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

Ranasinghe ArschchigeWasantha Lal

Accused-Appellant

C.A.Case No:-244/2013

H.C.Kalutara Case No:-459/05

V.

The Attorney General

Attorney General's Department,

Colombo 12.

Repondent

Before:-H.N.J.Perera,J. &

K.K.Wickremasinghe,J.

Counsel:-Samadara Jayasinghe for the Accused-Appellant

A.R.H. Barry S.S.C for the Respondent

Argued On:-25.02.2015

Written Submissions:-12.06.2015

Decided On:-20.11.2015

H.N.J.Perera, J.

The accused-appellant was indicted with six others in the High Court of Kalutara on five counts.

Count 1:- that on 27th March 1995 the accused named in the indictment was guilty of being a member of unlawful assembly with the common object of committing robbery on Kulatunga Arachchige Premasinghe thereby committing an offence punishable under section 140 of the Penal Code.

Count 2:-that at the same time and place and in the course of the same transaction causing robbery of cash and goods worth Rs106,500/-from Somapala Epasinghe thereby committing an offence punishable under section 383/146 of the Penal Code.

Count 3:-that at the same time and place and in the course of the same transaction, caused hurt by shooting at Epasinghge Somapala thereby committing an offence punishable under section 300/32 of the Penal Code.

Count 4:-that at the same time and place unlawfully entered the premises of Epasinghege Somapla thereby committing an offence punishable under section 436/32 of the Penal Code.

Count 5:-that at the same time and place committing robbery of cash and goods worth Rs.106,500/- from Epasinghege Somapala thereby committing an offence punishable under section 384/32 of the Penal Code.

The seventh accused died pending trial and the 2nd ,3rd ,4th ,5th and the 6th accused pleaded guilty to the charges in the indictment and sentenced accordingly.

The 1st accused-appellant pleaded not guilty to all the charges of the indictment and after trial was found guilty for the 1st ,2nd, 3rd and 4th counts and was sentenced to on –

Count 1- to 6 months R.I and to a fine of 20,000/- and in default to 3 months S.I

Count 2- 20 years R.I and to a fine of Rs.5000/- in default to a term of 3 months S.I. The 1st accused-appellant was also ordered to pay Rs,20,000/- as compensation to witness No.1 and in default to a term of 6 months S.I .

Count 3- 20 years R.I and to affine of Rs.5000/- in default to a term of 3 months S.I. The 1st accused-appellant was also ordered to pay a sum of Rs. 25,000/- as compensation to witness No.1 and in default to a term of 1 year S.I.

Count 4-10 years R.I and to a fine of Rs.5000/-in default to a term of 6 months S.I.

The sentences imposed on the 1st accused-appellant to run consecutively.

Aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

When this matter was taken up for argument before this court the learned Counsel for the accused-appellant confined this appeal to the convictions on count 1 and 2 of the indictment. It was also argued that although the learned trial Judge had convicted the accused-appellant on count 3 there is no evidence to convict the accused-appellant for attempted murder but only for causing hurt.

It was also further submitted by the Counsel for the accused-appellant the fact that the, 1st accused-appellant was identified, deadly weapons were used and that robbery was committed are not challenged in this appeal. But the fact that 1st and 2nd charges based on unlawful assembly had not been proved beyond reasonable doubt and that there was no evidence to prove the charge of attempted murder.

The injured person Epasinghege Somapala had very clearly stated that someone shot at him and that before he fell down four persons came

and held him. He has further stated that three of them had covered their faces and confirmed the fact that only four persons were there. He has stated that the person who did not cover the face entered the house and took his son with him. The other three persons asked him to be quiet. He has very clearly stated he did not see anybody else apart from the said four persons but he felt as though there were some others outside the house. Even the wife of the said witness, Mallawarachchige Prema Kusumalatha has clearly stated that three persons entered the house with her husband. She has very clearly stated that she saw only three persons that night. The son of the injured person Chamila Roshan also stated that he saw his father and behind him three or four persons and that he cannot exactly remember the number. Throughout his evidence he had said that he only saw three or four persons that night.

On perusal of the judgment of the earned trial Judge, it is very clear he has come to the conclusion that five or more persons had arrived at the house of the injured in view of the evidence given by the injured to the effect that he thought or felt that there were some more people outside the house.

Section 138 declares that an assembly of five or more persons is designated an "unlawful assembly" if the persons composing that assembly have one or more six specified objects. Section 139 creates the offence of being a member of an unlawful assembly, and section 140 prescribes the punishment for that offence. Section 146 provides that "if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

Where the requirements of this provision are satisfied, one member of an unlawful assembly may be criminally liable for the acts of another.

Therefore it is very clear that in the instant case there is no evidence to clearly establish beyond reasonable doubt that five or more persons did actually participate in committing the said offences as stated in the indictment.

In this case when one consider the evidence of the three eye witnesses it is clearly seen that the prosecution has failed to prove beyond reasonable doubt that five or more persons were involved in committing the said offence that night and that the first accused-appellant was one of the members of that unlawful assembly. It is paramount duty of courts to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise. Where the prosecution has failed to establish the charge beyond reasonable doubt, the benefit of the doubt should be given to the accused. Therefore the accused-appellant has to be acquitted on count 1 and 2 of the indictment.

It was further contended by the Counsel for the accused-appellant that the charge for attempted murder has not been proved beyond reasonable doubt.

In Rex V. Whybrow (1951) 35 Cr. App. Rep.141 the principle was clearly laid down that in the law elating to attempt, intention is the essence of the crime. If the charge is one of attempted murder, intent becomes the principal ingredient of the offence.

In Sudu Bands V. The Attorney General [1998] 3 Sri.L.R 375 it was held that the proper tests to apply to determine whether the act is an attempt are the equivocality test and the proximity test. Where an accused has gone far enough to make his action unequivocal then the equivocality test applies.

Intention is the essence of the crime. A distinction must be drawn between preparation and attempt. The act must be sufficiently proximate to the actual commission of the act.

In the instant case there is clear evidence to show that the victim was shot at when he was coming home in the night, in the dark with the aid of the light of a torch. There is evidence in this case to prove that a gun shot was in fact fired at him. The evidence led in this case also establish the fact that the victim was shot at close range. The witness had stated that the distance was about 12 to 13 feet. The doctor M.Sivasubramanium who examined the witness also had confirmed the fact that the victim have been shot at from a very close range one feet or maximum three feet away from the victim. The doctor had further stated that the injured area was about 4x4 square inches. It was spread at the elbow area of the right arm and the at the chest area of the right side. The said burning injuries and abrasions were due to the striking of unburned and heated gun powder and other waste when the gun was fired. The doctor has referred to the said injuries as tattooing injuries.

The Counsel for the accused-appellant had argued that the ingredient of an attempt to commit murder, which is relevant to constitute the offence has not been proved beyond reasonable doubt. In considering this submission this court has to take into account the positions at which the prosecution witness and the accused were stationed shortly before this firearm was used. It is manifest that the distance was only few feet which separated the two parties. It is very clear from the evidence led in this case that the accused-appellant had with others waited in hiding in the dark for the victim to arrive and had shot at him from a very close range. According to Doctor Sivasubramanium the victim has been shot at just 1 to 3 feet away from the victim .We hold that these acts clearly amounted to an attempt to commit murder in terms of proximity rule and equivocality test.

The acts established by the prosecution evidence satisfy both the proximity Rule and the Equivocality Test which are the correct criteria to determine whether the act of the accused-appellant constituted an attempt to commit murder. It is manifest that the contention of learned Counsel for the accused-appellant that the ingredient of an attempt to commit murder has not been established in the instant case is wholly misconceived both in fact and in law.

In the circumstances we set aside the conviction and the sentence of the accused-appellant for the counts 1 and 2 of the indictment and acquit the accused-appellant from the said charges. But we confirm and affirm the conviction and the sentence of the accused-appellant for count 3 and 4 of the indictment.

Accused-appellant acquitted on count 1 and 2.

Conviction for count 3 and 4 is affirmed.

Subject to the said variation the appeal is dismissed

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JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL