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

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

C.A.No.245-247/2016
H.C. Kegalle No.2481/2006

01. HerathMudiyanselage Ranjith Bandara
02. Heeralugedara Ananda Bandara
03. HerathMudiyanselage Sisira Ranjigh Kumara.

Accused-Appellants

Vs.

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

Respondent

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BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI J.**
COUNSEL	:	Nimal Jayasinghe with K. Jayasinghe for the 1st, and 3rd Accused-Appellants. Neranjan Jayasinghe for the 2nd Accused-Appellant Parinda Ranasinghe (Jr.) (P.C.) A.S.G for the respondent
ARGUED ON	:	03.10. 2018
DECIDED ON	:	10th December, 2018

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ACHALA WENGAPPULI J.

The 1st and 3rd Accused-Appellants and the 2nd Accused-Appellant, in their separate petitions of appeal, seek to set aside their conviction by the High Court of *Kegalle* for the murder of *Alutwattegedara Samarasinghe* on 31st March 2005 and the imposition of the sentence of death consequent to that conviction.

Being aggrieved by the said conviction and sentence, the 1st Accused-Appellant sought to challenge its validity on the basis that the evidence presented before the trial Court by the prosecution does not

support a conclusion that he had entertained a murderous intention, since only a single stab injury that had been inflicted on the deceased. In relation to the appeal of the 3rd Accused-Appellant, he sought to challenge his conviction based on the misapplication of the concept of common intention by the trial Court. The 2nd Accused-Appellant also challenged his conviction on the same basis.

In view of these grounds of appeal raised by the three Accused-Appellants, it is incumbent upon this Court to consider the evidence presented by the prosecution in support of the charge of murder.

The only eye witness to the incident, *Sriyalatha,* is the wife of the deceased. On the day of the incident, there was a wedding function in a neighbouring house and the witness and the deceased were helping them out. The incident took place in the late evening. The deceased was serving liquor to the guests at this function to which the 1st Accused-Appellant too was a guest. The deceased had served liquor to him as well. The 1st Accused-Appellant had enjoyed himself at the function and even played a musical instrument to entertain the guests.

Late in the evening the deceased left the function to return to his house in order to take some medication which had to be taken before 10.00 p.m. His wife accompanied him. On their way, they came across a group of persons consisting of the three Accused-Appellants and another unidentified person. This was near a pandal erected to welcome the guests who arrive for the function. It was decorated with light bulbs.

As they were passing the group, the 1st Accused-Appellant grabbed the deceased from his shirt and said "නියම ඔවුලාව" and stabbed him on the

front of his chest. The 2nd and 3rd Accused-Appellants too had held the deceased by his shoulder. Having received the stab, the deceased fell on the ground and the witness raised cries for help. The unidentified person did nothing.

It is stated by the medical officer who performed the post-mortem examination on the body of the deceased that he had died as a result of a penetrating stab injury to the ventricle of his heart, which also pierced right atrium. The medical officer had observed only one stab injury externally and it was located 8 cm left to the mid line and 2 cm below left nipple. In his evidence, the medical officer expressed his opinion as this stab injury is sufficient to cause death in the ordinary course of nature.

In fact, the deceased was operated on at the hospital, but later succumbed to his injury in spite of surgical intervention to save his life.

The Police have arrested the three Accused-Appellants who appeared to have evaded their arrests. A knife was recovered by the Police, upon the information provided by the 1st Accused-Appellant at his house and the medical officer was of the view that it could have been used in the infliction of the external injury observed on the body of the deceased. The Government Analyst did not identify any blood on its blade.

In support of his ground of appeal, the 1st Accused-Appellant contended that there was only a single stab injury was inflicted and coupled with the admission by the eye witness that he had no prior animosity with the deceased, there was insufficient evidence to conclude that he entertained a murderous intention.

This submission of the 1st Accused-Appellant, is essentially relies on the fact that there was only a single stab injury. The intention that could be gathered from that fact had been considered in several judicial precedents. Majority of these precedents favours the view that it could be taken as a consideration that could negate any murderous intention and the judgment of ***Weerappan v The Queen*** 76 N.L.R. 109 is one such oft quoted authority. However, it is apparent that his Lordships in that instance have decided to reduce the criminal liability of the appellant to culpable homicide not amounting to murder from murder upon the basis that there was no direction to the jury as to the circumstances that were available in the evidence which "*... might indicate the absence of murderous intention*".

On the other hand, the issue whether a single stab injury could reduce the offence of murder to that of culpable homicide was considered in the light of the statutory provisions as set out in limb three of Section 294 of the Penal Code by this Court in ***Farook v Attorney General*** (2006) 3 Sri L.R. 174. Having noted that the injury caused to the deceased had high probability of causing death, the Court of Appeal has proceeded to affirm the conviction for murder adopting reasoning of judgments of the Indian Supreme Court.

In ***Somapala v The Queen*** 72 N.L.R. 121, the Court of Criminal Appeal, having analysed Sections 293 and 294 of the Penal Code, held thus:-

> "*... while the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either-*

(a) the offender intends to cause bodily Injury and has the special knowledge that the intended injury is likely to cause the death of the person injured, or

(b) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death."

The single stab injury that had been inflicted by the 1st Accused-Appellant had penetrated the chest cavity of the deceased, reached his heart and caused a cut in ventricle. The act of the 1st Accused-Appellant of grabbing the deceased by his shirt had thrusting a knife deep in to chest cavity right above his heart is considered in the light of these judicial precedents, it is reasonable to conclude that the 1st Accused-Appellant has had the requisite knowledge that he has inflicted an injury so imminently dangerous and there was high probability of causing death. His utterance that "හියම වෙලාව" and prior attack on *Asela Bandara* (PW3) supports a conclusion that he was not under the influence of liquor to the degree of incapacitating him to form a murderous intention (as per ***Dayaratne v Republic of Sri Lanka***(1990) 2 Sri L.R. 226) and upon seeing the deceased, who was on his way home to take his regular medication, he stabbed him for no apparent reason.

Therefore, it is our firm view that the conviction of the 1st Accused-Appellant for the offence of murder by the trial Court is justified and his appeal ought to be dismissed on that account.

In respect of the 2nd and 3rd Accused-Appellants, it was submitted that they did not share a common murderous intention with the 1st Accused-Appellant. The 2nd Accused-Appellant submitted that evidence presented by the prosecution even suggests that he may have held the deceased by his shoulder to protect the deceased from stabbing.

The 3rd Accused-Appellant is the son of the 1st Accused-Appellant. The 2nd Accused-Appellant had no such relationship either to the deceased or to the 1st Accused-Appellant. It is clear from the evidence that few minutes prior to the incident of stabbing of the deceased, when the 1st Accused-Appellant had attempted to stab witness *Asela Bandara,* he was with a group of people. It could well be that the 2nd and 3rd Accused-Appellants were there with the 1st Accused-Appellant at that time. They did not do anything. Only the 1st Accused-Appellant showed any aggression on the witness. There is no evidence that either of these two Accused-Appellant's had any motive against the deceased.

The incident of stabbing, as described by the wife of the deceased, happened suddenly with no warning. The words of the 1st Accused-Appellant itself did not convey any imminent danger. The sequence of the act of stabbing is that the 1st Accused-Appellant had grabbed the passing deceased by his shirt and then stabbed him. There is no evidence of a time gap between the grabbing and stabbing. In this sequence, there is no role to play for any other person. The witness then claimed that the 2nd and 3rd Accused-Appellants have held the deceased while the 1st Accused-Appellant stabbed. No further details were elicited by the prosecution as to the role played by these two Accused-Appellants prior to the grabbing and after the act of stabbing.

When the evidence presented before the trial Court is considered in its proper perspective in the light of above considerations, it appears that the 2nd and 3rd Accused-Appellants may have held the deceased only after the act of stabbing. Even if they have held him while the act of stabbing, that fact alone is not sufficient to satisfy the burden on the prosecution to prove beyond reasonable doubt that these two Accused-Appellants were actuated by a common murderous intention with the doer of the act when it failed to place sufficient evidence to establish that there is "... evidence, direct or circumstantial, either of pre arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence", which enable the trial Court to "... conclude that the co accused had the common intention with the doer of the act, and not merely the same or similar intention entertained independently of each other" as per the judgment of the Court of Criminal Appeal in ***The King v Asappu*** 50 N.L.R. 324.

There is no evidence led before the trial Court to exclude the possibility of intervention to prevent the attack, as claimed by the 2nd Accused-Appellant before this Court. The resultant position is that the evidence presented by the prosecution is clearly insufficient to impute criminal liability on the 2nd and 3rd Accused-Appellants under Section 32 of the Penal Code for the commission of murder beyond reasonable doubt that they entertained common murderous intention. In these circumstances, we hold that there is merit in the ground of appeal presented by the 2nd and 3rd Accused-Appellants and their appeals are therefore entitled to succeed.

In view of the above, we make the following orders;

1. The conviction of the 1st Accused-Appellant and his sentence is affirmed by dismissing his appeal.

2. The conviction and sentence imposed on the 2nd and 3rd Accused-Appellants are set aside by allowing their appeal.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL