

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 under
Section 331 of the Code of Criminal
Procedure Act No.15/1979.

C.A.No.91/2013

H.C. Kurunegala No. HC 355/2006

01. Abdul Wahid Haprul Asad
02. Millawane Gedara Buddhika Ruwan
Kumara

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULLI, J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellants.
Chethiya Goonesekera D.S.G. for the
respondent.

ARGUED ON : 06th May, 2019

DECIDED ON : 21st June, 2019

ACHALA WENGAPPULLI, J.

This is an appeal by the 1st and 2nd accused-appellants (hereinafter referred to as the "1st and 2nd appellants" respectively) against their conviction for multiple counts of murder and the consequent imposition of penalty of death.

The indictment that had been presented to the High Court of *Kurunegala* contained 152 counts including 40 counts of murder, 36 counts of attempted murder against the 1st appellant while it is alleged that the 2nd appellant aided and abetted the 1st appellant to commit said offences. At the conclusion of the trial, the 1st appellant was found guilty to 33 counts of murder and 27 counts of attempted murder. The 2nd appellant was

found guilty to 33 counts of abetment to murder and 27 counts of abetment to attempted murder.

Prosecution case is that the 1st appellant, being the driver of the bus bearing registration number NWHT 2520, packed with passengers to its capacity, was on its way to *Colombo*. Upon reaching the *Yangalmodera* level crossing, on A6 highway the 1st appellant made an attempt to drive around the closed rail gate of the level crossing with its red light burning in spite of the fact that onlookers have warned him of the oncoming *Colombo-Kandy* intercity express train. The train collided with the passenger bus at the middle of its body while it was sitting right on the rail track, resulting in extensive damage to the passengers and the vehicle which was then further damaged due to the fire that erupted immediately after the said collision. The incident left 40 persons dead and at least 27 persons seriously injured. The 2nd appellant was the conductor of the bus and it is alleged that when the gate of the level crossing was closed he had positioned himself on the rail track, acted as a lookout and beckoned the 1st appellant to drive through the opening left on the wrong side of the road on to the rail track.

Learned Counsel for the appellants, having made submissions in support of the appeal of the appellants, contended that the appellants could not have entertained a "murderous intent" in the teeth of the evidence on record and cited several portions of evidence led by the prosecution, which are reproduced below, in support of the said contention.

- a. the vehicle had been halted behind 2-3 vehicles which had stopped at a railway crossing as half gates had been lowered and red light burning
- b. there had been a 'S' bend along the rail track at the approach to the crossing, therefore an approaching train could not be seen at a distance
- c. the second appellant had alighted from the vehicle gone up to and examined the crossing and beckoned the first appellant to bring the vehicle to cross the track
- d. when the vehicle had crossed the track halfway, suddenly the train had appeared and crashed into it resulting in the deaths and injuries to passengers
- e. the first appellant was also seriously injured and struck in the driving seat. He was pulled out and hospitalised for a long period. The second appellant who had got into the bus just before it crossed was also seriously injured and hospitalised
- f. there is no evidence that the appellants in fact had seen the train approaching
- g. there is no evidence that the appellants attempted to jump out and flee from the bus in view of the inevitable collision of the train and bus
- h. independent witness *Wimalaranga* and the gate keeper *Jayaratne* testified that the first appellant had halted the bus at the gate and proceeded forward once given 'all clear'

signal by the second appellant which was obviously done as there was no train in sight.

In these circumstances, it was submitted by the learned Counsel for the appellants that the evidence presented by the prosecution clearly points to an error of judgment on the 1st appellant which resulted in the commission of a rash and negligent act which could have been made culpable under Section 298 of the Penal Code and therefore the appellants would have been found guilty to that offence.

Learned Deputy Solicitor General, in supporting the conviction of the appellants, contended that the conduct of the appellants had "shown nothing but complete disregard for human life and safety of his passengers to whom he had an utmost responsibility to provide with safe transportation" and therefore moved this Court to affirm the convictions entered against them by the High Court of Kurunegala. He cited an extensive list of judicial precedents and texts which dealt with the "knowledge" referred to in the Fourth Limb Section of 294 of the Penal Code.

Since the learned Counsel for the appellants argued that the 1st appellant had no murderous intention in his mind when he drove the passenger bus on to the rail track, this contention must be examined in the context of the applicable law and the relevant judicial precedents.

The case for the prosecution was presented not on the basis that the 1st appellant had driven the ill-fated passenger bus onto the rail track with intention to cause death of a particular individual or some individuals or that he intended to cause bodily injury which is likely to cause death to

such individuals. Similarly, the evidence does not reveal that he intended to cause bodily injury which is sufficient in the ordinary course of nature to cause death to a particular individual or individuals. The first three limbs of Section 294 of the Penal Code which are based on "intention" and therefore has no application to the instant appeal.

It is clear that the prosecution had relied on the Fourth Limb of Section 294 of the Ceylon Penal Code, when it alleged that the 1st appellant committed murder when he drove a bus with passengers through a level crossing when there were clear warnings of the arrival of the train.

Fourth Limb of Section 294 is as follows ;

"If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as it likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Dr. Gour, in his treatise of *The Indian Penal Code* (13th Edition, at p.979) states that;

"The clause "fourthly" comprehends generally the commission of imminently dangerous acts which must in all probability cause death or cause such bodily injury as is likely to cause death. When such an act is committed with the knowledge that death might be probable result and without any excuse for incurring

the risk of causing death or injury as is likely to cause death, the offence is murder. This clause, speaking generally, covers cases in which there is no intention to cause death of any one in particular."

In the said limb, there is no mention of any "intention". Instead, it speaks about knowledge. That knowledge must be about the act of the offender which is so imminently dangerous that it must in all probability cause death, or such bodily injury as it likely to cause death. The requisite knowledge, in relation to the Fourth Limb of Section 294 of the Penal Code, has already received judicial attention.

In *Somapala v The Queen* 72 N.L.R. 121 the Court of Criminal Appeal, having noted that the knowledge that envisaged in the Fourth Limb of Section 294 of the Penal Code is

"... knowledge, that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of high probability of causing death or injury likely to cause death"

and stated further that;

"... it is thus appears while the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such 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 death of the person injured, or*
- b. *the offender knows that, because the act so imminently dangerous, there is the high probability of causing death or an injury likely to cause death."*

In *King v Wjeratnam* 43 N.L.R. 25, the Court of Criminal Appeal cited *Plowden J* in *Barkatulla* (1887)(P.R. no. 32 of 1887) where it was stated that "*An act done with knowledge alone is not prima facie murder ... it becomes an act of murder only if it can be positively affirmed that there was no excuse ... it must be a 'wholly inexcusable act of extreme recklessness'.*" This view was adopted in *Bandara v Attorney General* (2006) 2 Sri L.R. 1, *Farook v Attorney General* (2006) 3 Sri L.R. 174 and *Chandrasena v Attorney General* (2008) 2 Sri L.R. 255.

In *Jinadasa v Attorney General* (1984) 2 Sri L.R. 234, a divisional bench of this Court held that;

"... to prove that the accused is guilty of murder under the fourth limb the prosecution must prove beyond reasonable doubt that the person committing the act knew that it was so imminently dangerous that;

1. *it must in all probability cause death or*
2. *in all probability cause such bodily injury as is likely to cause death and that the accused*

committed such act without any excuse for incurring the risk of causing of such injury as aforesaid."

In pronouncing the judgment of *The King v Rengasamy* 25 N.L.R. 438, the Court of Criminal Appeal considered the different connotations of the terms "intention" and "knowledge." It is stated that;

"Intention is a conscious and voluntary act of the mind. It consists in desiring a particular result and in formulating to oneself the physical means by which that result is to be achieved. The mental decision and the physical act may be momentary, but the above factors must be present. Knowledge, on the other hand, is a mere passive condition of the mind. It may or may not be consciously present in the mind at the moment the act is done. Intention involves knowledge, and is frequently inferred from it. In cases where knowledge of the nature of the act and its consequences are sufficient ... for example in the cases contemplated in the fourth paragraph of Section 294 of the Penal Code, such knowledge is sufficient to constitute murder. This paragraph does not apply to all cases of homicide. It relates only to cases of extreme rashness and disregard to human life. Illustration (d) under this section shows what was intended by the framers of the Code. This is the only class of cases in which a man may be guilty of

murder, even though he might not have intended the death of his victim. In all other cases intention is an essential requisite of murder under our Code. Where knowledge is imputed to the accused as a legal fiction, intention should not be argued from it".

The learned High Court Judge was mindful of the applicable law in relation to the multiple counts of murder the 1st appellant was charged with. He had correctly investigated whether the 1st accused had the requisite knowledge and not the intention as argued by the appellant. In coming to the finding that it is the Fourth Limb of Section 294 of the Penal Code that applies to the case before him, learned High Court Judge had considered the applicability of other three limbs of the said section. Having determined the applicability of the Fourth Limb to the evidence led by the prosecution before him, learned High Court judge had then considered the question of the nature of the required knowledge in relation to the Fourth Limb of the said section. He had then correctly applied the principle of law enunciated in *Somapala v The Queen* (supra).

