

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

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

C.A.No.280-281/2013

H.C. Colombo No.HC 3260/2006

02. Kosgodage Jayasiri Pushpakumara

03. Sarath Weerasinghe

Accused-Appellants

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Amila Palliyage with Nihara Randeniya and
Duminda de Alwis for the 1st Accused-
Appellant.
Indika Mallawarachchi with K. Kugaraja for the
2nd Accused-Appellant.
Chethiya Goonesekera D.S.G. for the respondent

ARGUED ON : 04th October 2018

DECIDED ON : 18th January, 2019

ACHALA WENGAPPULI J.

The 2nd Accused-Appellant and 3rd Accused-Appellant (hereinafter referred to as the 1st Appellant and 2nd Appellant respectively) have individually appealed against their conviction and sentence imposed by the High Court of Colombo. The two Appellants were indicted along with the 1st Accused for conspiracy to commit murder of *Weerahennedige Nandasena* during the period commencing from 8th September 2003 and ending with 9th September 2003. The 1st Appellant was also indicted for murder of the said deceased as the 2nd count on the said indictment while the 2nd Appellant was indicted for abetment of the said murder.

After trial without a jury, the trial Court in its impugned judgment, acquitted the 1st Accused on the basis that he was not involved neither in the commission of the offence of murder of the deceased nor has he abetted the said murder. The trial Court, however, found him guilty of the offence of criminal assault or force, punishable under Section 343 of the Penal Code, when he threatened the witnesses after the murder of the deceased.

The 1st Appellant sought to challenge his conviction and sentence of death upon the ground that the prosecution has failed to establish their case beyond reasonable doubt. The 2nd Appellant's ground of appeal was the evidence of the prosecution does not reveal that he entertained a common murderous intention with the 1st Appellant.

Prosecution presented its case primarily on the evidence of the wife *Champika Perera* and the son of the deceased *Sandaruwan Fernando* who presented eye witness accounts of the sequence of events that led to the violent death of the deceased.

The deceased was employed as a labourer of Panadura Government Hospital and to supplement the family income, operated a small grocery shop in the front portion of their half completed two storied building in which they also lived in. The two Appellants are their neighbours who used to buy grocery items from their shop.

In the evening of 8th September 2003, wife of the 2nd Appellant bought groceries from the shop at about 7.30 p.m. and only paid Rs. 50.00 when her total bill was Rs. 100.00. The deceased then expressed his displeasure by stating to the woman that her husband should pay up his

old debts. The 2nd Appellant, who thereafter learnt this conversation had shouted at the deceased by coming to the grocery.

At about 1.30 a.m. in the same night, *Champika* heard the 1st Appellant, who is known to her as "Baba", tapping on their rear door. He himself identified as "Baba" and wanted to buy a cigarette. The deceased then gave him a cigarette through a small opening of about 1 ½ inches of the front door. The 1st Appellant then remarked " වෙනදටත් සිතරටී දෙනෙන ඔහොමද, දොර ඇරඹන්න". Sensing trouble, the witness signalled her husband not to. When the deceased tried to remove the padlock, the two Appellants forced their way into the grocery by kicking on the door. The 1st Appellant had a manna knife tucked in his back and pulled it out. He then ordered the deceased to sit on the stairway to the 1st floor while holding the knife. In spite of witness's plea, the 1st Appellant struck the deceased with the manna knife and the deceased then ran up the stairs.

When the witness held the 1st Appellant who attempted to ran after the deceased, the 2nd Appellant intervened and held her by her hair. He then put her down and put a ligature around her neck with the black cloth he had used to cover his face up to that point of time. This act of the 2nd Appellant afforded an opportunity for the witness to identify him. She said " සරන් අයිසෙ ඔයන් ආටද?" He then put a gag on her and held a manna knife against her neck.

The 1st Appellant has then shouted at the 2nd Appellant " මිඩ්ටත් මරන්න". Hearing this command, the deceased turned back, and he was then struck on his neck with the manna knife by the 1st Appellant. After the attack on his neck, the deceased fell down crashing a glass sheet in the

process. At that time, her two sons have held on to the 2nd Appellant pleading with him not to kill their mother. The 2nd Appellant then loosened his grip on her by stating that “ උම අපට සිගරට් එකක් හරි ඉයට දීම නියෙන නිසා අප අරිනව ”.

Thereafter, the two appellants have left the shop. The witness shouted for help and only her parents, who lived nearby, have responded. Her son, *Sandaruwan* gave evidence consistent with his mother.

It is the evidence of the medical expert that the deep cut injury on the neck of the deceased has severed cervical vertebra the carotid artery, jugular vein, trachea and spinal cord and thereby resulting the death of the deceased, in a very short time interval. Of the 10 external injuries that were seen on the body there were several “defensive injuries” noted by the medical expert as spoken to by the lay witnesses.

