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

In the matter of an Appeal against the order of the High Court of Matara under Section 316 of the Code of Criminal Procedure Act.

C.A.No.113-114/2016

H.C. Matara No.195/2009

01. Kotawila Vithanage Chandradasa
alias Madi Hichcha

02. Kotawila Vithanage Munidasa
alias Madi Raththa

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI J.**
COUNSEL	:	Gayan Perera for the 1st Accused-Appellant. Indika Mallawarachchi for the 2nd Accused-Appellant. Haripriya Jayasundera S.D.S.G for the respondent
ARGUED ON	:	23.07. 2018
DECIDED ON	:	26th September, 2018

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ACHALA WENGAPPULI, J.

The 1st and 2nd Accused-Appellants were indicted before the High Court of Matara for committing the murder of one *Kalinga Chandradasa* on or about 8th October 2006. After trial without a jury, the trial Court found both the Accused-Appellants guilty of murder and were sentenced to death.

Being aggrieved by the said conviction and sentence, both the Accused-Appellants, although represented by two Counsel, raised similar grounds of appeal. They relied on grounds of appeal that the trial Court had failed to consider whether both Accused-Appellants were actuated by a common murderous intention and it failed to consider the lesser culpability of them on the basis of sudden fight. The 1st Accused-Appellant

had, in addition, raised further grounds of appeal during the hearing of the appeal on the complaint that the items of evidence which are favourable to him had not been considered by the trial Court and there was no formal adoption of evidence .

In the circumstances, it is necessary to consider the evidence placed before the trial Court by the prosecution.

At the time of the trial, the only eye witness to the incident, *Wickramage Gunapala*'s evidence was admitted under Section 33 of the Evidence Ordinance and his deposition was read over before the Court. Witness *Thushara Champika,* although not an eye witness to the incident, provided some items of circumstantial evidence. Witness *Niroshan* is a son of the deceased and is the person who provided the 1st information to Police on the same night about the death of his father.

The prosecution case is that the deceased had arrived at the small grocery shop run by *Champika.* He was then dragged on to the middle of the road by the 1st Accused-Appellant. The 2nd Accused-Appellant also arrived there. Both the Accused-Appellants are brothers. Two of the Accused-Appellants have then assaulted the deceased. Then the 2nd Accused-Appellant brought a bicycle air pump kept at the shop. When witness *Gunapala* tried to intervene to prevent the assault on the deceased, the 1st Accused-Appellant had pushed him away after uttering obscenities.

Due to fear of harm, witness *Gunapala* did not complain to authorities, but conveyed what he saw to one *Jayanatha* at another funeral house, who in turn passed that information to *Niroshan*.

When *Niroshan* arrived at the scene, he saw his father fallen on the middle of the road and his motor bicycle was on top of him. He had thereafter taken his father to Hospital, where his death was confirmed upon admission.

The Police had recovered a broken bicycle air pump near the place where the assault took place and noted that its pumping shaft was bent.

During the post mortem examination, 20 external injuries were observed by the Consultant J.M.O. and 11 of them were lacerations in addition to 7 abrasions. Except for the two injuries noted on the penis of the deceased and two other injuries on his buttocks and thigh, all other injuries were concentrated on the head and face area of the body of the deceased.

Consultant J.M.O., Dr. L.B. M. Fernando, was of the opinion that the injury Nos. 1 and 3 have resulted in the fracture of the skull and intruded into the cranial cavity causing internal damage to the underlying brain tissues and a significant force is needed to inflict such injuries. He was of the opinion that the laceration could have occurred by assault with the bicycle air pump and its shaft. He further testified the blood sample taken

from the body of the deceased was analysed and it showed that it contained 75% of ethyl alcohol level in the blood.

The death was due to injuries to the skull and brain as a result of blunt trauma. In the report issued by the GENETECH (marked P2), the bicycle air pump had deceased's blood stains.

It is in the above quoted evidentiary background, the several grounds of appeal needs to be considered.

The complaint of adoption of evidence by the 1st Accused-Appellant has no merit as the learned High Court Judge who convicted both Accused-Appellants, at the commencement of further trial before him, clearly exercised his discretion conferred upon him under Section 48 of the Judicature Act with no objection by the Accused-Appellants.

The ground of appeal based on lesser culpability as the evidence revealed there was a "sudden fight" needs to be considered next.

In a recent judgment of this Court, the applicable principles in relation to the plea of sudden fight was reconsidered. In CA 131/2000, C.A.M. of 10.09.2008, de Abrew J held that in respect of exception 4 to Section 294 of the Penal Code;

" ... in order to derive the benefit of this special exception, the following ingredients will have to be fulfilled.

