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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/14/2011

H/C Avissawella case No.55/2008

1. Ruwan Kapila Nawasinghe
2. K. A. Lalith Perera

ACCUSED

And,

1. Ruwan Kapila Nawasinghe
2. K. A. Lalith Perera

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Dr. Ranjith Fernando for the accused-appellant

Dappula Livera PC, Additional Solicitor General for the AG

Argued on: 28.05.2016, 03.07.2015, 28.01.2016

Written Submissions on: 24.02.2016

Judgment on: 03.06.2016

Order

Vijith K. Malalgoda PC J

The accused-appellants were indicted before the High Court of Avissawella for committing the offence of attempted murder of one Krishan Nalin Priyadarshana on 10th January 2003 by assaulting him, an offence punishable under section 300 read with section 32 of the Penal Code.

When the indictments were served on them, both accused-appellants elected to be tried before the High Court Judge without a jury. At the conclusion of the High Court trial the Learned High Court Judge Avissawella had convicted both accused and sentenced them for ten years Rigorous Imprisonment and a fine of Rs. 5000/- with a default term of 3 months simple imprisonment. In addition to the above sentence, compensation of Rs. 300000/- was ordered on each accused with a default term of one year simple imprisonment. Being dissatisfied with the above conviction and sentence the above accused –appellants have preferred the present appeal before this court.

Prosecution in this case had mainly relied on the evidence of the injured Nalin Priyadarshana. In addition to his evidence another witness who had witnessed the incident too had called to give evidence along with the police and the medical evidence.

The main issue which was to be decided by the High Court was that whether the act which resulted in inflicting a grevious injury said to have committed by the two accused as alleged by the prosecution or whether it was an accident as claimed by the two accused.

According to the evidence of the victim Nalin Priyadarshana, he had questioned the 1st accused-appellant with regard to an indecent proposal said to have made by him to his mother few days prior to the incident. Since thereafter some complains have been made against the victim by the 1st accused, of assault and also an attack on the lorry the 1st accused was working as the drive. On the day in question both parties had gone to Padukka Police Station with regard to the complaint on the attack on the lorry. The 1st accused was accompanied by the 2nd accused who is the husband of the owner of the lorry. The matter was settled at the police station and they left the police station around 10.00 am.

According to the witness, he had returned home thereafter and around 12.45 he had left his house to go to his sister's place in his uncle's three-wheeler. His uncle had dropped him at the main road and when the witness was walking towards the bus stand he had seen the lorry driven by the 1st accused parked by the side of the road about 25 meters away. Witness had seen both the 1st and the 2nd accused inside the lorry. Witness continued walked towards the bus stand and at one stage he looked behind after hearing a sound of a vehicle from his behind. At that stage he saw the lorry driven by the 1st accused, coming towards him at a slow speed with the 2nd accused inside and all of a sudden the lorry came and knocked down him at high speed. He was dragged for about 20 meters until the lorry was stopped. After that the two accused who got down from the lorry and had come up to him, dragged him out and attacked with an Iron rod. After attacking him he was put inside the lorry by the two accused and thereafter gone to the police station and to the Hospital and admitted him to the hospital.

The next witness summoned by the prosecution was one Baladara Arachchilage Chaminda who was running a tailor shop at Galagedara Junction. According to him, around 1.30 pm he had gone to Meepe Junction for some matter and on his way, after hearing a noise when he looked, he had seen the injured being dragged by the lorry driven by the 1st accused. Witness had further seen the two accused pulling out the injury and attacking him but he did not intervened due to fear but had taken steps to inform the uncle of the injured about the incident.

Kaluhakuruge Hemapala uncle of the injured too have given evidence confirming the position taken by the injured as well as witness Chaminda.

As against the said version placed before court, by the prosecution, the 1st accused-appellant whilst giving evidence on oath testified to the effect that, he is the driver of the lorry which involved in this incident and, the injured on several occasion had demanded money as ransom from him and due to this, he had lodged a complaint at the police station on 10.01.2003. On the day in question he had gone to the police station with the 2nd accused for the inquiry and the injured was warned by police on that day. Since the injured once again threatened the 2nd accused not to use a particular road, they had gone to the police to complain against the injured again and when they were returning at Meepe the injured had all of a sudden jumped to the moving lorry. Even though he had tried to avoid the accident, the injured had collided with the lorry. Thereafter they had taken the injured to the police station and on the instructions of police took him to the hospital and admitted him to the hospital by the 1st accused-appellant himself.

To confirm the above position Dr. Sunil Ananda Kumara of Padukka Hospital was summoned by the defence as a defence witness, and the said witness had confirmed that the injured Nalin Priyadarshana was admitted to the hospital by one Ruwan Kapila Nawasinghe.

Whilst making a dock statement, the 2nd accused-appellant had corroborated the evidence given by the 1st accused-appellant.

As observed by this court the incident referred to above had taken place during the broad day light on the main Avissawella – Colombo road closer to Meepe Junction. In addition to the injured, there is one other witness who had given evidence corroborating the prosecution version but it is observed that he too is an associate of the injured who had failed to intervene in the incident to rescue the injured when he was attacked by the two accused.

In the said circumstances, what is important to consider by this court is the independent evidence place before the trial court and to consider whether the Learned Trial Judge correctly considered the said evidence.

In his judgment the Learned High Court Judge has considered the Medical evidence as follows "කෙටි සායනික ඉතිහාසය මගින් පැ.ස.1 කියා ඇත්තේ 2003.01.10දින මෙම සිද්ධිය මීපේ-පාදුක්ක පාරේ සිදුවූ බවත් තමාව ලොරියේ හප්පා පුද්ගලයන් තිදෙනෙක් තමාට මුහුරු වලින් පහරදුන් බවත්ය.

තුවාලකරුව පරීක්ෂා කිරීමේදී දෙපා පණනැති වී ආකාරය සහ අනෙකුත් තුවාල වෛද්‍යවරයා නිරීක්ෂණයකර ඇත. තුවාලකරු වයස අවුරුදු 20ක් බවද හිසේ වම්පස සෙ.මී 3x4 තැලුම් තුවාලයක්, ඊට අමතරව රළු පෘෂ්ඨයක් මත ඇදියාමෙන් සිදුවියහැකි විශේෂ ආකාරයේ සීරීම් තුවාලයක්....

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...එම තුවාල අතරින් කොඳු ඇට පෙලේ අස්ථි භග්නය මාරාන්තික තුවාලයක් ලෙස වෛද්‍යවරයා හඳුන්වා දීඇත....

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...2,3,4 සීරීම් තුවාල සහ අස්ථි භග්නය ලොරිරථයේ ගැටමෙන් සිදුවියයුතුබවය. එහිදී තල්ලුවීමකින් හෝ විසිවීමකින් එකී අස්ථි භග්නය සිදුවියහැකි බවත් එසේ විසිවී වැටීමෙත් සමඟ ඇදියාම නිසා තුවාල සිදුවියහැකි බවත් සඳහන්කර ඇත...

...ඒ අනුව වෛද්‍යවරයාගේ සාක්ෂිය සමස්ථයක් වශයෙන් සලකන කල එම තුවාල එනම් අස්ථි භග්නය සිදුව ඇත්තේ පිටේ කොඳුඇට පෙලේ යන අතර අනෙක් සීරීම් තුවාල සිරුරේ පිටුපස ප්‍රදේශයේ දක්නට ලැබෙන බව පෙනීයයි. වෛද්‍යවරයාගේ සාක්ෂිය වඩාත් ගැලපෙන්නේ තුවාලකරුවන පැ.ස.1 නලින් ප්‍රියදර්ශනගේ සාක්ෂි සමඟය..

From the above it is very much clear that the Learned High Court Judge was mindful of both position placed before him when considering the Medical Evidence. He had further considered the evidence of the investigating officer SI Senevirathne with regard to the scene observation to the effect, "එම ස්ථානය නිරීක්ෂණය කිරීමේදී ,....එම ස්ථානයේ යම්කිසි දෙයක් ඇදීගෙන ගිය බවට වලවල් හැරී තිබුනා වැලිතීරුවේ.....යනුවෙන් සඳහන් කර ඇතිඅතර....."

It is further observed by this court that whilst considering the above evidence the Learned High Court Judge was mindful of the contradictions marked as වි-1-වි-5 and the omission marked during the trial and correctly concluded that those contradictions and omission do not go to the root of the case,

In this regard I am reminded of the decision in ***The Attorney General V. Sandanam Pittchi Mary Theresa SC Appeal 79/2008*** SC minutes 06.05.2010 where Thilakawardena (J) considered several Indian authorities with regard to the admissibility of contradictions and omissions to the effect;....Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (***Vide Boghin Bhai Hirji Bhai V. State of Gujarat AIR 1983 SC 753)*** witness should not be disbelieved on account of trifling discrepancies and omissions (***Vide Dashiraj V. The State AIR (1964) Tri 54***)

Out of the said contradictions, the contradiction which was produced marked වි-3 with regard to the history given to the Medical Officer, to the effect that three people attacked him, the witness when the said position was confronted with him had said that due to his condition at that time he may have said so and the said fact had been properly evaluated by the Learned High Court Judge in his judgment. We further observe that the Learned High Court Judge had properly evaluated the evidence given by the

1st accused-appellant and the dock statement of the 2nd accused-appellant and rejected the same for well considered reasons given by him. In this regard the Learned High Court Judge had considered the independent evidence given by the Medical Officer and the Investigating Officer with regard to the injuries received by the injured as well as the scene observation as referred to by me in this judgment. We further observed that the Learned High Court Judge has considered the fact that the two accused appellants had taken the injured to the police station and hospital immediate after the incident but, was mindful and also considered the fact that the injured was dragged for a distance which was corroborated both by medical and police evidence and decided to rule out the possibility of an accident as claimed by the two accused-appellant in their defence.

It is also important to consider at this stage whether the evidence led at the trial warrant a conviction under section 300 of the Penal Code.

The Medical Officer who testified before the High Court with regard to the injuries found on the injured person had clearly said that the injury No. 1 found on the spinal code had endangered the life of the victims. As observed by the trial judge the victim is paralyzed and not been able to walk after this incident.

According to the evidence of witness Priyadarshana, the vehicle driven by the 1st accused-appellant was parked by the side of the road when he saw it for the 1st time and thereafter when he looked back after hearing a noise had seen the vehicle coming towards him at a slow speed not on the road but right behind him on the gravel stretch. The fact that the incident had taken place outside the road, on the gravel stretch is confirmed by the evidence of the investigating officer. Immediately after the incident, the two accused-appellants have pulled the injured out of the lorry and assaulted him.

When this evidence is considered with the medical evidence led at the trial it is clear that the act committed by the 1st and the 2nd accused does not come under any other provision of law but it falls within the section 294 of the Penal Code.

Clause 3 of section 294 of the Penal Code reads thus,

"If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death

Illustration (c) given in the Penal Code explain the said clause as follows,

(c) A intentionally gives Z a sward cut or club wound sufficient to cause the death of a man in the ordinary cause of nature Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z's death.

Under the said clause it is necessary to establish two ingredients, firstly the intention and secondly the injury inflicted was sufficient in the ordinary cause of nature to cause death. As it was observed in this Judgment, possibility of an accident is clearly ruled out and the material clearly established that the act was an intentional act. Medical evidence has clearly established that the injury caused was sufficient in the ordinary cause of nature to cause the death.

As observed in the case of ***Rahman Ismail V. Emperor AIR 1939 252*** "for cases that fall within clause (3) it is not necessary that the culprits should have knowledge of death so long as the intended injuries are sufficient to cause death."

Under these circumstances it is correct to conclude that the material available in this case warrants a conviction under section 300 of the Penal Code.

The next important issue to be considered by this court is whether the 2nd accused-appellant had shared the common intention with the 1st accused-appellant at the time the offence had committed.

There is strong evidence before court that the 2nd accused-appellant was physically present inside the lorry from the time the injured had first seen the lorry when it was parked by the side of the lorry. After the lorry driven by the 1st accused-appellant knocked down the injured both of them had got down from the lorry and attacked the injured.

In the case of the ***Queen V. Mahathun 61 NLR 54*** it was held that, "to establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre- arrangement. It can be formed on the spur of the moment.

Subsequent to the attack on the injured both the accused were involved in taking the injured to the police station and to the hospital, pretending that the injured had received the injuries due to a road accident. These facts clearly indicates the fact that the two accused when causing injuries to the injured had acted in furtherance of common intention shared between them.

When considering the material already discussed in this judgment, I see no reason to interfere with the findings of the Learned High Court Judge and therefore I decide to dismiss this appeal. The conviction and the sentence imposed by the Learned High Court Judge is affirmed.

However considering the submission made by the Learned Counsel for the accused-appellants before this court, we decided to make order directing the jail sentence imposed on both accused-appellant to be implemented from the date of sentence i.e. with effect from 28.04.2011. Subject to the above variation of implementation of the sentence, the conviction and the sentence imposed is affirmed. Appeal Dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL