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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No: Democratic Socialist Republic of Sri Lanka

HCC-0293-19

High Court of Kurunegala Case No:

HC/91/08

COMPLAINANT

Vs.

1. Pulihith Devayalage Douglas Wickremapala
2. Pulihith Devayalage Senarath Satharasinghe
3. Pulihith Devayalage Pradeep Sanjeewa Jayaratne

ACCUSED

AND NOW BETWEEN

1. Pulihith Devayalage Douglas Wickremapala

2. Pulihith Devayalage Senarath Satharasinghe

3. Pulihith Devayalage Pradeep Sanjeewa Jayaratne

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : K Priyantha Fernando, J. (P./C.A.)

: Sampath B Abayakoon, J.

Counsel : Palitha Fernando PC, for the 1st and the 2nd Accused-Appellants

: Neranjan Jayasinghe, for the 3rd Accused-Appellant

: Dileepa Peiris, SDSG for the Respondent.

Argued on : 11-11-2021

Written Submissions : 27-08-2020 (By the 1st and 3rd Accused-Appellants

: 21-08-2020 (By the 2nd Accused-Appellant)

: 30-09-2020 (By the Respondent)

Decided on : 03-12-2021

Sampath B Abayakoon, J.

This is an appeal by the accused appellants (hereinafter referred to as the appellants) on being aggrieved by the conviction and the sentence of them by the learned High Court judge of Kurunagala.

The appellants along with the 4th accused named in the indictment were indicted before the High Court of Kurunegala for committing the following offences.

(1) That on or around 11th April 2005 at Pohorawatta in the High Court jurisdiction of Kurunegala, along with persons unknown to the prosecution conspired to cause the death of Batagollegedara Nissanka Wijeweera and thereby committed an offence punishable in terms of section 296 read with section 113B and 102 of the Penal Code.

(2) At the same time and in the same transaction, caused the death of the above mentioned Nissanka Jayaweera and thereby committed murder, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

(3) At the same time and in the same transaction caused injuries to one Batagollegedara Ariyadasa by throwing stones at him and thereby committed attempted murder, an offence punishable in terms of section 300 read with section 32 of the Penal Code.

After trial without a jury, the appellants were found guilty for the 2nd and the 3rd counts against them and were acquitted on the 1st count, while the 4th accused mentioned in the indictment was acquitted of all the charges preferred against him. Accordingly, the appellants were sentenced to death on the 2nd count and for a term of 10 years rigorous imprisonment on the 3rd count.

At the hearing of the appeal, the learned Counsel for the appellants urged the following grounds of appeal for the consideration of the Court.

(1) The learned High Court judge had failed to take into consideration the special exception of sudden fight or grave and sudden provocation, when there was evidence from the prosecution as well as for the defence.

(2) The learned High Court judge had convicted the appellants for the count of murder on contradictory and unreliable evidence of the sole eye witness.

(3) The learned High Court judge convicted the appellants for the charge of attempted murder on contradictory and unreliable evidence.

(4) The learned High Court judge failed to evaluate the evidence of the defence and failed to reason out the grounds on which she rejected the dock statements of the appellants.

(5) The learned High Court judge failed to adequately consider whether the prosecution has proved the common intention of the appellants.

Facts that led to the incident as revealed by evidence briefly, are as follows;

PW-01 Wijekumara, his deceased brother Nissanka and his wife, the other brother Somakumara, and their father Ariyadasa, were watching television at about 8.30-9.00 in the night at their home, and suddenly someone started pelting stones at the house from outside. They also used filthy language and called for his brother Nissanka. Looking outside, he has identified Douglas the 1st appellant, Senarath the 2nd appellant and Pradeep the 3rd appellant with the aid of the lights that were lit outside of their house and the light of the street lamp post, which was near the house. After hearing the shouting, it was their father Ariyadasa who went out of the house in order to inquire what was happening, and soon thereafter, PW-01 heard a cry that the father was hit by a stone. Hearing the cry, the deceased and the witness went near the father who was fallen on the ground in front of the small boutique run by him in the

compound of the house. At the same time the 1st and the 2nd appellants who entered the compound started chasing after the deceased.

