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

In the matter of an appeal from the High Court in terms of Section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal

Case No: 117-119/2018 vs

High Court Colombo

Case No: HC 3275/2006

1. Abeysekera Gunasekara Arachchilage Asanka Chamara
2. Ahanhettige Lakmal Pradeep Premachandra
3. Munaweera Arachchige Sumith Srilal
4. Chinthamani Mohottige Thushan Chandana
5. Hegoda Gamage Sudath Kumara
6. Luwis Anthony Vidanalage Sanjeewa Abeyrathna

Accused

And now between

2. Ahanhettige Lakmal Pradeep Premachandra

3. Munaweera Arachchige Sumith Srilal

5 .Hegoda Gamage Sudath Kumara

Accused– appellants

vs

The Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant - Respondent

COUNSEL : Palitha Fernando, P.C. with Neranjan Jayasinghe and Isansi Dantanarayana for the 3rd accused-appellant

Nalin Ladduwahetti, P.C. with H. J. Fariz and Lakni Silva for the 2nd accused-appellant

Indika Mallawarachchi for the 5th accused-appellant

Dileepa Peiris, DSG for the complainant - respondent

ARGUED ON : 02/08/2021

DECIDED ON : 11/11/2021

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

R. Gurusinghe, J.

The three Appellants with three others were indicted in the High Court of Colombo on the following charges:

1) For being a member of an unlawful assembly, the common object was to hurt one Prasanna Perera, an offence punishable under section 140 of the Penal Code.

2) Causing the death of Susantha Perera, an offence punishable under section 296 read with 146 of the Penal Code.

3) Causing grievous hurt to Manel Perera, an offence punishable under section 317 read with 146 of the Penal Code.

4) Causing grievous hurt to Cyril Perera, an offence punishable under section 317 read with 146 of the Penal Code.

5) Causing grievous hurt to Stanley Jayasinghe, an offence punishable under section 317 read with 146 of the Penal Code.

   6 – 9 counts are alternate charges of the above under common intention.

The Appellants are referred to by their accused numbers as in the indictment to avoid confusion. The fourth accused died before the conclusion of the trial.

All five accused were acquitted and discharged of counts 1 – 5. The sixth accused was convicted of all counts. The second, third, and fifth accused were convicted of counts 6, 7, and 9. The first and the third accused were convicted of count 8.

The grounds of appeal relied on by the second accused-appellant are as follows:

1) The Learned High Court Judge misdirected himself in law and fact, in acquitting a co-accused on the same charges, against whom the same weight of evidence and by the prosecution. Thereby disregarded the Principle of Indivisibility of the credibility of a witness.

2) The Learned High Court Judge misdirected himself in law applying the principle of common intention and thereby holding the appellant guilty of the said offence.

3) The prosecution failed to establish the identity of the accused beyond reasonable doubt.

4) The Learned Trial Judge has made no genuine judicial analysis of the

   contents of the dock statement and has not given cogent reasons for

rejecting same in his endeavor to determine whether it would creates reasonable doubt.

5) In acquitting the accused of the one to eight charges and convicting the accused of other charges read with Section 32 of the Penal Code the Learned Trial Judge misdirected himself in law, giving the benefit of the doubt prevalent in the said acquittal to the other offences thereby causing grave prejudice to the appellants.

6) The Learned Trial Judge misdirected himself in law and fact in weighing the case for the prosecution with that of the defense, prime-facie rebutting the presumption of innocence.

The Grounds of appeal relied on by the third accused-appellant are as follows:

1) The Learned Trial Judge failed to give adequate attention to a strong motive and the first witness, Manel Perera, had falsely implicated the third accused-appellant.

2) The dying deposition said to have been made to witness Manel Perera has been wrongly admitted against the third accused at the trial.

3) The Learned Trial Judge refused to rely upon the evidence of Manel Perera in respect of the sixth accused but relied upon the same witness to convict the second accused-appellant.

4) The Learned Trial Judge totally failed to pay attention to the concept of common intention before attributing liability on the second accused-appellant based on common intention.

5) The Learned Trial Judge has considered a statement to the police as collaborating the evidence of identity against the third accused contrary

to the provision of Section 110(3) of the Code of Criminal Procedure Act. This is prejudicial to the third accused-appellant as liability is attributed to him on the basis that he committed the offence in furtherance of a common intention with the first accused-appellant.

6) There has been inadequate consideration of the dock statement made by the third accused-appellant.

7) Due to one or more reasons set out above, the third accused-appellant has been denied a fair trial.

The principal ground of the appeal of the fifth accused-appellant is that the evidence relating to the identity of the fifth accused suffered from serious infirmities, which render the conviction unsafe.

The appellants argue that the Learned Trial Judge acquitted the sixth accused and convicted the others on the same evidence.

They have cited the case of *Baksh vs Queen 1958 [AC 167 AC]*, where it was held,

"Their credibility cannot be treated as divisible and accepted against one and reject against the other. The honesty having been shown to be open to question, it cannot be right to accept their verdict against one and re-open it in the case of other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases."

The same principle has been accepted in some subsequent cases.

This argument could be sustained if the Trial Judge disbelieved the evidence of PW1 against the sixth accused. Reasons for the acquittal of the sixth accused are found in paragraph 76 of the judgment. The Learned Trial Judge observed that as per the evidence of PW1, apart from the accused, there were some other people present as well at the time of the incident. The sixth accused had not

positively participated in the assault on the deceased or other persons. When considering the participation of each accused separately, the Learned Trial Judge found that the sixth accused had not done anything to infer that he had the common intention with the other accused to kill the deceased or hurt the other witnesses. The Learned Trial Judge acquitted the sixth accused considering his non-participation in the incident. As per the evidence of PW1, the sixth accused was there. However, he had not participated in assaulting any person. Therefore, the Learned High Court Judge observed that there was no evidence to infer that the sixth accused had a common intention with the other accused. Thus, the mere presence of the sixth accused was not sufficient to find him guilty of charges. The argument that the Learned Trial Judge disbelieved the evidence of PW1 against the sixth accused is untenable and should be rejected.

In the Case of *Francis Appuhamy and Others vs The Queen 68 NLR 437*, a witness identified the first to fifth accused persons. However, the fifth accused's name was not mentioned in the statement to the police. The first to the fourth accused was known to the witness for a considerable time. The fifth accused was known to her for a relatively shorter period. The Jury returned the verdict of not guilty regarding the fifth accused. In the appeal, the argument was that the verdict on the first to fourth accused was unreasonable in the light of acquittal of the fifth accused on the same evidence.

The Court of Criminal Appeal held that;

"We were referred to the remarks contained in the judgment of the Privy Council in the case of *Mohamed Fiaz Baksh v. The Queen [(1958) A.C. 167.]* that the credibility (of witnesses) could not be treated as divisible and accepted against one and rejected against another…In regard to the distinction the Court of Criminal Appeal made, the Privy Council observed that "if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at

any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all."

In this case, the Learned Trial Judge did not disbelieve the evidence of PW1. He found that there was no substantial evidence to infer the involvement of the sixth accused at the crime scene, thus the evidence was insufficient to prove that the sixth accused had a common intention along with the other accused. Therefore, the argument that since the sixth accused was acquitted, all the other accused also should have been acquitted cannot be accepted. This argument is therefore rejected.

The next argument is that the Learned Trial Judge misdirected himself in law in applying the principle of common intention.

In the case of the *King vs Assappu (50 NLR 324)*, the Court of Criminal Appeal held that;

"We are of opinion that in all cases where the question of common intention arises the Judge should tell the Jury that, in order to bring the rule in section 32 into operation, it is the duty of the prosecution to satisfy them beyond all reasonable doubt that a criminal act has been done or committed; that such act was done or committed by several persons; that such persons at the time the criminal act was done or committed were acting in the furtherance of the common intention of all; and that such intention is an ingredient of the offence charged, or of some minor offence. The Judge should also tell the Jury that in applying the rule of common intention there are certain vital and fundamental principles which they must keep prominently in mind - namely *(a)* the case of each prisoner must be considered separately; *(b)* that the Jury must be satisfied

beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed; *(c)* they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned - *47 N. L. R. at p. 375; (d)* the Jury must be warned to be careful not to confuse "Some or similar intention entertained independently of each other" with "Common intention"; *(e)* that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case -*A. I. R. 1945 P. C. 118; (f)* the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be 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, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other - *47 N. L. R. at p. 375, 48 N. L. R. 295; (g)* the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act - *44 N. L. R. 370, 46 N. L. R. 135, 473, 475; (h)* in such a case such co-accused would be liable only for such criminal acts which they themselves committed; (*i*) the Jury should also be directed that the mere fact that the co-accused were present when the doer did the criminal act does not *per se* constitute common intention, unless there is other evidence which justifies them in so holding - *45 N. L. R. 510;* and (j) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles…"

The Learned Trial Judge has considered the acts of each accused separately.

