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

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

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA Case No: 321-322/18

HC Panadura

Case No: 2761/10

1. Balawickrama Kannkanamge Chelan Janaka Kumara

2. Panavannage Nilusha Fernando

Accused -Appellant

The Hon. Attorney General,

Attorney General's Department,

Colombo 12

- **Complainant - Respondent**

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Shavindra Fernando, PC with
Sajith Wijesooriya
for the 1st accused-appellants

Dharshana Kuruppu with
Sajini Elvitigala and
Dineru Bandara
for the 2nd accused-appellants

ARGUED ON : 27/07/2021

DECIDED ON : 02/11/2021

R. Gurusinghe, J.

Two accused-appellants were convicted for committing the murder of one Kirindi Lakshan Cooray, an offence punishable under Section 296 of the Penal Code read with Section 32 of the Penal Code.

The prosecution has called PW1, 11,13,14,10,4,9, and the court interpreter.

The first accused-appellant gave evidence from the witness stand. He was cross-examined by the prosecution. The second accused-appellant made a dock statement.

The Learned Trial Judge delivered the judgment on the 11th of July 2018, convicting the two appellants and sentencing them to death.

The deceased was a Squash coach at SSC. He and his wife PW1 was living at Thimbirigasyaya at the time of his death. On the 13th of January 2009, in the evening, they came to the deceased aunt's house at Lunawa. After having dinner, PW1, the deceased, his aunt, and PW4 went to Angulana to return some notes to a friend of PW4. They came back to the aunt's house at Lunawa. The car stopped at the gate. Aunt and her daughter PW4 went into the house. The deceased was not able to find his slippers and asked PW1 to look for them. They switched the seats; PW1 sat at the driving seat and bent her head to find the slippers of the deceased. At that time, the accused-appellants came near the door, opposite the driving seat where the deceased was seated, and shouted in Sinhala, "Ado Kavinda." The shutters were closed at that time. When PW1 heard the noise, she looked up and saw the appellants on the motorcycle near the door, opposite the driving seat where the deceased was seated, and the first accused-appellant shot the deceased. PW1 ran towards the aunt's house shouting, "Kavindata Vedithabuwa." The aunt and the others came immediately. The first accused got into the driving seat of the car. The aunt and PW1 got into the rear seat. The first accused drove the car to the Lunawa hospital in a few minutes. After that, the deceased was transferred to the Kalubowila hospital in an ambulance. The second accused-appellant also came to the Lunawa hospital with a friend of the deceased.

Defense Version

Two appellants went together to attend a party at Yohan's house at Angulana. They left the party around 10.00 pm on the motorcycle, which belonged to the second accused-appellant, as the first accused-appellant wanted to attend a funeral.

The second accused-appellant rode the motorcycle along the road that leads to Lunawa from Angulana. While they were on their way, the motorcycle fell into a pit. At that time, the second accused-appellant asked the first accused-appellant to keep his hand on the side pocket of the second accused-appellant's trouser, as his service weapon was inside his pocket, and to prevent it from dropping. At that time, the first accused-appellant saw the deceased's car parked at the deceased aunt's house gate. The deceased was one of his closest childhood friends. He asked the second accused to see whether Kavinda was inside the car. The second accused sounded the horn of the motorcycle. The deceased waved his hand at them. The second accused stopped the bike near the door where the deceased was seated, and at that time, the first accused grabbed the gun from the trouser pocket of the second accused and showed it to the deceased. At that moment, the gun exploded. The second accused grabbed the gun out of the first accused hand. The first accused asked for the keys to the car from PW1, which she gave. The first accused got into the driving seat of the car and took the deceased to Lunawa hospital within a few minutes.

GROUNDS OF APPEAL

1. The Learned Trial Judge had failed to analyse the evidence of the prosecution witnesses correctly and has erroneously omitted to consider the several contradictions made by the witnesses. As a result, this has arrived at several erroneous inferences and /or conclusions.

2. The Learned Trial Judge has failed to consider the absence of the common murderous intention.

3. The Learned Trial Judge has failed to consider the story of the prosecution as highly improbable.

4. The Learned Trial Judge has failed to consider that at least a reasonable doubt was created in the prosecution case by the evidence of the

accused-appellants and thereby has failed to award its benefit to the appellants.

The Learned Trial Judge himself concedes the fact that there is evidence that supports the defense version. The basis on which the Trial Judge has rejected the defense version and accepted the prosecution version is found on page 33 of the Judgement.

Page 33 (345 of the brief)

විත්තියට මෙය හදිසි අනතුරක් ලෙස පෙන්වීමට හැකි කරුණු වන්නේ මෙය අහඹු හමු වීමක් නොවන බව (පෙර සැලසුම්කර ගත් දෙයක් වන බව) තහවුරු කිරීමට පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් වී නොමැති බවත් එමෙන්ම පිළිගත හැකි පෙළඹවීමට හේතුවක් ඉදිරිපත් කිරීමටද පැමිණිල්ල අසමත් වීමත් පැමිණිල්ලේ සාක්ෂි මතින්ම ඉදිරිපත් වන විත්තිකරුවන්ගේ පසු හැසිරීම තුළින් එනම් රෝහලට ගෙන යාම තුළින් විත්තිකරුවන්ට මරණීය චේතනාවක් නොතිබුණු බව පෙනී යාමත්ය. නමුත් මෙම ස්ථාවරය වෙඩි තැබීම කළේ සහ යතුරු පැදිය පැද ගෙන ආවේ 01 වන විත්තිකරු බවට ඇසදුටු සාක්ෂිකාරිය පැවසීම සමඟ නොගැලපෙයි.

පැමිණිල්ලේ ප්‍රබල සාක්ෂි විශේෂයෙන්ම යතුරු පැදිය පැද්දේ 01වන විත්තිකරු බවට ඇති සාක්ෂිය සාක්ෂිමය විශ්වාසවන්තභාවයෙන් යුත් සාක්ෂියක් ලෙස පිළිගැනීම හා එය මත ඇති වන අනුමිතියන් මත මෙය ඕනෑකමකින් කරන ලද ක්‍රියාවක් බවට නිගමනයක් පැන නගිනවා මෙන්ම පැමිණිල්ලේ සාක්ෂි මගින්ම අනාවරණය වන විත්තකරුවන්ගේ පසු හැසිරීම තුළින් මෙය මරණය සිදු කිරීමේ චේතනාවෙන් කළ ක්‍රියාවක් නොවන බවටත් නිගමනයක් ඇති වෙයි. මෙවන් අවස්ථාවකදී සාමාන්‍යයෙන් එය විත්තියේ වාසියට සැලකිය යුතුය. විත්තියේ වාසියට ඇති නිගමනය පිළිගැනීම කළ යුතු වෙයි. එය එසේ සැලකුවද එයින් පෙනී යන්නේ මරණකරු මරා දැමීමේ මරණීය චේතනාවක් නොවූ බව පමණි. නමුත් මෙම වෙඩි තැබීම පෙර සුදානමක් සහිතව වෙඩි තැබීමට සූදානම් කරන ලද ගිනි අවියක්

මරණකරුගේ හිසට එල්ල කළ බවත් එයින් වෙඩි තැබූ බවටත් ඇති ඇස දුටු සාක්ෂිකාරියගේ සාක්ෂියද සලකා බැලිය යුතු වෙයි. එය බැහැර කළ නොහැක.

To convict the appellants, the Trial Judge has come to the following findings as per the evidence of PW1.

1. The motorcycle rider was the first accused, and the defense version is not compatible with that evidence.

2. If the first accused rode the motorcycle, the second accused should have given his pistol to the first accused. If so, the inference that could be drawn is that they have agreed to kill the deceased.

3. The pistol was loaded, but according to the evidence of the 2nd accused, he had not kept the pistol loaded. It was not possible to fire the gun accidentally.

The first accused gave evidence under oaths. The State Counsel extensively cross-examined him. The first accused admitted that he took the gun out of the trouser pocket of the second accused and tried to show it to the deceased to perform a joke and never denied that he caused the firearm injury to the deceased. His position was that he never intended nor wanted to kill the deceased. The incident happened due to his foolishness.

The Trial Judge himself concedes that the subsequent conduct of the appellants is compatible with the defense version. The incident happened at 10.00 pm. The accused came from the opposite direction, where the car was stopped. If the accused had come to kill the deceased, they could have fled the place quickly on their motorcycle. PW1 stated that at that time, no other people were there. They waited there, and the first accused himself drove the car to the nearest hospital

without delay. PW1 admits that there was no delay in admitting the deceased to the Lunawa hospital.

The first accused and the second accused were at the hospital until the police came. The pistol and the rest of the ammunition were immediately handed over to the police by the second accused. The vehicle in which the deceased was seated at the time of shooting was recorded as an admission under Section 420 of the Civil Criminal Procedure Court. The accused had not known that the deceased and his wife were there at the place of the incident. They met by chance. PW1 stated in her evidence that the only person they informed that they were coming to the aunt's house was Aunt, PW 3. The deceased and PW1 were to leave the aunt's house long before the time of the incident. The deceased and two others went to hand over some notes to a friend of the aunt's daughter. However, they were unable to trace that friend's house, and they came back without handing over the notes. They had to go again after they had their dinner. The accused did not know that the deceased would be at the place of the incident at that time. The meeting occurred purely by chance.

The Learned Trial Judge believed that the rider of the motorcycle was the first accused. PW1 stated in her evidence that both accused were on the motorcycle, when the first accused shot the deceased. However, she later admitted that the first accused was not on the motorcycle. She had told the police that the first accused came near the vehicle door saying something that she could not hear properly. After that, he shouted "Ado Kavinda" and shot him. PW1 also admitted that by that time, the second accused was still on the motorcycle. It is unusual for the rider to get down while the pillion rider was still on the motorcycle. The rider can easily keep his feet on the ground and hands on the handle and keep the motorcycle standing. The Pillion riders' seat is generally a little higher than the rider's seat.

The first accused categorically stated that the second accused rode the motorcycle. The Learned High Court Judge stated in the judgment that the first

accused was the rider and the second accused was on the rear, and the defense did not challenge this position. However, this is not so. On page 130 of the brief, the counsel for the defense has suggested the following:

මම යෝජනා කරනවා දෙවන චූදිත බයිසිකලයේ පැදගෙන ආපු පුද්ගලයා වීමත් ඔහුට කිසිඳු දැනීමක් සම්බන්දයක් පළවෙනි චූදිත කර සිදුවීම සම්බන්දයෙන් ඔහුගේ සම්බන්දයක් නෑ කියලා.

In this regard, the evidence of PW1 is not convincing because her position in the evidence was that the first accused was still on the motorcycle when he shot the deceased. However, when confronted with her statement made to the police, she changed that position. She accepted that what had been recorded in her statement was correct. As per her statement, the first accused was standing near the car at the time of the shooting. Only the second accused was on the motorcycle. The prosecution did not challenge the position that the second accused drove the motorcycle. When considering this evidence, what is more probable is that the second accused was the rider. Even the learned High Court Judge accepted that the position of the defense is more plausible if the rider was the second accused. The Trial Judge refused the defense version based on the inference that he had drawn, relying on the evidence of PW1 regarding who the motorcycle rider was.

The first accused testified under oath that he grabbed the gun from the trouser pocket of the second accused. The prosecution did not challenge this position. However, without any evidence, the Learned Trial Judge drew an inference that the second accused should have given the gun to the first accused, purely on the inference that the second accused was the pillion rider. PW1 had not seen the first accused riding the motorcycle or seated on the rider's seat. When she saw the first accused, he was standing in front of the car door. When considering the above evidence, the inference that the first accused rode the motorcycle is erroneous.

In the case of *King vs Assappu* 50 NLR 324, the Court of Criminal Appeals held, the following matters should be considered when considering common intentions;

1. The case of each accused must be considered separately.

2. The accused must have actuated by a common intention with the doer of the act.

The rule is that the presence alone is not sufficient to establish a common intention. The presence must be a participatory presence.

In this case, there is no evidence to establish a pre-meditated plan between the two accused to kill the deceased. The Learned Trial Judge inferred from the evidence that the accused should have agreed to kill the deceased. It is not the only inference that could be drawn from the evidence. The story of the defense is equally possible. Where there are two or more possibilities, the appellants could not be convicted. The accused should be given the benefit of that doubt.

If the second accused had a common intention to kill the deceased, he could have used the pistol himself. There was no evidence that the first accused had any experience of using a gun before. Being a sub-inspector of police, the second accused, serving in a Special Police unit, was well trained to use weapons; there was no reason for him to give the gun to the first accused to shoot the deceased. The Learned High Court Judge has decided either the evidence of the first accused or the second accused was false regarding whether the gun was loaded when it was taken by the first accused. He says that when he pointed the gun towards the deceased, the gun went off.

The Government analyst stated in his evidence that the particular gun does not have a safety lock. If there is a cartridge in the gun chamber, it will fire when

the trigger is pulled. The only safety on this pistol is to de-cock the action using the decocker. The Learned High Court Judge says, “The question of the safety lock does not arise if there was no cartridge in the chamber.” The Government analyst described that there are two action methods in this particular type of gun. The gun was a semi-automatic pistol. He explained how to prepare the gun to fire as follows:

“Open the slide and put a cartridge in the chamber, or otherwise a magazine can be put into the pistol. If there is a magazine, the slide should be pulled to chamber a cartridge”.

The Government analyst stated as follows:

ON (page 209 of the brief)

මෙම ගිනි අවිය එක්තරා ආකාරයකින් දුර්වල තත්ත්වක තිබෙන ගිනි අවියක් ලෙස සලකන්නට හැකි වෙනවා. එසේ වන්නේ මෙය සම්මත ස්වයංපූරක පිස්තෝල වල තිබෙන ආරක්ෂක යතුර රහිත ගිනි අවියක් වන නිසා මෙය යම් ආකාරයකින් කොකින් යාන්ත්‍රනය සිදු කර ආරක්ෂිතව තබා ගතහොත් යම් කිසි පුද්ගලයෙක් ට්‍රිගරයේ මිරිකීමක් සිදු වුවහොත් වෙඩි තැබීමක් සිදුවෙනවා.

ප්‍රශ්නය

එතකොට පතොරමක් කුටීරය ඇතුලට ඇතුලත් කර නැත්තම් කිසියම් ආකාරයකින් ඉබේ පත්තු වීමේ හැකියාවක් නෑ. ඒකට එකඟ වෙනවා ද

එහෙමයි

මේ ස්වයංපූරක යාන්ත්‍රනය සිදු වන්නේ පළවෙනි වෙඩි තැබීමෙන් ඇති වන ශක්තියෙන් අප යාන්ත්‍රිකව කරන සිදුවීම් ගිනි අවිය විසින්ම සිදුකරගැනීම නමුත් ඒ සඳහා පළමුවන වෙඩි තැබීම සිදු විය යුතුයි.

This evidence shows that regardless of the method of loading the pistol, if there is a cartridge in the chamber and if the trigger is pulled, the gun fires. In view of this evidence, the evidence of the first accused cannot be rejected as false evidence. At least it creates a reasonable doubt as to whether he intended to kill the deceased. The benefit of the doubt should have been awarded to the first accused.

There was no motive at all to kill the deceased. The deceased and the two accused were friends, and there was no animosity between the accused and the deceased. The accused and the deceased met clearly by chance. There was no evidence at all to establish a pre-meditated plan between the two accused. The subsequent conduct of the accused is compatible with the defense version. The first accused himself took the deceased immediately to the nearest hospital. The second accused voluntarily handed over the weapon to the police immediately. The accused did not try to deny their involvement. At the trial, they admitted several facts which the prosecution would have had to establish otherwise.

However, the first accused should have acted more prudently when he took the gun from the second accused. Both accused had consumed liquor. However, the first accused should have known that he might cause the death of his friend if the gun went off. Even though the first accused did not intend to kill the deceased, he should have had that knowledge.

There is no evidence to establish that the second accused had common intention to kill the deceased. For the reasons set out above, the conviction and sentence against the second accused is set aside. The second accused is acquitted of the charge.

The conviction and the sentence for murder against the first accused is set aside. The first accused is convicted of the charge of culpable homicide not amounting to murder. The first accused is sentenced to a term of five years rigorous imprisonment, which deemed to have been served from the date of the conviction, namely 7th November 2018, and to a fine of Rs. 20000/- and in default six months rigorous imprisonment.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree

Judge of the Court of Appeal