During the investigations, the 1st Appellant was arrested in the night of the 9th of September 2003 at *Jayanthipura, Polonnaruwa* and a manna knife was recovered upon the information provided by him at his house in *Angulana* which was covered with a black plastic bag placed near the boundary fence.

The 1st Appellant made a statement from the dock denying any involvement in the death of the deceased whilst claiming that there were rumours that he was having an extra marital affair with the wife of the deceased. The 1st Appellant, wanting to clarify the situation with the deceased, had visited the deceased in the night. After some time the deceased screamed that he is trying to murder him and he left the house. After his arrest the police recovered a knife and a club from his house.

The 2nd Appellant gave evidence under oath. He stated that when he was passing the deceased's house, he heard the cries raised by the deceased. He had a knife with him. He had then entered their house to enquire the reason for the commotion. At that time, he saw the 1st Appellant chasing after the deceased, armed with a manna knife. At that time *Champika* fell down at his feet when she ran after the deceased. He held her by her hair and at that moment the 1st Appellant shouted at him to "kill her". Thereupon witness *Champika* stood up with the help of the 2nd Appellant. He also saw the 1st Appellant returning with his knife.

The trial Court had considered the evidence of the prosecution as well as of the Appellants. It had accepted the prosecution evidence as a truthful and reliable account of the incident that resulted in the death of the deceased while opting to disbelieve the evidence presented by the Appellants. This conclusion is justified since the evidence of the Appellants contained certain claims that had not been put to the prosecution witnesses during their cross examination.

It had been noted by the trial Court that the evidence of the prosecution is consistent, probable and the accusation against the Appellants was made soon after the incident.

We have carefully considered the evidence presented before the trial Court by the prosecution as well as the Appellants and are of the firm opinion that the conclusion reached by the trial Court is quite justified owing to the nature of the evidence presented by the prosecution.

The Appellants were convicted of the conspiracy to murder by the trial Court. In *The King v. M.E.A. Cooray* - 51 N.L.R. 433 their Lordships have clarified the applicable law as follows:-

"Under our law as it now stands it is the agreement per se to commit or abet a criminal offence which is intended to be penalised, whether or not an overt follows the conspiracy. So long as the existence of the conspiracy can be proved the common concurrence of minds of more minds than one - with a view to achieving an object which is an offence under our law that constitute criminal conspiracy under the Penal Code."

The evidence placed by the prosecution against the Appellants are sufficient to prove beyond reasonable doubt that they had the common concurrence of minds and also physical manifestations of such concurrence. They lured the deceased to let them into his grocery that night, had the necessary weapons to carry out the individual tasks that were agreed upon after meticulously planning the attack on the deceased. The real threat of death posed by the 2nd Appellant on the witness *Champika* made the deceased to abandon his attempt to escape his imminent death. The command by the 1st Appellant to kill the witness also is a clear indication that they knew who their target was and the reason given by the 2nd Appellant for his decision to spare the life of *Champika* reiterates that prior agreement.

The manner of execution of the fatal attack on the deceased by the 1st Appellant has proved beyond any doubt as to his intentions. The near

severance of the neck of the deceased with a manna knife is an act done with an obvious murderous intention. There is not a single circumstance before the trial Court to consider the lesser culpability since the intention of the 1st Appellant was obvious, when he struck on the neck of the deceased with such force to cut the 7th cervical vertebra and several blood vessels, using a manna knife.

In relation to the count of abetment to murder levelled against the 2nd Appellant, the applicable legal principle could be found in *King v Marshall* 51 N.L.R. 157. It was iterated by the Court of Criminal Appeal that:-

“ ...mere presence with the intention of giving aid to the principal offender was not enough. There must also be the doing of something, or the illegal omission to do something, in order to facilitate the commission of the offence by the principal offender.”

When the role played by the 2nd Appellant in the attack that resulted in the death of the deceased is considered in the light of the above quoted principle of law and the motive attributed by the prosecution to commit the murder, it is clear that it was the 2nd Appellant who instigated the 1st Appellant to engage in this heinous crime over the perceived “insult” of reminding him of his old debt. He enticed the 1st Appellant to commit murder over their “friendship”. However, in giving evidence he had opted to hand over total responsibility on the 1st Appellant but the trial Court had obviously and correctly decided not to believe him.

The 2nd Appellant’s conduct during the necessarily fatal attack on the deceased, more than enough to find him guilty of abetment of murder.

In view of the above reasoning we are of the firm view that there is absolutely no merit in the appeal of the Appellants and their appeals ought to be dismissed.

Accordingly, we affirm the convictions and sentences of the 1st and 2nd Appellants . The appeals of the 1st and 2nd Appellants stand dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J

I agree.

JUDGE OF THE COURT OF APPEAL