

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

1. Abdl Jenuth Nihath
2. Abdul Kareem Imamdeen

Accused-Appellants.

C.A.No. 262/2008

H.C. Trincomalee No.HC62/05

Vs.

Hon. Attorney General

Compliant Respondent

Before : M.M.A.Gaffoor,J. &
K.K.Wickremasinghe,J.

Counsel : Unica Fonseka for the Accused-Appellants.
S.Thurirajah ASG P.C. for the A.G.

Argued on : 24.06.2016

Decided on: 30.09.2016

M.M.A. Gaffoor,J.

This is an appeal from the judgment of the High Court of Trincomalee dated 19.12.2008, The accused - appellants (herein after referred to as

appellants) along with four others were indicted for committing the following offences,

01. That on or about 28.03.1997 being a member of an unlawful assembly to causing Death of certain Abdul Majeed thereby committing an offence Punishable under Sec.140 of Penal Code.

02. At the same time and the place in the course of the same transaction caused death of Abdul Majeed thereby committing an offence Punishable under sec.146 of Penal Code read with sec.296 of Penal Code.

03. At the same time and the place in the course of the same transaction caused death of Abdul Majeed in furtherance of common intention thereby committing an offence punishable under sec.32 of Penal Code read with sec.296 of Penal Code.

At the conclusion of the trial, the learned Trial Judge acquitted all the accused from 1st and 2nd charges framed against them and convicted the 1st and 2nd appellants for the 3rd Charge for lesser offence of culpable homicide not amounting to murder causing death of Abdul Majeed under Sec. 297 of Penal Code read with sec.32 of Penal Code and sentenced them to undergo 8 years R.I. and with the fine of Rs.10,000.00 each entailing a

default sentence of 06 months R.I. Being aggrieved by the conviction and sentence the appellants have preferred this appeal to this Court,

The facts of the instant case for the appeal as follows;

The appellants had altercation with 3rd witness and thereby animosity ensued from uttering filth words which were unbearable by the mother of the 3rd witness who is an elderly women to sleep at night while appellants were engaged in gambling in front of bakery situated in the vicinity of the residence of 3rd witness. Due to this unpleasant situation the 3rd witness told the appellants that she is going to make a complaint against them to the police, as a result the appellants angrily approached her and lifted their sarongs to her and called her indecent way , thereafter 3rd witness went to the police station and made a complaint against them. However the 1st appellants' father intervened and resolved this matter amicably.

Late in the evening of 28.03.1997, at 08.30 - 09.30 pm the accused entered the compound of the residence of the 3rd witness and they assaulted 3rd and 4th witnesses. The 4th witness was attacked by holding down by the use of a bicycle. The 3rd witness under attack by the 1st and 2nd appellants, on seeing this attack the deceased Abdul Majeed, father of the 3rd witness who came after performing his prayer rushed to aid of her the 1st and 2nd appellants had attacked deceased with use of shovel and piece of firewood

brought with them, as a result of this attack the deceased collapsed to the ground and was taken to the hospital where he was found dead.

The grounds of appeal presented by the Accused-appellant are not substantially capable of affecting the core of the case. This is due to the fact that there is no material contradiction as to the evidence given by the witnesses present. Sufficient evidence can be found as to the accuracy of the identification of the accused persons there was light at the time of the incident and such fact as to the light was established by the accused persons as well. The 3rd witness has also identified both the 1st accused Nihath and 2nd accused carried a piece of fire wood and a shovel from the bakery respectively. The defense was that these appellants had no hand what so ever in the crime for which they were convicted as they were not at the scene of incident at the relevant time.

After the oral submission the counsel for the parties filed written submission and the following matters were raised as grounds of appeal on behalf of the appellants and are briefly set out as follows;

01. Testimonial untrustworthiness of the prosecution witnesses.

02. There was no common intention between two appellants to commit offence for which they have been convicted by the High Court.

I shall now deal with the 1st ground of appeal urged by the learned counsel for the appellants. The learned counsel contended that testimonials of the prosecution witnesses are not trustworthy but at the conclusion of the trial, the learned Trial Judge acquitted all the accused from 1st and 2nd charges framed against them and convicted the 1st and 2nd appellants for the 3rd Charge for lesser offence of culpable homicide not amounting to murder causing death of Abdul Majeed under Sec. 297 of Penal Code read with sec.32 of Penal Code and sentenced them to undergo 8 years R.I. and with the fine of Rs.10,000.00 each entailing a default sentence of 06 months R.I. According to the evidence given by the witnesses on behalf of the prosecution Mohamed Nihar, Abdul Careem Ummu Raseena and Abdul Majeed Rukiya Umma were eye witnesses and their evidence were correctly corroborating each other.

The learned counsel for the appellant pointed out some of the contradictions. In view of these contradictions I have come to the conclusion that these contradictions were not capable of creating a reasonable doubt in the prosecution case as they are not material and this view is supported by the judgment of **A.G. vs Visvalingam 4 NLR at Page 286**. It was held that the court is bound to distinguish between material and immaterial contradictions of the evidence and therefore immaterial contradictions should not be taken in to consideration by the court and therefore the contradictions

marked by the Learned counsel for the appellant immaterial to be considered by the Court.

In the judgment of **Bhuginbhai Hirgibhai Vs State of Ujarat Air 1983 SC at Page 753** held that a witness cannot be expected to possess a photographic memory and to recall the details of incident. It is not as if a video tape played on the mental screen the power of observation which differ from person to person and witness cannot be expected to recall accurately everything.

In the judgment of **Samaraweera vs the AG 1990 (1) SLR at page 256** held that the Credibility of witness can be treated as divisible and against one and rejected against another the Jury must decide for themselves whether that part of testimony which is found to be false taints the whole or whether the false can safely be separated from true. By applying these principles enunciated in the judgments of the Superior Courts. The 1st ground urged by the counsel for the appellants is not tenable in law.

I shall now deal with the 2nd ground urged by the learned counsel for the appellants that there was no common intention between the two appellants to commit offence for which they have been convicted the learned trial judge having analyzed evidence given by both parties come to the conclusion that the act of causing death of deceased Abdul Majeed was perpetrated by these

appellants in furtherance of common intention and the evidence given by these appellant were not capable of creating reasonable doubt in the prosecution case.

In support of his finding the learned Trial Judge cited judgments of **King Vs Assappu 50 NLR at page 324, Mahbubsha Vs Emperor (1945) Air 47 Ban MCR - 941, Queen Vs Vincent Fernando 65 NLR at page 265 and Barendra Kumar Ghose (1925) Air (PC) - 1**. With all these cases it was held that the existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all the cases. The common intention can develop even during the course of an occurrence.

The learned counsel for the appellants cited the Judgement of the **Queen Vs Gopalapillai and another 61 NLR at page 160 and Fernando et al Vs the Queen 54 NLR at Page 255** in fact the facts and the legal principles analyzed with regard to Sec. 32 of Penal Code appears to be similar but the factual situation and the point of time of the incident were materially distinguishable per se, for the instant appeal.

Therefore, I am unable to find fault with the learned Trial Judge's conclusion with regard to evaluation of evidence of both sides and the analyzing of legal position of Section 32 of the Penal Code in the light of Sec.297 of Penal Code and for the above reasons, I reject both grounds urged by the learned counsel for the appellants.

In conclusion, for the reasons stated above I hold no merit in this appeal. Therefore I affirm the conviction and sentence imposed by the learned High Court Judge of Trincomalee on 19/12/2008.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL