

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

The Democratic Socialist Republic of Sri Lanka
Complainant

Vs

1. RM Vipula Dharmasiri Ratnayake
 2. Mohamad Rizmin Sheriffdeen alias Tiron
 3. D Steevan Ananda Kumar
 4. Mohamad Firdaus Rinus
 5. Nagoor Abdul Rahim Sarafdeen
 6. Nagoor Pitchche Mohamad Firdaus
- Accused

And now between

1. D Steevan Ananda Kumar
2. Mohamad Firdaus Rinus

Appellants

Vs

The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 170-172/2010
HC Badulla 41/2005

Before : Sisira de Abrew J &
Sunil Rajapakshe J
Counsel : Razik Zaroook President's Counsel with Isuru Somadasa
for the 1st appellant (3rd accused)
Amila Palliyage for the 2nd appellant (4th accused)
Yasantha Kodagoda DSG for the Respondent.

Argued on : 6.12.2012, 7.12.2012 and 10.12.2012
Decided on : 14.2.2013

Sisira de Abrew J.

The accused appellants (3rd and 4th accused) and the 1st, 2nd and 5th accused were interdicted on five counts. The 1st count was that the accused were members of an unlawful assembly common object of which was to cause grievous injuries to Ajith which is an offence punishable under section 140 of the Penal Code. The 2nd count was that they whilst being members of the said unlawful assembly committed the murder of said Ajith an offence punishable under section 296/146 of the Penal Code. The 3rd count was that they whilst being members of the said unlawful assembly caused injuries to one Pradeep Kumara Edirisinghe an offence punishable under section 314/146 of the Penal Code. The 4th count was that they committed the murder of said Ajith and thereby guilty, on the basis of common intention, of offence under section 296/32 of the Penal Code. The 5th count was that they caused injuries to Pradeep Kumara Edirisinghe and thereby guilty, on the basis of common intention, of offence under section 314/32 of the Penal Code.

The learned trial judge, after trial, acquitted all accused of 1st, 2nd and 3rd counts. However he convicted 3rd and 4th accused of the offence of culpable homicide not amounting to murder on the basis of common intention which is an offence under section 297/32 of the Penal Code. They were, on this offence, sentenced to a term of ten years rigorous imprisonment (RI) and to pay a fine of Rs10,000/- carrying a default sentence of six months simple imprisonment (SI). The 4th accused, on count No.5, was convicted for causing injuries to Pradeep Kumara Edirisinghe and was sentenced to a term of one year RI and to pay a fine of Rs5000/- carrying a default sentence of three months SI. The other accused were acquitted on 4th and 5th counts. Being aggrieved by the said convictions and the sentences, the 3rd and the 4th accused have appealed to this court. The facts of this case may be briefly summarized as follows:

According to the evidence of Dinesh on 9.12.2001 around 4.00 p.m he with Manoj, Manju (Pradeep), Ajith and two others was coming in a car to go to Badulla from a hotel called Dunhida Sisilasa after consuming beer at the said hotel. On his way at Puwakgodamulla junction the 6th accused who was among several people signaled to stop the car. When Ajith the deceased person in this case stopped the car, the 5th accused came and held Manoj who was on the front seat of the car by his shirt collar. The 6th accused came and put his hand round Ajith's neck and took him little away from the car. Dinesh does not say the exact point that Manoj got down from the car. But by this time Manoj too had too had got down from the car. When the 6th accused was taking Ajith, Dinesh and Manoj too got down from the car. When they were about 8 to 10 feet behind Ajith, the 5th accused came and assaulted Ajith's face. He does not specify any weapon that 5th accused was having but from the evidence it appears that the 5th accused had assaulted Ajith with his fist. At this time five people came to this place. The 3rd and 4th accused who were among them assaulted Ajith with clubs. Due to this assault Ajith fell on the ground. The 2nd, 3rd, and 4th accused attacked Ajith who was lying fallen. When Manju went and prevented the attack on Ajith he too was attacked by the crowd among whom he (Dinesh) identified the 2nd, 3rd and 4th accused. When Dinesh went and prevented Ajith being attacked, he too was attacked. The 6th accused did not attack the deceased (Ajith). Although Dinesh says that the 2nd accused attacked Ajith, he later says he could not remember whether he saw the 2nd accused at the time of the attack on Ajith. Later Dinesh and Manju took Ajith to the hospital. After admitting Ajith to the hospital he went and lodged a complaint at the police station.

Pradeep alias Manju says that Ajith (the deceased person) stopped the car when the 6th accused signaled to stop. At this stage the 5th accused came and held Manoj by his collar. The 6th accused took Ajith little away from the car and

thereafter the 3rd and the 4th accused assaulted Ajith with a club. When he went near Ajith he too was assaulted by the 4th accused.

John Karunadasa who was called by the defence says that around 2.00p.m on 9.12.2001 Manoj who came in his car addressed the 5th accused in the following language: Did you eat milk rice. Tonight we will bomb.” At the place where the incident of causing injuries to the deceased person took place, the accused and some people were enjoying the result of the general election which took place on the previous day. They were serving milk rice to the people. John Karunadasa was a member of this party. Later he saw somebody lying fallen on the ground. It has to be noted here what Manoj said is not evidence in this case since he was not called as a witness. John Karunadasa did not see anybody attacking the deceased person. This is the summary of the evidence of John Karundasa. In my view his evidence has not affected the prosecution case. The accused appellants, in their dock statements, denied the incident.

The evidence of Pradeep alias Manju was that 3rd accused and 4th accused attacked the deceased person with clubs. But in his statement made to the police he had said an unknown person but could identify if seen again attacked Ajith and him with a club. He denied that he made such a statement. Thus learned defence counsel marked the above sentence as a contradiction. In his evidence he says that he knew the 3rd accused as he (the 3rd accused) worked in one Nadir's boutique. Further he says that he knew the 4th accused for a long period. When I consider the above matters I am of the opinion that the above contradiction is a material contradiction. But when I consider the evidence of the case I hold the view that this contradiction has not affected the evidence of Dinesh.

Learned counsel for the 4th accused contended that evidence of Manju was contradicted by Dinesh who says that Manju was attacked by both 3rd and the 4th accused. But Manju says that he was attacked by 4th accused.

Dinesh says that Manju covered the deceased person when he (the deceased person) was being attacked. But Manju does not say that he covered the deceased person. Dinesh says that 2nd, 3rd and 4th accused attacked the deceased person. But Manju says only 3rd and 4th accused attacked the deceased. Learned counsel drawing our attention to the above contradictions contended that the prosecution evidence cannot be accepted in view of the above contradictions. I now advert to this contradiction. When a person being attacked by one or more persons and if the incident is witnessed by several people, there can be contradictions among the evidence of witnesses because what is noticed by one person may not be noticed by another. Law does not expect the prosecution to prove criminal case according to a mathematical formula. This view is supported by the judicial decision of *Bhuginbai Hirjibhai Vs State of Gujarat AIR 1983 SC 753* wherein the Supreme Court of India held thus: "By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

The powers of observation differ from person to person. What one may notice, another may not. An object of movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in a rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."

Applying the principles laid down in the above judicial decision, I hold that there is no merit in the said contention advanced by learned counsel for the 4th accused.

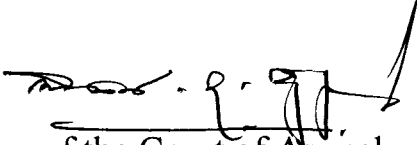
Learned defence counsel at the trial had tried to point out some omissions when Dinesh was giving evidence. But he has failed to draw the attention of learned trial judge with reference to the statement made Dinesh.

Therefore it has to be decided that no omission had been brought to the notice of court.

Dinesh has made a prompt statement to the police. Thus his evidence satisfies the test of promptness. No vital contradiction has been marked in his evidence. Therefore his evidence satisfies the test of consistency. Learned counsel for 3rd and 4th accused contended that the evidence of the prosecution was not corroborated by the medical evidence. But the doctor who did the post mortem examination says that the injuries on the head could be caused if the deceased was attacked when he was lying fallen. Dinesh at page 81 says that the deceased was attacked when he was lying fallen. I am therefore unable to agree with the above submission of both counsel.

In my view the convictions of the accused appellants can be affirmed on the evidence of Dinesh. When I consider the evidence led at the trial, I hold the view that there is no reason to interfere with the judgment of the learned trial judge. For the above reasons, I affirm the conviction and the sentence of the appellants and dismiss the appeal. I direct the prison authorities to implement the sentence from the date of conviction.

Appeal dismissed.



Judge of the Court of Appeal

Sunil Rajapakshe J

I agree.



Judge of the Court of Appeal