In Paragraph 78 of the judgment, the Learned Trial Judge observes that as per the evidence, the third accused cut the deceased with a sword, the fifth accused

stabbed the deceased in the head. The second accused fired a shot in the air. Only the second, third and fifth accused were found guilty of the offence of murder.

There were 29 injuries on the body of the deceased. Injury No. 24 was a stab injury that pierced the heart and lungs of the deceased and was necessarily a fatal injury. The injury No. 26, 27, 28, and 29 were grievous injuries. The Learned Trial Judge observed that these injuries were caused to kill the deceased, and therefore the second, third and fifth accused had the common intention to kill the deceased. This finding is not an inference based on circumstantial evidence but on actual participation to achieve the object of killing the deceased. These incriminating facts are incompatible with the innocence of the accused. The active participation of the second, third, and fifth accused shows a common intention among them to kill the deceased. In the circumstances, the conclusions arrived at by the Trial Judge cannot be faulted.

The argument that a dying deposition was wrongly admitted has no merit. The conviction was not based on a dying deposition. The Learned Trial Judge considered the evidence regarding the incident, which resulted in the killing of the deceased and injuring the others. Each accused was convicted for the offenses where the accused had actively participated in achieving the result. There were three incidents on that fateful day. The first incident was at a betting center that PW1 did not see. The second incident was that the second and fifth accused came to the deceased's house and assaulted the deceased, which PW1 and PW6 saw. The third incident occurred at about 7.00 p.m., killing the deceased and injuring PW1, PW2 and PW3. No dying deposition was admitted in the evidence. After the second incident, the deceased stated to his mother the names of the second and fifth accused. This can not be treated as a dying deposition. The argument that some accused were identified only in the dock would be considered later. In the circumstances, the contention that a dying deposition was wrongly admitted is rejected.

On behalf of the third accused, it was argued that the deceased family members had a strong motive to implicate the third accused. The Learned Trial Judge considered whether the third accused was falsely implicated for a previous animosity between PW1 and the third accused. PW1 stated in her evidence that she was involved in dealing with illicit liquor. It was suggested to PW1 at the trial that the third accused had given information to the police regarding her illicit liquor, and therefore, there is a strong motive to implicate the third accused.

PW1 rejected this suggestion and said that the third accused gave information to the police only after her son's death. She admitted that she had been fined for illicit liquor cases.

The Learned Trial Judge has considered this argument and concluded that there was no connection between the illicit liquor cases and the murder. PW1 herself was grievously injured in the incident. PW2 also was injured. Both of them gave evidence in the trial. As per the evidence of PW2, when he came to see what was happening, the third accused assaulted him. His hand was severely injured, and he went inside the house. PW3 did not state anything regarding the other accused. He did not say that he had seen the third accused assaulting their son. If PW2 wanted to implicate any of the accused falsely, he could have done so as he was present when the incident happened.

On behalf of the third accused, the only suggestion made to PW2 was that he was telling lies regarding his injury. There was no suggestion to PW 2 that he was giving evidence against the third accused because of the previous animosity

PW3 had given evidence at the Magistrate Court, and that evidence was adopted under section 33 of the Evidence Ordinance where PW3 had stated that;

'මේතුන්වෙනි විත්තිකරු කියාගෙන ගියා ඔය ඉන්නේ රෝයිගෙ මාමා. ඕකවත් කපන්න කිව්ව. මම තුන්වෙනි විත්තිකරු හොඳට මා දන්නව'.

PW1 and PW2 gave evidence. PW1 and PW2 were assaulted by the third accused. The son of PW1 was killed. The house was damaged. The witnesses had not implicated the third accused in any other previous or subsequent offence. What happened to the deceased and PW1, PW2 and PW3 were not made-up events. The incidents actually occurred. The Learned Trial Judge concluded that there was no reason to reject the evidence of PW1 and PW2. This court has no reason to disagree with this finding.

The next ground of appeal is that the identity of the accused was not established beyond a reasonable doubt. The third accused was living in the immediate neighborhood; there was no issue regarding his identity.

The argument is that the fifth accused was a total stranger to PW1 before the incident. PW1 stated that on the date of the incident, the second and fifth accused came to her house and asked her whether Roy (deceased) was at home. PW1 answered in the negative. However, when they were about to leave, the deceased came to the road from somewhere. There was an altercation between the deceased and the second and fifth accused. The second and fifth accused hit the deceased. When the second accused was about to get on to his cycle, a pistol dropped, and then the second accused took it and got onto the cycle. PW1, in her evidence, said that her deceased son introduced the second accused as Pradeep and the fifth accused as Chutie Malli. The complaint is that this introduction cannot be considered reliable, and therefore, the identity of the second and fifth accused was not proved beyond a reasonable doubt. The Learned Trial Judge accepted this evidence. By the time the third incident happened in which the deceased was killed, PW1 knew the second and fifth accused as Pradeep and Chutie Malli. PW6, in his evidence, stated that on the evening of the date of the incident at about 6.00 p.m., Pradeep, the second accused, and Chutie Malli, the fifth accused, had an altercation with the deceased on the road. After that, the second and fifth accused went away on

their cycles. This witness referred to the second and fifth accused as Pradeep and Chutie Malli.

There was no suggestion to PW6 that the second and fifth accused were not known to him before the incident. No contradiction or omission was marked during the cross-examination. PW6 stated that the second accused and third accused were from their village. He knew them from their childhood. The fifth accused was also known to him for about ten years before the incident. He said he did not know the fifth accused's real name, but he was known as Chutie Malli. This evidence was not shaken during the cross-examination.

Furthermore, PW6 did not say that he saw the third incident though he was only a little distance from the place of the incident. He said he heard the noise of a gunshot and shouting. He rushed to the place of the incident. When considering the evidence of PW6 and the evidence of PW1, there was no doubt that the second and fifth accused came to the deceased's house in the second incident. Therefore, PW1 knew the second and the fifth accused as Pradeep and Chutie Malli at the third incident. Counsel for the fifth accused submitted that the fifth accused was not referred to as Chutie Malli. However, almost all the witnesses referred to him as Chutie Malli.

Furthermore, the Fifth accused in his dock statement stated this;

"මගේ නම සුදත් කුමාර ගෙදරට චූටි පුතා කියල කියනව.

In view of the aforementioned evidence, we hold that the second and fifth accused's identities were established beyond reasonable doubt.

The evidence of the two witnesses called by the third accused revealed nothing helpful to this case. The Learned Trial Judge considered that evidence. The Learned Trial Judge considered all dock statements made by the accused. The second and fifth accused made a very short statement denying their involvement.

The third accused stated that he came home around 5.30 to 6.00 p.m. on the day of the incident. Few three-wheelers came and stopped before his house. Then some people went towards the deceased's house. After about fifteen minutes, they came back and went away in the same three-wheelers. There was animosity between him and the deceased's family because he was a police informant about the illicit liquor of the deceased family.

The Learned Trial Judge considered the dock statement. The Judge stated in his judgment that if he could believe the dock statements, the accused should be acquitted, and if it creates reasonable doubt, still he would acquit the accused. Paragraphs 67, 68, 69, 70,71, 72, 73, 74, and 75 are devoted to considering the dock statements made by the accused. The Learned Trial Judge adequately dealt with and addressed the evidential value and came to a conclusion. Therefore, the complaint that the Learned Trial Judge had not analysed and not given reasons to reject the dock statements cannot be accepted.

The following argument concerns the contradiction marked as 2V 1 in paragraph 19 of the judgment, the Learned Trial Judge stated that this contradiction further proves the second accused's identity. This is a misdirection and contrary to the provisions of section 110-3 of the Criminal Procedure Code. However, as discussed above, the identities of the accused were established beyond reasonable doubt by other evidence, and misdirection on the part of the Trial Judge had not caused prejudice to the accused. As such, by applying the provision of Article 138 of the Constitution and section 334 of the Criminal Procedure Code, this argument is rejected.

On behalf of the third accused, it was submitted that as he was well known to the witnesses, he would not have gone to the scene, and the learned Trial Judge did not consider that fact. PW1 gave evidence that the third accused attacked the deceased with a sword and also attacked PW2 with a sword. PW2 stated that his hand was cut by the third accused. PW3 had given evidence and stated that

the third accused asked other accused to cut PW3. Therefore, this argument cannot be accepted.

For these reasons, the appeals of the accused-appellants are dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal