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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Hathsarasinghage Wimal Premathilaka

Hatharasinghage Nilantha

Court of Appeal **Accused**
Case No.CA/180-181/2011 **Vs,**

And Now Between

Hathsarasinghage Wimal Premathilaka
Hatharasinghage Nilantha

Accused-Appellants

High Court of Embilipitya
Case No. HCE 26/2006 **Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before **: S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : Indica Mallawaratchy AAL with K. Kugaraja AAL for the first Appellant
Dharmasiri Karunaratne AAL for the second Appellant.
Chethiya Goonesekera DSG for the Respondent

Written Submissions : First Accused Appellant - 4th April 2018
Second Accused Appellant – 2nd April 2018
Respondent – 24th April 2018 and 27th June 2018

Argument on : 20th 28th June 2018

Judgment on : 13th July 2018

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JUDGMENT

S. Thurairaja, PC. J

Honourable Attorney General had preferred an Indictment against first and second Accused Appellants (Hereinafter sometimes referred to as First appellant/ Second Appellant) under section 296 of the Penal Code for committing the Murder of Moramudalige Somadasa (Sometimes referred to as the Deceased) at the High Court of Rathnapua and transferred to the High Court of Embilipitya after it was created. Both Appellants opted to have the trial before the Judge without Jury. After the trial the learned Judge found both appellants guilty for Murder and sentenced them to Death. Being aggrieved with the said conviction and sentence both appellants filed an appeal to the Court of Appeal.

First Appellant submitted the following grounds of appeal;

1. Common intention not proved.

2. Failed to address his Judicial mind as to whether the presence of 1st Accused Appellant was mere presence as opposed to participatory presence.

3. Failed to apply the principles governing the evaluation of Circumstantial evidence.

The Second Appellant submitted the following grounds of appeal:

1. Trial Judge did not consider the Dock Statement

2. Trial Judge failed to evaluate the evidence.

3. Common Intention was not established

4. Doubt in the credibility of evidence of the main witness

5. Cause of Death was not properly considered by the trial Judge.

The Prosecution led the evidence of Munasinghe Manamperi, (Prime witness) Senarath Yapa Gunawardana Karunawathie (wife of the 1st witness), Senanayake Mallika (Wife of the deceased), Dr. Jeewa Prasad Subasinghe , ASP. Loku kamedi Hennadige Roshan Silva (Police investigator), PS. 42611 Hewa Thanthrige Richard Peiris, Don Hendrick Laithsiri Velancious Jayamanna (Assistant Government Analyst), Jayasinghe Arachchige and Manjula Prasad Jayasinghe (Court interpreter). When the defence called both Appellants made a Statement from the Dock.

It is the version of the prosecution that on the 17th March 1998, the first and the Second appellants had murdered the Deceased and severed his head from the body. There is no eye witness to the incident.

Prosecution witness M. Manamperi testified in Court that he is residing at Galkandagoda also known as Urubokkakanda. On the day in question at around 11.30 in the morning he had taken his cattle for grazing and returned around 3 PM, there he had seen the 1st and the 2nd Appellants were clearing field (Chena) and setting on fire for cultivation. Evening about 6 PM he had gone to take bath to the nearby well, there he had heard an altercation between the appellants and the Deceased. This witness claims that he knows the Appellants and the deceased for a considerable period of time. When he was near the well he had a thud noise like someone hitting on a coconut, he then peeped in and found that the deceased was lying on the ground with some yellowish colour on the neck and whimpering, he was pointing at his neck, both appellants were looking at the deceased. 1st appellant was not armed and the 2nd appellant was armed with a knife. This witness got scared and ran to his home and told his wife there. He was so shocked he couldn't talk first and showed it in sign language. He testifies that it was around 6 PM and had sufficient light to see and identify the people.

On that night the brother and the son of the deceased came there in search of the deceased, witness due to fear in live in that jungle, had told them that he didn't see him. On the same night both appellants had come there and inquired from him who came there, did he saw the deceased and what happened to the deceased. The 2nd appellant entered the home and lit his cigar.

When the Police came on the first occasion this witness said that he didn't see anything and knows nothing. After the initial findings by the Police, he revealed what he knew about the incident. He told court that due to fear, he didn't even go to see the body of the deceased.

Senarath Yapa Gunawardane Karunawathie, wife of the above witness Manamperi, revealed to Court that her husband came home shocked and he couldn't speak and conveyed it by sign language. She also knows the Appellants well and identified from the dock.

Senanayake Mallika, wife of the deceased gave evidence and said that her husband was killed, she doesn't know what happened at the place of the incident. She had identified the body to the District Medical Officer (DMO).

Dr. Jeewa Prasad Subasinghe (DMO) gave evidence and explained that the head of the deceased was cut and severed from the neck. Since his body (in two parts) were exposed to animals. It was putrefied and damaged. He was of the view that the Cause of Death (COD) Head was severed after strangulation. He also had observed many injuries ante mortem and post mortem.

ASP. L.K.H.Roshan Silva, PS. H. T. R. Peiris and SI. Budhiratne gave evidence about the Police investigation. Police have recovered many items including the knife on a statement made by the appellants, under section 27(1) of the Evidence Ordinance. Police also used sniff dogs to assist them in the investigation the Dog also came up to the place of the 1st Appellant and stopped. Both appellants were arrested after 5 days ie. 22nd March 1998 at Galkandagoda, Haldola.

Assistant Government Analyst D. H. L. V. Jayamanna gave evidence and informed Court that they did the DNA test and found human blood in the Katy (Manna knife).

When the defence called the 1st appellant made an unsworn statement from the dock and said that he knows nothing about this incident Police got him to sign some papers. He also said he was kept in the Police station for 4 days.

The 2nd appellant made a very long Dock statement and told that he didn't do it and shifted the burden on the other.

While Dock statements amount to evidence, a statement of one Accused should not be used to implicate another accused. This principle of evaluating dock states was laid out in **The Queen v. Kularatne [1968] [71 NLR 529]** as follows.

> "we are in respectful agreement, and are out of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony".

And the decision in **Monis Appu v. Heen Hamy (1924) (26 NLR 303)** where Bertram C.J stated that

> "if one prisoner standing on the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court"

Considering the grounds of Appeal submitted by the both Counsels for Appellants it will be appropriate to consider altogether.

The Counsels complaint that the Learned Trial Judge has not considered the common intentions, participated presents and mere presence, concept of circumstantial evidence, Doc statement and the Cause of death was not considered.

This Court is mindful that this trial was taken up before a Judge without Jury. Therefore the previous decided cases which focused on address to the Jury by the Judge where facts and legal concepts were advised to the Jury. There a Judge is expected to give complete details of legal concepts to jury who were layman. If it is not told it is presumed that Jury was not in position to consider. Presently most of the Cases were taken up before a Judge who is legally competent judicially trained and sensitive to human affairs. There we cannot expect for the Judge to place it on writing the whole legal concept for what he learnt from the Law School up to this point further his human behavioural sensitiveness also cannot be explained in a Judgment. It is common factor that there are huge numbers of cases brought before the Courts, and everybody expects to conclude their matter as early as possible. If Judges start explain everything in a judgement he/she will not be able to conclude cases.

This does not mean that Trial Judge is empowered to give only his decision without reasons. As provided in our Code of Criminal Procedure Act the trial judge is expected to give adequate reasons for the findings.

It is the complaint here is that common intention is not discounted. I perused the judgement and find the Learned Trial Judge had analysed the facts of the case, and explained the basic concept of common intentions. According to available facts the Hatharasinhage Wimal Premathilaka, 1st Accused-Appellant and Hatharasinghage Nilantha 2nd Accused-Appellant were seen by the witness Munasinghe Manamperi on the day of the incident were clearing a land (Hena) and setting it fire. After a while when the witness went to have bath at the well he heard an altercation between the appellants and the deceased. The 1st Appellant heard saying "පස්සෙ බලාගමු"(Let us lookafter later) 2nd Accused- Appellant saying "මගෙ කොයි අයියත් එකයි"(who comes, I don't care). The quarrel continued for 5 minutes then witness heard thud noise like someone hitting on a coconut then he ran to the place which is very close by their he saw the deceased fallen on the ground whimpering"අ". Showing his neck which had yellow stain. He had seen the 1st Accused- Appellant was looking at the deceased who was on the ground 2nd Accused-Appellant was also looking at the deceased aimed with knife. The witness categorically says there was no one other than these three people in that evening.

In the late evening when the witness was at home with his wife brother and son of the deceased had came there inquiring the deceased. Due to sear witness had said he didn't see. After that in the same night the 1st Accused- Appellant and 2nd Accused-Appellant had came there and inquired from the witness who came in searching the deceased and also asked whether he knows what happened to the deceased.

These two Accused persons were from the same area but after the death of the deceased went somewhere for sometime.

Considering the above facts among other evidence at early shows these two appellants were together at the given time. The Learned Trial Judge has correctly found that these two appellants acted on common intention. Basic explanation and concept as available in the said judgement, there these grounds of appeal fail on its own merits.

Regarding the concept of the circumstantial evidence, we are of the view that the Learned Trial Judge has considered the essential ingredients which are necessary for this case.

In **Padala Veera Reddy vs. State of AP and others 1989 Ind law SC 31** it was laid down that when a case rests upon circumstantial evidence such evidence must satisfy the following tests.

1. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and;
4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence".

In **R vs. Clarke (1995) 78 A Crim R 226** it was held that,

"if evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction about the need to exclude such a possibility beyond reasonable doubt should usually be given. Such a direction should be give even if the evidence is very slight, if it could be interpreted as raising a reasonable possibility of innocence".

"if evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction about the need to exclude such a possibility

The 1st Accused- Appellant made a doc statement saying that he does not know anything of this incident. The 2nd Accused- Appellant made a lengthy doc statement except few facts it cannot be considered by the Learned Trial Judge. The provisions of the Evidence Ordinance will not permit Learned Trial Judge to do so.

Regarding the cause of death the Learned Trial Judge had adequately analyse the evidence of DMO and came to his conclusion. It is evidence before the trial court that the body of the deceased was found in two pieces, head and torso. Whoever committed this act it is very brutal and inhuman. The cause of death given by the DMO includes strangulation and injury to neck. Under these circumstances we have no reason to find deficiency in the judgement.

Considering all grounds of appeal we find that the Learned Trial Judge has adequately considered the facts and the law necessary to this case. Therefore all grounds facts on its own grounds.

After carefully considering the submissions by all counsels, judgements and the evidence finding of guilty of the Appellants are well founded. We have no reason to interfere with the Judgements. We accordingly we dismiss the appeal and affirm the conviction.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J
I agree,

JUDGE OF THE COURT OF APPEAL