It was the evidence of PW-01 that the 1st appellant had knife with a long handle in his hand and the 2nd appellant had a sword about 3-4 feet long. The assailants who chased after the deceased along the road has attacked him from behind. According to PW-01, it was Senarath the 2nd appellant who attacked the deceased first, followed by the 1st appellant Douglas. Pradeep the 3rd appellant who was also armed with a sword has attacked the deceased thereafter. The witness has stated that although the 4th accused Nilmini, the brother of Pradeep was also armed with a manna knife, it was he who attempted to prevent the appellants from causing harm to the deceased. The witness who went after the brother who was chased by the appellants has observed what was happening by hiding near a termite mound which was by the roadside.

After the attack, the appellants have prevented a neighbour from taking the deceased and the injured to the hospital by attacking his three-wheeler. Subsequently, the injured were taken to the hospital where the deceased was pronounced dead. It was the evidence of the witness that during the attack on his brother, the mother's sister of the 2nd appellant (PW-16) pleaded with them not to cut the deceased but to no avail. After coming home from his hiding, the witness has observed damage to their house due to the stone throwing and has also seen household goods being thrown out of the house.

He has explained that the reason for the attack was his brother's providing of information to Police as to the elicit liquor trade of the father of the 3rd appellant and the 4th accused. During the cross examination of the witness several alleged omissions and contradictions have been marked on behalf of the appellants.

PW-02 was the other brother mentioned by PW-01 as the person who was at home, he is the one who has come out of the house behind his father. It was

his evidence that when he came out of the house, he saw the 3rd appellant Pradeep using filthy language at them. When the father inquired from him, he was kicked by the 3rd appellant, which resulted in him falling and the father was struck with a stone while attempting to get back to the house. He has also seen Douglas, the 1st appellant coming into the house and dashing the TV on the floor and throwing it out. He has not seen what happened to his brother the deceased or where he went, but has heard a cry from his brother from the roadside.

PW-04 Nilmini Marasinghe was the wife of the deceased who was present in the house at the time of the attack. She has corroborated the evidence of the other witnesses.

PW 06 and PW-07 has been treated as adverse witnesses for the prosecution hence, their evidence has not been considered by the learned High Court judge for the purposes of the judgment.

PW-09, the Judicial Medical Officer Dr. Senanayake was the one who has examined the injured Ariyadasa. He has observed two injuries on the head of the injured and it was his opinion that the injury number 02 was an injury that can cause the death in the ordinary course of nature. He has also opined that the injury may be a result of being struck by a stone.

The injured Batagollegedara Ariyadasa giving evidence has stated that before the incident, at around 7.30 in the night, Douglas the 1st appellant and one Sarath came to the small boutique he operates in the compound of his house and asked for 30 packets of gram. As they appeared to be threatening, it was his evidence that he closed the boutique hurriedly and went home. He has confirmed the evidence of the other witnesses as to what happened on that day thereafter, and has stated that it was the 2nd appellant who struck him with a stone.

PW-08 was the then Judicial Medical Officer (JMO) of the Polgahawela hospital who has conducted the postmortem examination on the body of the deceased Nissanka. He has observed 17 injuries on the body out of which 11 have been cut injuries. Injuries 1 to 5 have been deep cut injuries to the head and the neck, while injuries 6,7,8 have also been cut injuries to the back of the head and the back shoulder. Injury number 11 has been a cut injury to the front chest area. Injury 17 was a cut injury to the face of the deceased. Apart from the cut injuries other injuries had been contusions and lacerations. He has opined that injury 1 and 5 are necessarily fatal injuries caused to the deceased.

On an application by the prosecution the earlier mentioned mother's sister of the 2nd appellant has been called as a witness. It was her evidence that when she went to her sister's house at about 8.30pm. on the date of the incident, she saw the 2nd appellant consuming liquor with some of his friends. After advising him to not to get involved in any quarrels she has returned home. After hearing some noise from the direction of the house of Nissanka (the deceased) she has gone towards the house. She has seen the 1st appellant with a club. The 2nd appellant with a sword and the 3rd appellant with another club. She has stated that when she reached the shrine room near the house of the deceased, she saw some stones being thrown from the direction of the deceased's house and both sides were seen throwing stones against each other. She has come to know about Nissanka's death the following morning. Incidentally, she has not been cross examined on behalf of the appellants.

Chief Inspector Ranjith Kulathunga (PW-10) was the main investigation officer who has inspected the scene of the crime after the incident. He has observed that there was sufficient light at the place of the incident from the street lamp and the other sources at that time. He has found a television set dashed in front of the house and other damages to the house.

When called for a defence at the end of the prosecution evidence, the appellants have chosen to make statements from the dock.

The 1st appellant in his dock statement has stated that on the day of the incident, he, along with the 2nd and the 3rd appellants and another person called Sarath consumed liquor, and when they were passing the house of Ariyadasa on their return, stones were thrown at them. As a result, they too threw stones at the direction of the house.

Both the 2nd and the 3rd appellants have taken the same stance as the 1st appellant in their respective dock statements, while the 4th accused had denied any involvement in the incident.

Grounds of appeal: -

It was submitted by the learned President's Counsel on behalf of the 1st and the 2nd appellants that, since all the appellants were acquitted of the charge of conspiracy, it is clear that there had been no evidence of prior arrangement by the appellants to cause injuries to the deceased and his father Ariyadasa. It was contended that very fact that there had been no conspiracy establishes the fact that the appellants had no prior common intention to commit the offences.

It was his argument that under the circumstances, the learned High Court judge should have looked into the mitigatory circumstances which amounts to culpable homicide not amounting to murder. The learned President's Counsel relied on Exception 4 of section 294 of the Penal Code to formulate this argument.

Exception 4 of the Penal Code reads as follows;

> **Exception 4- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.**
>
> **Explanation-**

It is immaterial in such cases which party offers the provocation or commits the first assault.

It was his view that injured Ariyadasa suffered his injuries not due to a planned attack on him as revealed in evidence. It was his submission that the evidence of the witness Subaratne Menike, (PW-16) considered by the learned High Court judge in the judgment as the only independent witness, establishes that both parties were throwing stones at each other which accelerated into the incident where injuries were caused to the deceased and his father.

Furthermore, it was submitted that the learned High Court judge has failed to adequately consider the participation of each of the appellants with a common intention to commit the acts alleged to have been committed, which amounts to a misdirection by the learned High Court judge.

Commenting on the evidence of PW-01 it was the contention of the learned Counsel for the 3rd appellant that there is an issue as to the credibility of his evidence which has escaped the attention of the learned High Court judge. Pointing to the evidence of PW-01 given before the High Court, where he says that the 4th accused Nilmini, although was present at the scene of the crime, he was the one who attempted to stop the assault, it was his position that his evidence given at the Magisterial inquiry was in total contrary. It was brought to the notice of the Court that at the inquiry, it has been the evidence of PW-01 that the 4th accused also cut the deceased using a manna knife. (The contradiction marked V-05). It was his view that the learned High Court judge's consideration that contradiction as a minor contradiction was a misdirection.

He pointed to the alleged discrepancies of the evidence of PW-01 and PW-02 who was the younger brother of PW-01, where he says that it was, he who went near his father and not the PW-01. He also points out to the evidence of PW-04 where she says that when the father was hit and fell all the family members came out of the house and went near him.

It was his view that the learned High Court judge should have considered the grave and sudden provocation of the appellants by the members of the deceased's family by throwing stones at them, under Exception 1 of section 294 of the Penal Code.

Citing the judgment of **Piyathilaka and 2 Others Vs. Republic of Sri Lanka (1996) 2 SLR 141,** it was submitted further, the evidence that the appellants were under the influence of liquor at the time of the provocation should have been considered as a relevant factor in favor of the appellants under the circumstances.

It was the submission of the learned Senior DSG for the Attorney General that there was no evidence of a provocation of the appellants at all, and the incident was not a result of a sudden fight. Although the prosecution failed to prove the conspiracy charge because of the treating of PW-07 as an adverse witness for the prosecution, it was his position that the damages caused to the house and household goods and the fact that the appellants even attacked the vehicle that attempted to take the injured to the hospital establishes the common intention of the appellants.

It was his contention that although the learned High Court judge has considered PW-16 Subarathna Menike as an independent witness, she was not, as she was the 2nd appellant's mother's sister. The appellants argument that stones were thrown at them was an afterthought in his view, as it was not the position of the appellants when the main witnesses were giving evidence.

In terms of section 105 of the Evidence Ordinance it is up to an accused to prove that the case of the accused comes within exceptions.

The relevant section 105 reads as follows;

> **When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Ceylon Penal Code, or within any special**

exception or proviso contained in any other part of the Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

However, our superior Courts have constantly viewed that even if an accused person did not raise a defence based on exceptions to section 296 of the Penal Code, it is the duty of a trial judge to consider whether there is evidence available for such an exception, if there is evidence on record.

In the case of **King Vs. Belana Withanage Eddin 41 NLR 345** Court of Criminal Appeal held;

> *"In a charge of murder, it is the duty of the judge to put to the jury, the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence of record, although such defence was not raised nor relied upon by the accused."*

In **King Vs. Vidanalage Lanty 42 NLR 317** the Court of Criminal Appeal observed the following;

> *There was evidence in this case upon which it was open to the jury to say that it came within exception 04 of section 296 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lessor verdict might possibly be based.*
>
> **Held:**
>
> > *"It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of a lesser offence."*

In the instant action, although learned Counsel went on the basis of a sudden fight and provocation to contend that the offence should have been considered by the learned High Court judge as an offence of culpable homicide not amounting to murder, I find that such a position has never been taken by the defence when the prosecution witnesses gave evidence.

The appellants have not admitted that they were drunk at the time of the incident and that they were provoked by the deceased or any member of his family, until the appellants made their dock statements. As pointed out correctly by the learned Senior DSG, this position appears to be an afterthought due to the evidence of PW-07, who was later treated as an adverse witness and PW-16 who says that the appellants were consuming liquor and when she reached the scene of the incident stones were being thrown at each other by the parties.

If it was the stand of the appellants that they were drunk and they were provoked, which resulted in a sudden fight, that position should have been put to the key witnesses when they gave evidence. Although the learned President's Counsel for the 1st and the 2nd appellants put much emphasis on the evidence of PW-16 based on the assumption of the learned High Court judge that she was the only independent witness in this action, as pointed out, she cannot be considered so by any means. Apparently, it appears to be that what the learned High Court judge meant was that she was the only witness who was not a member of the family of the deceased. Admittedly, she is the 2nd appellant's mother's sister and she is the one who has advised not to quarrel when he was consuming liquor. I find that this is a misdirection of facts by the learned High Court judge which has not caused any prejudice to the appellants.

The evidence led in this action clearly establishes the fact that at the time of the attack, the deceased, his father the injured, and his family members were attending to their nightly affairs after retiring to their home for the day.

It was only after hearing the appellants that the head of the household has come out to inquire, which under any circumstances cannot be termed a provocation.

There is no evidence of a sudden fight or provocation as contended by the Counsel for the appellants, but an intentional attack on the house of the deceased and his father by the appellants. Even though a dock statement has some evidentiary value, the appellants cannot expect the court to give equal value to their dock statements as against the evidence given under oath and subjected to the test of cross examination.

I find that the appellants have no basis to claim the exceptions to section 294 of the Penal Code in their favour in view of the medical evidence on the injuries of the deceased. As detailed earlier, of the 17 injuries found on the body of the deceased 11 of them have been serious cut injuries. The way the injuries have been inflicted on the deceased clearly suggests that he was chased and attacked from behind, which establishes the cruel and inhuman nature of the injuries inflicted on the deceased, which prevents the appellants claiming the benefit of grave and sudden provocation.

In the case of **King Vs. Marshal Appuhamy 51 NLR 140**, where the accused, who was indicted for murder, pleaded that his offence should be reduced from murder to culpable homicide not amounting to murder for the reasons that he acted on grave and sudden provocation and that he was so drunk that he was unable to form a murderous intention.