(a) The suddenness of the fight should be common to all participants and should not be one sided where one of the assailants with deliberate design to exploit the situation wades in and launches an assault.

(b) The quarrel should be sudden to all antagonists generating instantaneous heat of passion under the influence of which the offence is committed.

(c) The offender should not have an undue advantage such as attacking a defenceless unarmed person with a deadly weapon.

(d) The offender should not have acted in a cruel or unusual manner such as dealing repeated stab blows with great force on a defenceless adversary, where the intention to kill is not the product of passion generated instantaneously but more likely springing from malice or vindictiveness." (emphasis original)

When the evidence of the prosecution is considered against the principles as laid down in the said judgment, it is clear there was no

sudden fight but only a sudden attack on the deceased. The deceased has arrived at the scene on his own and then the 1st Accused-Appellant dragged him on to the middle of the road and assaulted him for no apparent reason. The 2nd Accused-Appellant also joined with him. They had some prior enmity against the deceased over an incident after consuming alcohol. The deceased was heavily intoxicated at this time and the use of the bicycle air pump and repeated blows on the head and face of the deceased clearly negates the possibility of a lesser culpability on a plea of sudden fight.

On the question of common intention, the 1st Accused-Appellant heavily relied on an answer given by *Champika* that during the attack on the deceased, he had said to the 2nd Accused-Appellant "are you trying to kill him ?". According to the 1st Accused-Appellant, this is a clear instance that he had no requisite common murderous intention that he shared with the 2nd Accused-Appellant to be found guilty of murder.

However, upon a closer examination of the evidence reveals a different picture. Witness *Champika* did not see the attack on the deceased. He did not see even the 2nd Accused-Appellant taking the air pump from his boutique. He had simply overheard some utterance. When his evidence is considered it is noted that this particular witness, although not an eye witness to the incident, gave evidence as if he witnessed the incident. That appears to be his manner of speech. It is his evidence he could not intervene to prevent the assault on the deceased due to his physical

disability and therefore he put up shutters to his shop when the attack on the deceased had commenced and went into his house located adjacent to the shop. He only knew that the Accused-Appellants were assaulting the deceased. As the 2nd Accused-Appellant had the air pump, he thought it was the 1st Accused-Appellant who uttered those words.

Evidence of witness *Gunapala* is clear on this aspect. He tried to intervene during the attack but was chased away by the 1st Accused-Appellant, after the 2nd Accused-Appellant picked up "something" from the shop, which he later identified as the bicycle pump.

Obviously, *Champika* did not see *Gunapala's* intervention. He had mistakenly attributed *Gunapala's* act of intervention to the 1st Accused-Appellant. The continued role played by the 1st Accused-Appellant from the initial stage of the attack on the deceased to the last, and then by putting the motor cycle on to the body of the deceased, with the help of 2nd Accused-Appellant clears any reasonable doubt as to the presence of common murderous intention.

The line of cross examination adopted by the 1st Accused -Appellant adds credence to this proposition. The question put to *Champika* was that it was the 1st Accused-Appellant who prevented an attack on the deceased on a previous occasion. Then in answer to that question *Champika* said the words attributed to him. But the 1st Accused-Appellant persisted with his

question referring to the earlier incident and not the incident as a result of which the death of the deceased was occurred. Thus, it is clear from the evidence that the 1st Accused-Appellant's position put to the witness is that it was on a previous incident he tried to prevent the attack and not at that particular time.

Learned High Court Judge had reproduced this segment of evidence in his judgment and yet decided that the 1st Accused-Appellant has shared the common murderous intention with his brother. The repeated blows on the head and face of the deceased with the air pump with significant force, clearly established the murderous intention of the 2nd Accused-Appellant.

The applicable principles are clearly laid down in ***Raju and Others v Attorney General*** (2003) 3 Sri L.R. 116, where it is stated that;

> *"In the case of King v Assappu 50 N.L.R. 324 Dias, J. sitting with Nagalingam, J. and Gratiaen, J. held that in a case where the question of common intention arises the Jury must be directed that –*
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> *(i) The case of each accused must be considered separately.*
>
> *(ii) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
>
> *(iii) Common intention must not be confused with same or similar intention entertained independently of each other.*

(iv) *There must be evidence either direct or circumstantial of pre- arrangement or some other evidence of common intention.*

(v) *The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.*

Justice Sirimanne in the case of Punchi Banda v The Queen 74 N.L.R.494 refers to the legal principle laid down in King v Assappu (supra) that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32 of the Penal Code."

Thus, it is clear that the trial Court had correctly applied the relevant legal principles in coming to its finding. Therefore, we affirm the conviction and sentence imposed on the Accused-Appellants by the High Court of Matara and accordingly proceeds to dismiss their appeal.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL