

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

Sirimadura Lahiru Rashmika Amarasekera

ACCUSED-APPELLANT

C.A. 51/2013

H.C. Matara 80/2009

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Neranjan Jayasinghe for the Accused-Appellant
Chethiya Gunasekera D.S.G. for the Complainant-Respondent

ARGUED ON: 13.05.2014 & 16.05.2014

DECIDED ON: 07.08.2014

GOONERATNE J.

The Accused-Appellant in this case was indicted in the High Court of Matara for the murder of one Nilantha alias Nilanga on 14.8.2004, along with another person called Nelson alias Presanna (now deceased). The main witness for prosecution was the wife of the deceased and the prosecution case is based more or less on circumstantial evidence. However this court note that the main prosecution witness had given a very detailed description of the scene of the crime, and of the premises where the deceased was found last lying on the ground.

On the prosecution version and the evidence that transpired from the main witness, is that she was with her husband, the deceased at their residence. At that time of the incident there were in that house her father, sister, one Upul, Sarathchandra, Ajith and her infant child. The deceased was having dinner at about 8.15 p.m with Ajith. The deceased had told the wife to prepare tea. When she was preparing tea she heard a noise of similar to a enamel plate falling on the ground, and that moment itself she heard somebody shouting "Budhu Ammo". Thereafter the witness had come through

the sitting room and came outside the house through the door on the left side near the spot described by her own words as දෙගොවෙහි වම් අත පැත්තෙන්. She shouted whilst she came out of the house and noticed two person running whom she later identified as the Accused and the other deceased person as described in the indictment, on the road just in front of the house. It was the evidence of the witness that there was sufficient light within and outside her house and as well as where the above two persons were found running. One of them had a gun (the deceased person named in the indictment) who was one of the perpetrators of the crime. The two persons running had done so one behind the other. We also note two other items of evidence (a) Accused was found in the garden of the deceased's house about 4 days prior to the incident. (b) some form of animosity between them due to a case filed in matara courts.

We also note that very many details concerning background facts inclusive of (a) & (b) above had been elicited in the evidence of the main witness.

The learned defence counsel very vehemently argued that the Accused-Appellant is innocent and there is no evidence in this case to prove that he shared a common murderous intention. However learned counsel goes

to the extent to state that the Accused-Appellant was present at the scene of the crime. He also submitted that the person named in the indictment Nelson alias Presanna had not been taken into custody. There is no evidence led to show that the gun that was in the possession of the said Presanne (deceased) was used for the commission of the offence. Learned defence counsel insisted that the proved circumstances in this case are inconsistent with the guilt of the Accused. He went further to argue that the mere presence or material elicited in evidence as above of common intention is not sufficient to convict in the absence of a criminal act.

The learned Deputy Solicitor General supported the case of the prosecution and the Judgment of the learned High Court. He referred to the medical evidence and more particular to seven injuries which are consistent with gun shots or pellets entering the body. Police evidence support recovery of pellets from the scene of the crime. He also referred to the dock statement of the Accused person. The gist of the statement indicates false implication, and parties known to each other and being implicated due past transaction between them, and deceased also being a person of bad character.

The entire case of the prosecution rest on circumstantial evidence. The question that need to be decided is whether the Accused shared the

common murderous intention with the person named in the indictment who is dead. Usually when two or more Accused are indicted for murder based on common intention the case of each Accused should be considered separately. Even if the main witness for the prosecution could be considered to be truthful, in the absence of direct evidence, court need to be extra careful, and consider whether the several proved and suggested circumstances would be sufficient to prove the guilt of Accused person. In criminal cases suspicious circumstance would not suffice to prove guilt. The entirety of the circumstantial evidence suggest some suspicious circumstances which could be categorized as followed:

- (a) Witness saw the Accused running behind or one behind the other after hearing gun shots and a distress call of the deceased. The other person who is deceased and named in the indictment had a gun with him.
- (b) Accused seen in the compound of the deceased four days prior to the incident.
- (c) Pellets recovered from the scene.
- (d) Some form of previous animosity suggested by main witness.
- (e) Medical report suggest gunshot injuries.

The position would have been somewhat different if the Accused was seen with a gun, and running. The Accused did not carry the gun, he merely ran behind the person with the gun who is no longer living. (a) to (e) above suggest suspicious circumstances but the cumulative effect of it cannot prove the guilt of the Accused, and to secure a conviction for murder. (a) to (e) is not sufficient to infer a common murderous intention we note the following case law on this point.

HE Queen Vs. Sumanasena 66 NLR 350...

In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence.

David & Another Vs. The Queen 71 CLW 75 ...

The two accused were indicted with the murder of one Abraham and both were convicted of murder. The deceased and three others were seated on the verandah of a house facing a public road, beside which is an embankment. The house and the embankment are on a higher level than the road. At about 8.30 p.m a gun-shot was heard and D, a witness, who was seated on the verandah, looked in the direction of the flash of the gun, and saw:

- (a) the first accused on the embankment with a gun in his hand, and that, in a moment, he turned and went along the embankment in a direction which would lead to his house; and

(b) The second accused about three or four feet behind the first accused, also going in the same direction.

The gun-shot injured Abraham and caused his death.

Held:

- (1) That the learned Commissioner had misdirected the Jury in summing up the evidence on the basis that the two accused persons had come together, when no witness supported the theory.
- (2) That the fact that the second accused hastily left the scene after the shooting was no serious indication that he was in any way concerned with the shooting and was quite compatible with his innocence.
- (3) That in the absence of evidence of any special friendship between the two accused persons, or of any association between them prior to the time of shooting, the fact that some three months earlier, the second appellant had accused the deceased of a gambling offence, remained a matter of slight suspicion only and ought to have been presented to the Jury as such.
- (4) That this was clearly a case in which the Commissioner should have directed the Jury:-
 - (a) that the inference of common intention must not be reached unless the evidence irresistibly leads to it;
 - (b) that the mere presence of a person at the scene of the offence does not justify an inference of guilt;
 - (c) that the evidence against each accused must be considered separately .

A somewhat similar cases to the case in hand may be noted.

King Vs. Jan Singho 41 NLR 573...

The case for the prosecution was that the deceased was shot by the first appellant and that the second and third appellants were in his company and were acting in furtherance of a common intention.

The evidence was that second and third accused were running away from the scene of the incident and that they were subsequently not seen in their home.

Held, that the facts did not lead irresistibly to the inference that such a common intention existed on the part of the second and third accused, that their actions were capable of an innocent explanation and that they were not guilty of the offence.

Wimalasena & Three Others Vs. The Queen 77CLW 01....

The 4 accused appellants were indicted on a charge of murder. Specific acts of shooting at the deceased were attributed to the 1st and 2nd accused. The 3rd and 4th accused were indicted on the basis of their having shared a common intention to be inferred from purely circumstantial evidence

The prosecution case, which the jury accepted in convicting all the accused of murder, consisted of:

As against the 1st accused, the fact that he fired the first shot, the evidence of a strong motive or ill will towards the deceased as disclosed by a complaint made by him to the Police made about eighteen hours before the shooting, as well as a definite threat uttered about three or four hours before the shooting.

As against the 2nd accused, the fact that he fired the second shot, the words uttered by him immediately before firing the shot that the deceased was not yet dead, and the finding of the weapon used for the commission of the offence in his house.

As against the 3rd and 4th accused, the fact of the relationship between themselves and the other two accused (the 3rd accused being the father of the 1st and 4th accused and the father-in-law of the 2nd accused); their arrival not together with, but 35 to 40 feet at least behind the 1st and 2nd accused; being armed with a katty and a club respectively; and dragging the body of the deceased in the river, after the deceased fell.

The Commissioner directed the jury as to the meaning of a common intention and explained to them the constructive liability of those who participated in a common criminal enterprise.

Held:

- (1) That although the proved circumstances in this case were consistent with the presence of a common intention, in a case based on circumstantial evidence, the jury should also be directed that before returning a verdict of guilty they should be satisfied that the proved circumstances should, not only be consistent with guilt but inconsistent with any reasonable hypothesis other than the guilt of the accused.
- (2) That the failure of the trial Judge to lay equal emphasis in his summing up on this aspect would be a non-direction which amounts to a misdirection, for in the absence of such a direction a jury would only consider whether the circumstances are consistent with guilt and would not even appreciate the necessity of applying their minds at all to the question whether those circumstances are equally consistent with innocence, in which event the verdict has to be one of not guilty.
- (3) That when the circumstances testified to are such that on careful analysis either view may be reasonably possible, it would in appropriate instances be necessary to direct the jury that if they are not able to make up their minds whether the proved circumstances are consistent only with guilt, their verdict should even then be one of not guilty as the case would in that event not have been proved beyond reasonable doubt.
- (4) That that the Court felt that in this case such a direction might in the circumstances well have compelled the jury to return a verdict favourable to the 3rd and 4th accused, particularly in view of the fact that the jury was divided as 5:2 even on the inadequate directions given.

(5) That that this was not an appropriate case in which the proviso to Section 5 of the Court of Criminal Appeal Ordinance (Cap. 7) could be applied.

I find that the learned trial Judge has not given his mind in the Judgment to the aspect of required murderous common intention. Nor can it be said that circumstances require an explanation from the Accused and in the absence of a proper explanation he need to be convicted. The dock statement of the Accused person gives some details. Mere presence and the fact that Accused has not explained his presence at the scene of the crime cannot prove his complicity in the Act. The prosecution must prove its case beyond reasonable doubt and not rely on suspicious circumstances. It is totally unsafe to act on the available evidence. I would also give examples of a misdirection by a trial Judge in the following case.

The Queen vs. Vincent Fernando 65 NLR 265...

It would be a misdirection to tell the jury that the statement of a deceased person as to the cause of his death which is admissible under section 32 of the Evidence Ordinance as a relevant fact is diminished in weight by the absence of cross-examination or that it is an inferior kind of evidence which must not be acted upon unless corroborated.

Common intention – Meaning of term – Penal Code, ss. 30, 31, 32

By section 32 of the Penal Code :-

“When a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him along.”

Held, that, to be liable under section 32, a mental sharing of the common intention is not sufficient; the sharing must be evidenced by a criminal act or illegal omission manifesting the state of mind.

Where the trial Judge, in the course of his summing up, said:-

“If there is a common intention, even if one of them does not do any act, he would still be liable as though he too committed the same act. The reason is the mere presence of those who shared a common intention gives encouragement and support and a sense of protection and security to the person actually committing the act.”

Held, that the direction was wrong in law.

In all the above facts and circumstances we cannot allow the conviction to stand. It is unsafe to act on the available evidence, especially when the main perpetrator of the crime is dead and no act done by the Accused-Appellant. Unsafe and unfounded inferences should not be drawn on suspicious circumstances. As such we set aside the conviction and sentence. Appeal allowed.

Appeal allowed.

W.M.M. Malinie Gunaratne J.

I agree.


JUDGE OF THE COURT OF APPEAL


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