Held:

> *That intoxication which fell short of the degree of intoxication contemplated by section 78 of the Penal Code could be considered in dealing with the*

question whether the man's susceptibility to provocation was affected by intoxication.

In the instant action there is no acceptable evidence to suggest that the appellants were susceptible to provocation due to intoxication at the time of the attack. The evidence of PW-16 speaks seeing the 2nd appellant consuming liquor with friends before the incident. The dock statements where the appellants say that they were after liquor, by no means provide cover for the appellants to claim provocation due to intoxication under the circumstances.

It was the contention of the learned President's Counsel that the learned trial judge has failed to give adequate consideration to the common intention before finding them guilty on that basis.

In the case of **The King Vs. Assappu 50 NLR 324** it was held by Dias,J. that;

In case where the question of common intention arises,

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

(2) The accused must have been actuated by common intention with the doer of the act at the time the offence was committed.

(3) Common intention must not be confused with same or similar intention entertained independently to each other.

(4) There must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.

(5) The mere fact of the presence of the accused at the time of the offensive is not necessarily evidence of common intention.

It is apparent from page 23 (Page 381 of the appeal brief) of the judgment, that the learned High Court judge has considered whether there was common intention among the appellants to commit the offence. Although each

appellant's action has not been considered separately, what they were doing at the time of the commission of the offence has been considered to conclude that there was common intention.

I find that even if considered separately, there was ample evidence in this action to determine the common intention of the appellants. As considered, the evidence establishes each appellants presence and participation in throwing stones at the house of the deceased and using foul language at the members of the house. There is evidence that each of them was carrying weapons. Evidence also establishes that each of the appellants have chased after the deceased and cut him and the actions of each of the appellants in the process. It is clear that the damages caused to the house and the attempt to prevent the injured being taken to the hospital are also part of the same common intention. Hence, I am of the view that even if there was a misdirection as claimed, it has not caused any prejudice to the appellant or has occasioned a failure of justice.

It was the contention of the learned Counsel for the 3rd appellant that the evidence of PW-01 was contradictory, and the learned trial judge was wrong when she determined that they are minor in nature and inconsequential. He also pointed out to the evidence of other witnesses, to argue that the evidence was not believable as to what really happened on that day, which should have been held in favour of the appellants.

I find that the learned High Court judge has considered each of the contradictions except for the contradiction marked V-05, and the mentioned omissions to form the conclusions reached by her. Although the contradiction marked V-05 has some relevance, were PW-01 in his evidence at the inquest held has stated that the 4th accused indicted also cut the deceased along with others, I am unable to agree that it has resulted in denial of a fair trial to the appellants.

As considered correctly by the learned High Court judge, when the totality of the evidence is taken into consideration the said contradiction makes no dent in the testimonial trustworthiness of the evidence of PW-01.

When it comes to the alleged omissions and inconstancies of the evidence of other witnesses, as considered correctly, it is natural for any witness to forget some details of what happened due to the passage of time and is an expected scenario in any trial, unless they go into the root of the matter.

Although the learned trial judge has considered the legal value that can be attached to a dock statement of an accused and what was stated by them in their statements, it appears that determining whether their statements can be accepted or rejected has escaped the mind of the learned High Court judge.

All the appellants have made similar dock statements to claim that they were after consuming liquor and stones were thrown at them from the direction of the house of the injured Ariyadasa and they also threw stones at them. Apart from that they have denied any connection to the crime.

I am of the view that even if considered in its correct perspective, their dock statements would not have provided a reasonable explanation or created any doubt as to the overwhelming evidence available against them in this action.

The proviso to Article 138 of the Constitution which confers jurisdiction on the Court of Appeal to hear and determine appeals reads thus;

> "**Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice"**

Accordingly, I find that the mentioned misdirections and nondirections have not prejudiced the appellants or has caused any failure of justice which requires intervention from this Court.

For the aforementioned reasons, I find no basis to interfere with the findings of the learned High Court judge.

The appeal therefore is dismissed, as it is devoid of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P./ C.A.)

I agree.

President of the Court of Appeal