

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

The Attorney General

Complainant

Vs.

Iddagodage Sarath Kumara

Accused

Court of Appeal Case No. C.A. 205/2008

H.C. Colombo Case No. 9698/98

And Now Between

Iddagodage Sarath Kumara

Accused-Appellant

Vs.

The Attorney General

Respondent

Before : Sarath De Abrew, J. &

H.N.J. Perera, J.

Counsel : Amila Palliyage for the Accused-Appellant

HariPriya Jayasundera, D.S.G. for the Attorney-General

Argued on : 23.04.2012 and 08.05.2012

Written Submissions

Tendered on : 27.06.2012, 31.07.2012 and 18.12.2013

Decided on : 04.04.2014

Sarath De Abrew, J.

The Accused-Appellant and one W.P. Prasanna Perera alias Alli (2nd Accused) were indicted in the High Court of Colombo for committing the murder of Managamage Anura Wickramanayake on 02.01.1994 with one Patapedige Athula Devendra who is now deceased, punishable under Section 296 read with Section 32 of the Penal Code. After trial without a jury, the learned trial Judge acquitted the 2nd Accused and convicted the Accused-Appellant and imposed the death sentence on 11.01.2008. Being aggrieved of the conviction and sentence, the Appellant had preferred this appeal to this Court.

At the hearing of the appeal the learned counsel for the Appellant urged the following grounds of appeal on behalf of the Appellant.

- 1). The learned trial Judge had erred in law by failing to consider the vital omission marked by the defence on the evidence of prosecution eye-witness, Nimashi at the trial in relation to her evidence at the non-summary inquiry and thereby misdirected himself by placing reliance on her credibility.

- 2) The learned trial Judge had failed to consider the evidence in favour of the accused.
- 3) The learned trial Judge's findings in the Judgment are contrary to the evidence adduced before Court.
- 4) The learned trial Judge had erred in law by attaching vicarious liability and convicting the appellant under common intention.

The facts briefly are as follows as elicited from the evidence of the main prosecution witnesses, Ajantha Malkanthi, Sandya Kumari and Sudheera Nimashi. The deceased Anura Wickramanayake was the husband of witness Ajantha Malkanthi who were all residents of Kotahena. On 01.01.1994 they have gone with their friends and relatives to the Galle Face Green in a van to celebrate the new year. While they were returning well past midnight in the van driven by Ajantha's brother-in-law, Ranjith Ganegoda around 1.30 A.M, an argument had had occurred between Ranjith and his wife who had attempted to get off from the vehicle. At this point, Ranjith who was driving the van, had stopped it near the laundry at Bloemendhal Road, Kotahena. Ranjith had alighted and dealt a blow on his wife at which point the children inside the van had started crying. Due to

the commotion, the accused appellant, Sarath, along with the 2nd accused, Alli and others had arrived at the scene. The appellant, Sarath had uttered obscenities whereupon one Samantha who was among the party in the van had dealt a blow on the appellant. Thereafter the appellant had run back towards the laundry and had returned with one Athula Devendra who had died before the indictment was framed. According to witness Sandya Kumari the appellant Sarath was armed with a manna knife while Athula Devendra was armed with a kris knife.

Witnesses Ajantha, Sandya and Nimashi have testified as to what they witnessed of the second stage of the drama from different angles. Witness Ajantha had requested Athula Devendra and the appellant not to interfere as this was a family dispute. Thereafter Athula and the appellant had gone towards the van which was parked nearby.

The van had been parked near the boutique called "Majeed" close to the laundry. The street lights were burning at the time enabling clear identification. The appellant Sarath and Athula

Devendra were known to witness Ajantha Malkanthi even before this incident. Thereafter witness Ajantha had noticed her husband the deceased fallen on the ground near Bloemendhal Road about 100 yards away from where the van was parked. She had noticed Athula near her fallen husband and had heard witness Sandya shouting “අනිත්ත එපා”. She had failed to notice the appellant Sarath nearby.

Witness Sandya Kumari too had joined the Galle Face trip party with her husband and two sons and was a friend of the deceased party. After the van stopped near the laundry and the shop called “Majeed”, while those who came in the van were attempting to resolve the dispute between husband Ranjith and wife Kanthi, a crowd of male youngsters had approached them from Bloemendhal Road to Wasala Road, among whom was the accused-appellant Sarath. There had been a heated exchange of words between this crowd and the party who came in the van. The appellant and the others had run up Wasala Road and the appellant had woken up Athula Devendra and brought him to the scene. Witness Ajantha too had walked towards them followed by witness Sandya. Ajantha had implored the appellant Sarath not to create a problem stating “ ඒක අපගේ පුද්ගලික

ප්‍රශ්නයක්” At this stage witness Sandya had observed that the appellant Sarath was armed with a manna knife while Athula was having a kris knife in his hand. They had walked towards the Majeed boutique where the van was parked. The deceased Anura was about 15 feet away from the witness. Suddenly witness Sandya has discovered that her two sons were missing and she called out to the deceased Anura to help locate them. The deceased had gone towards Bloemendhal Road in search of the children followed by witness Sandya.

Thereafter witness Sandya had seen Athula chasing after the deceased Anura and repeatedly stabbing him when the latter fell on the ground inspite of her shouting “අනිත්ත එපා”. She had not noticed the appellant Sarath at that stage.

Witness Sudheera Nimashi, elder daughter of the deceased Anura and witness Ajantha, was only 10 years old at the time of the incident. According to Nimashi, after the van stopped near the Majeed boutique, she and her younger sister alighted from the van, while her father the deceased went out and sat on the pavement

opposite the boutique. There was a crowd of people among whom was the appellant Sarath. She had seen the appellant approaching her father the deceased and dealing a blow on her father's head with a manna knife. Thereupon the deceased had started running down Bloemendhal Road chased by Athula Devendra. Witness Nimashi and her sister had also run after their father. While they were watching, she had seen the deceased falling down whereupon Athula had repeatedly stabbed him with a knife. At that point she could not remember whether the appellant Sarath was present. Thereafter witness Sandya and Nimashi's mother Ajantha had approached the scene and the deceased was rushed to the hospital in a three-wheeler where he was pronounced dead. Witness Nimashi was the only eyewitness who testified as to the accused-appellant attacking the deceased with a weapon.

At the trial, other than the aforesaid main witnesses Ajantha Malkanthi, Sandya Kumari and Sudheera Nimashi, the prosecution has led the evidence of the doctor who performed the post-mortem examination followed by police witnesses who conducted investigations then attached to the Kotahena Police. The kris knife

(P3) had been recovered from the scene itself while a manna knife (P5) had been recovered subsequent to a Section 27 Evidence Ordinance statement from Athula Devendra.

After the closure of the prosecution case the learned trial Judge had called for the defence. The case record indicates that the 1st accused appellant had chosen to be silent while the 2nd accused had made a brief exculpatory dock statement denying complicity.

I have perused the entirety of the Information Book extracts, non-summary and trial proceedings, the judgment of the learned trial Judge and finally the extensive written submissions and case law authorities submitted by both parties at the hearing of the appeal. It is now left to consider the several grounds of appeal urged on behalf of the appellant.

The main ground of appeal was that the learned trial Judge had erred in law by failing to consider the vital omission marked by the defence in the evidence of the prosecution eye-witness Nimashi to the effect that she had failed to mention at the non-summary inquiry that she saw the appellant attacking her father with a manna knife (Page 122 of the Record). A perusal

of the judgment of the learned trial Judge, on the contrary, indicates that the learned trial Judge had extensively and explicitly considered the impact of this omission (Pages 235-241 of the Record) on her credibility and had arrived at a finding that this omission by itself would not affect the credibility of a witness of the tender age of 10 years in the light of the other evidence led at the trial. Due weight should be attached to the opinion of the trial Judge unless it could be shown that the trial Judge has drawn improper inferences from specific facts that are proved.

Further, in reviewing the veracity of a witness, the Appellate Court may employ certain rules and guidelines to elicit the truth as the Appellate Judges do not have the benefit of observing and questioning the witness first-hand. One such rule is to delve in to the police statement of the witness, not to use it as substantive evidence but to bolster a proper inference as to the credit-worthiness of a witness, as enunciated by F.N.D. Jayasuriya J in Keerthi Bandara vs Attorney General (2002) (2 SLR 245 at page 261). In the instant case a perusal of the police statement of witness Nimashi clearly indicates that she had explicitly mentioned witnessing the appellant Sarath attacking her father with a weapon like a manna knife. A perusal of her evidence at the non-summary inquiry also indicate that she

had testified that the appellant had attacked her father on the head while seated before the boutique which is consistent with her evidence at the trial, even though she had omitted to mention the use of a weapon like a manna knife. Evidence of Sandya Kumari (Page 100 of the Record) corroborates the fact that the appellant was armed with a manna knife.

Therefore the evidence of Nimashi at the trial that she saw the appellant attacking her father with a manna knife cannot be construed a deliberate concoction. Evidence must be weighed and the evidence of a solitary witness, where her testimonial trustworthiness is not impeached, could be acted upon by Court. Sumanasena Vs. Attorney General (1999) (3) SLR 137.

In view of the above, the failure of the learned trial Judge to act on the purported omission in the evidence of Nimashi at the non-summary inquiry has not prejudiced the substantial rights of the appellant. Accordingly, the main ground of appeal should fail.

The 2nd, 3rd and 4th grounds of appeal revolve on the question as to the correctness and justification based on the evidence of the appellant being convicted of the charge of murder on the basis of acting in common

intention with Athula Devendra in causing the death of the deceased. A perusal of the judgment clearly indicates that the learned trial Judge had come to a finding that the appellant was acting in furtherance of a common intention with Athula Devendra in causing the death of the deceased. (Pages 254-259 of the Record).

Based on the 2nd, 3rd and 4th grounds of appeal, it was the contention of the appellant that the learned trial Judge had erred in law by convicting the appellant under common intention due to the following reasons.

- a) The evidence of Ajantha Malkanthi and Sandya Kumari clearly established that the appellant Sarath did not chase after the deceased and was not present at the point Athula Devendra inflicted fatal injuries on the fallen deceased
- b) The learned trial Judge failed to consider in favour of the appellant that no weapon was recovered from his possession and the manna knife (P5) too had been recovered from the possession of Athula Devendra found under the bed in his room.
- c) The learned trial Judge had incorrectly stated in the judgment (Page 235 of the Record) that witness Sandya Kumari had testified that she

saw the appellant too chasing after the deceased with a manna knife, which was contrary to her evidence.

- d) There was no evidence of pre-arrangement or participatory presence of the appellant along with Athula Devendra leading to a necessary inference of sharing of common intention to cause harm to the deceased.

On a perusal of the evidence led at the trial, other than with regard to the contention c) above, I am inclined to conclude that the learned trial Judge did not misdirect himself in convicting the appellant on the basis of common intention for the following reasons.

- a) When the van stopped near the laundry, the appellant had come with others and uttered obscenities whereupon he was dealt a blow by one Samantha who came in the van.
- b) The appellant had run towards the laundry and returned with Athula Devendra both wielding knives, leading to the inference of pre-concert.
- c) When they were requested to move away as this was a family dispute they had walked past the parked van in the direction where the deceased was seated opposite the Majeed boutique.

- d) Thereupon the appellant has drawn first blood by attacking the deceased with the manna knife, in the presence of Athula.
- e) Thereafter Athula Devendra had taken over simultaneously and chased after the deceased and dealt fatal stab blows in furtherance of a common murderous intention. Gnanapala and Nissanka Vs. Attorney General (C.A. No. 107-108/1997).
- f) The fact that the manna knife (P5) apparently used by the appellant was recovered from the possession of Athula Devendra under his bed too could be construed that they were acting in concert subsequent to the event too.

The very fact that it was the appellant who brought in Athula Devendra, the fact that both were armed and finally the fact that the appellant attacked the deceased first, to my mind, was sufficient to establish a meeting of the minds and a sharing of a common intention to harm the deceased, from which point the thread of vicarious liability would run to bind the action of one to the other. 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 withdraw from the situation to disengage and detach himself from vicarious liability. Therefore, the fact that the appellant, after attacking the deceased with the manna knife, was not physically present alongside when Athula stabbed the deceased would not absolve the appellant from incurring vicarious liability on the actions of Athula.

A minute perusal of the Information Book Extracts would have thrown further light of previous enmity and evidence of motive between the deceased and the perpetrators, which the prosecuting State Counsel had failed to grasp and lead at the trial, which would have perhaps answered the pertinent question why the assailants attacked the deceased

In view of the above I am of the view that the Appellate Court should not interfere with the conviction under Article 137 of the Constitution. Accordingly, I affirm the conviction and sentence imposed by the learned trial Judge and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera,J.

I agree

JUDGE OF THE COURT OF APPEAL