In determining the issue whether the 1st appellant had the requisite knowledge or not, the prosecution relied on the evidence of the conduct that had been attributed to him. There was truthful and reliable evidence presented before the trial Court that the 1st appellant had, upon noting the rail gate was closed and a line of vehicles is already waiting for rail gate to open after the train passes the crossing, directed the 2nd appellant to walk

onto the rail track and to act as a lookout. This is a clear indication as to the state of mind of the 1st appellant. He was fully aware of the imminent danger that is involved with his intended act of driving across the railway crossing, when a train is about to pass through, and should there be a collision with the train, then;

- a. *it must in all probability cause death of one or more of his passengers or*
- b. *in all probability cause such bodily injury as is likely to cause death to them.*

The 1st appellant, during his evidence admitted that he knew the imminent danger that was involved with his act of driving across the railway when a train is about to pass and also that death would ensue if there is collision with the locomotive. On this issue, Dr. Gour, states at p. 982 that;

"The question is whether an act is imminently dangerous depends upon the nature of the act and its evident risk to human life. The word "imminently" implies a risk which is both threatening and near."

Prosecution presented evidence through the Railway Guard, the Operator of the automatic rail gate at *Yangalmodera* level crossing, the Engine Driver of the Intercity Express train as to the details in relation to

the signalling process, the timing and the distances that are involved and how the rail gate operates.

It is stated in evidence that the rail gate of *Yangalmodera* level crossing would start to close when the *Kandy* bound train passes the "point" near *Walakumbura* Railway Station, located 700 yards from the said level crossing. The rail gate mechanism was serviced two days prior and was perfect in working order. As the train passes *Walakumbura*, the signal light on the main road burns in yellow colour alerting the motorists of the imminent arrival of the train. The alarm bell at the level crossing starts to ring and the rail gate closes automatically. The train is then given green light signal to proceed along across the level crossing. There is a 'S' bend in the approach to the level crossing and as the train took the first of the double bend, the Engine Driver saw the ill-fated passenger bus on the middle of his track. Then the Engine of the train had rammed onto the passenger bus and continued to move some 200 yards since its braking mechanism was damaged due to the collision with the passenger bus. The train was travelling at the speed of 40 - 45 miles per hour and would reach the level crossing about 7 seconds from the "point" in *Walakumbura*.

This evidence indicates the imminent nature of the danger that is involved with the act of the 1st appellant. When the 1st appellant arrived at the level crossing, the rail gate was already closed and there were few vehicles already waiting in line. The closed rail gate indicated that the train has passed *Walakumbura* "point" and on its way. The estimated seven

seconds window of opportunity that existed between the closing of the gate and arrival of the train had already started its count down and is narrowing. Then the 1st accused took his bus through the other lane of the highway to reach the level crossing. He then sent the 2nd appellant to act as lookout. The 2nd appellant cannot see beyond the bend but signals the 1st appellant to drive on, who then squeezes his bus through the gap between the rail gate and opposite lane, on to the rail track. Each of these individual actions of the appellants consume the remaining crucial seconds that are left for the train to arrive at the level crossing. And the train arrives resulting in the collision.

The signal lights showed red and alarm bells were ringing, when the 1st appellant took the bus on the track. The 1st appellant drove his bus through the gap right on to the rail track when the gate operator, a lineman of the Railway Department and a three wheeler driver were shouting at him that the train is arriving. These factors clearly satisfy that the act of driving a loaded passenger bus onto the rail track by the 1st appellant when a train is about to arrive is an act of imminent danger and of the 2nd appellant in abetting the 1st appellant.

It is noted that the wording of Fourth Limb of Section 294 indicates another requirement that the prosecution must establish. That requirement is that the 1st appellant committed the culpable act "without any excuse". The 1st appellant had sought to provide an excuse for committing the imminently dangerous act. He claimed that the passengers are office

workers and he would generally reach *Colombo* at a particular time so that they could reach their offices in time and he took this risk with a view to reach his destination in time keeping to his reputation.

Whether this is a valid excuse or not must be considered in the light of judicial applicable precedents.

In *The King v Rengasamy* (supra) Bertram C.J. stated that;

"The words 'without any excuse' are intended to except such cases, as where a military officer lawfully fires upon a mob, or where the captain of a vessel takes the risks contemplated in Section 74. In my opinion juries should be told that this enactment should be confined to that class of cases, and that in ordinary cases it should be left out of consideration."

Thus, it is clear that the 1st appellant had no valid excuse and had knowingly committed his act which is clearly imminently dangerous and in all probability cause death of one or more of his passengers or such bodily injury as is likely to cause death. The 2nd appellant had clearly aided and abetted the 1st appellant.

In view the consideration contained in the preceding paragraphs, we are of the firm opinion that the appeal of the appellants is without any merit and ought to be dismissed on that account.

Therefore, the convictions that had been entered upon the appellants and the sentences that are imposed on them are hereby affirmed by this Court.

The appeal of the appellants is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL