage the 1st accused attacked the deceased person with a club and due to the blow he fell on the ground. At this stage the 2nd accused stabbed him. According to the Post Mortem Report (PMR) there were four stab injuries on the back of the chest. Two injuries were six inches deep and the other two 4.5 inches deep. Premawathi says that, at the time of deceased person being stabbed, her house was set on fire. Navarathne Manike says that the 3rd accused tried to set fire to the deceased person's shed. She says that she identified him with his voice. But she does not say the words that he spoke at that time. She has not seen anybody setting fire to Premawathi's house. In my view this identification is weak and the 3rd accused's identification has not been proved. Learned DSG admitted that there is no evidence against the 3rd accused to implicate with any of the offences in the indictment. I have perused the evidence led at the trial and hold the view that there is no evidence against the 3rd accused. I therefore acquit him of all the charges.

The 1st accused in his dock statement says that when he went and requested the deceased person not to use the filthy language the latter (the deceased person) took a club and assaulted him. When he shouted for help the 2nd accused came to the place. He does not say what the 2nd accused did as he takes up the

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position that he became unconscious as a result of the attack by the deceased person. The 2nd accused, in his dock statement, says that when the deceased person was attacking the 1st accused, he stabbed the deceased person in order to rescue the 1st accused. After the incident the 1st accused too went to the hospital to get treatment. Prosecution witnesses admit that the 1st accused was receiving treatment in the hospital for his injuries. But the 1st accused has not made any complaint to the police to say that he was assaulted by the deceased person. This is confirmed by the evidence of IP Padmakumara at page 129 of the brief. Further the 1st accused had told Premawathi who was also in the hospital that he received a club blow from the son of the deceased person. If he received injuries as a result of an attack by the deceased person he would have made a statement at least to the hospital police post. Further he could have asked his wife to give the said information to the police when she came to see him in the hospital. His wife gave evidence at the trial stating that she came to the hospital to see her husband. One cannot expect the 1st accused to keep quiet about his injuries especially when Sumathipala died during the incident. Making a complaint to the police that he received injuries from the deceased person would have been a good defence for him in a charge of murder against him. For the above reasons I am unable to accept the version of the 1st accused and I reject it. If the 1st accused had not received injuries in the hands of the deceased person, the position taken up by the 2nd accused has to be rejected. For the above reasons I reject the version of the 1st and the 2nd accused and I further hold that their dock statements do not create a reasonable doubt in the prosecution case. However Premawathi admits that there was a fight between the deceased person and the 1st accused. But she maintains the position that the 2nd stabbed the deceased person after the attack by the 1st accused. At one stage she says that the 2nd accused stabbed the deceased person after he (the deceased) fell on the ground. The learned trial judge concluded that the death of

the deceased person had taken place under grave and sudden provocation and in the course of a sudden fight. It is more appropriate to conclude that the death of the deceased person had taken place in the course of a sudden fight. It is clear from the evidence that the 1st and the 2nd accused have formed common intention to cause the death of the deceased person. Thus the convictions of the 1st and the 2nd accused on the offence of culpable homicide not amounting to murder on the basis of common intention concluding that the death was caused in the course of a sudden fight are correct and I affirm them. There is no evidence to conclude that the 7th and the 3rd accused participated or shared common intention with the 1st and the 2nd accused in causing the death of the deceased person. Therefore the convictions of the 3rd and the 7th accused on the offence of culpable homicide not amounting to murder on the basis of common intention are wrong and are hereby set aside. There is no evidence that the 1st, 2nd and 3rd accused inflicted injuries to Premawathi or they shared common intention with the 7th accused to cause injuries to Premawathi. Therefore conviction of 1st, 2nd and 3rd accused on the 7th count (causing injuries to Premawathi- an offence under sections 314/32 of the Penal Code) is wrong and is hereby set aside. But there is clear evidence that the 7th accused assaulted Premawathi. Therefore conviction of the 7th accused on the 7th count is right and is hereby affirmed. There is no evidence to suggest as to who set fire the house of Premawathi. Therefore conviction of 1st, 2nd, 3rd and 7th accused on count No.6 is wrong and is hereby set aside.

The next point that arises for consideration is whether the unlawful assembly charge and the charges relating to unlawful assembly (2nd, 3rd and 4th counts) could be maintained or not. The indictment alleges that the accused were members of an unlawful assembly common object of which was to cause injuries to Sumathipala (the deceased person). According to the evidence of Premawathi, there were fourteen people when stones were being pelted on her house. Thus at

this time there was an unlawful assembly. Therefore it appears that the common object of the unlawful assembly was to cause damage to the house of Premawathi. According to Premawathi when Sumathipala was being attacked she identified only the 1st, 2nd and 7th accused. She was not questioned as to how many people were there at the time of the attack on Sumathipala. There is no evidence to suggest that at the time of this attack there were five or more people at this place. Therefore at the time of the attack on Sumathipala there was no unlawful assembly. There was an unlawful assembly at the time of the stones being pelted on Premawathi's house. It may be that members of the said unlawful assembly common object of which was to cause damage to Premawathi's house went away from this place after pelting stones. This may be the reasons that Premawathi was able to identify only the 1st, 2nd and 7th accused. For these reasons I hold that the unlawful assembly stated in the indictment has not been proved beyond reasonable doubt. I therefore hold that count No.1 (unlawful assembly charge) has not been proved beyond reasonable doubt. The 2nd, 3rd and 4th counts were framed on the basis that the accused persons were members of the unlawful assembly stated in count No.1. When the 1st count is not proved the 2nd, 3rd and 4th counts fail. For these reasons I hold that the 2nd, 3rd and 4th counts have not been proved beyond reasonable doubt. I therefore set aside the conviction and sentences of all accused persons on the 1st, 2nd, 3rd and 4th counts and acquit them. I have earlier affirmed the conviction of the 1st and 2nd accused on the offence of culpable homicide not amounting to murder. The learned trial Judge has not imposed a sentence on this offence. I sentence the 1st and the 2nd accused to a term of eight years RI. I have earlier affirmed the conviction of the 7th accused on the 7th count. The learned trial judge has not imposed a sentence on the 7th count. On the 7th count I sentence the 7th accused to a term of six months RI. According to the finger prints report the 7th accused has no previous conviction. The charge is only under section 314 of the

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Penal Code. Considering all these matters I suspend the term of six months RI to a period of five years.

Convictions of the 1st and the 2nd accused on sections 297/32 of the Penal Code are affirmed and they are sentenced to a term of eight years RI.

Convictions and the sentence of the 3rd and 7th accused on sections 297/32 of the Penal Code are set aside.

Convictions and the sentence of the 1st, 2nd and 3rd accused on 7th count (sections 314/32 of the Penal Code) are set aside.

Conviction of the 7th accused on the 7th count is affirmed and he is sentenced to a term of six months RI suspended for a period of five years.

Convictions and sentence of all the 1st, 2nd, 3rd and 7th accused on 1st, 2nd, 3rd and 4th counts are set aside.

Convictions and the sentences of 1st, 2nd, 3rd and 7th accused on the 6th count are set aside. 3rd accused is acquitted of all the charges.

Judge of the Court of Appeal.

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal.