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 Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0375/2019

High Court of Panadura Case No:

HC/2720/2010

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Prangige Jayasiri Peiris

ACCUSED

AND NOW BETWEEN

Prangige Jayasiri Peiris

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J. (P./C.A.)
	: Sampath B Abayakoon, J.
Counsel	: Darshana Kuruppu with Sajini Elvitigala and Dinara Bandara for Accused-Appellant
	: Sudarshana De Silva D.S.G. for the Respondent
Argued on	: 01-12-2021
Written Submissions	: 31-07-2020 (By the Accused-Appellant)
	: 03-09-2020 (By the Respondent)
Decided on	: 20-01-2022

Sampath B Abayakoon, J.

This is a matter where the accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Panadura on following counts.

(1) Committing the offence of murder by causing the death of one Nammuni Nishantha Silva, punishable in terms of section 296 of the Penal Code.

(2) Committing the offence of murder in the same transaction by causing the death of one Guruge Wasantha Jayalal Silva, punishable in terms of section 296 of the Penal Code.

(3) Causing injuries to one Saminda Indika Peiris in the same transaction by using the motor lorry No 68-8243, an offence punishable in terms of section 316 of the Penal Code.

(4) Causing injuries to one Rangajeeva Nonis in the same transaction by the use of the above-mentioned lorry, an offence punishable in terms of section 316 of the Penal Code.

(5) Causing injuries to one Dilani Champika in the same transaction by using the same lorry, an offence punishable in terms of section 316 of the Penal Code.

(6) Causing injuries to one Sarangage Nihal in the same transaction by using the same lorry, an offence punishable in terms of section 316 of the Penal Code.

All the above offences are said to have been committed on 13th April 2005 at a place called Katukurunda.

After trial without a jury, the accused was found guilty as charged, and sentenced accordingly by the learned High Court judge of Panadura.

At the hearing of the appeal, although the learned Counsel for the appellant has urged several grounds of appeal in his written submissions, it was informed that the following grounds of appeal will be pursued for the consideration of the Court.

(1) The trial Court was in error when it failed to consider that PW-01 Nirmal Ajantha Gunawardena was not a reliable witness.

(2) The learned trial judge has failed to consider that the entire incident was an accident and the accused appellant cannot be found guilty for the charges in the indictment.

(3) The trial Court was in error when it shifted the burden of proof of certain matters to the accused appellant, whereas the burden rests on the prosecution.

Evidence in brief: -

After getting to know at around 9.30 pm in the day of the incident that his sister's son Sameera was being assaulted by the brother's children of the appellant, the PW-01 has gone towards the house where the incident was happening along with his mother to meet the appellant in order to settle the

matter and bring the mentioned Sameera back. The appellant was living near the place of the incident and was well known to the witness and his mother as they used to hire his lorry for their business activities. When they reached the byroad, where the appellant lives, which was off the Colombo-Galle main road, they have seen the appellant near his lorry parked on the road and after seeing the PW-01, the son of appellant's brother named Roshan has started to come after him with a sword in his hand.

Through fear, PW01 has started running back towards the main road, but has overheard the appellant calling the above-mentioned Roshan and his brother who was also there, to get into the lorry. Looking back while running he has seen the lorry coming after him. Reaching the main road, the witness has stopped after seeing that the Police have arrived. He has seen the two Police officers who were present, telling the people who gathered in the main road to witness what was happening, to disperse. According to the witness, the persons who gathered were on the left pavement side of the road towards Panadura. He has then seen the lorry which was driven by the appellant running over the people who were there, including the deceased and the injured.

After running over, the lorry has gone towards Panadura without stopping. Thereafter, the injured had been rushed to the hospital, but one of the Police officers who came to inquire into the dispute could not be found at the scene of the crime.

The evidence of all the injured have been consistent that they and the deceased were standing on the left-hand side of the road and were by the side of the road when the vehicle ran over them.

PW-19 IP Suranga Ranaweera was the duty officer of Panadura Police on 13th April 2005. At 21.50 hours the appellant has come into the Police Station without wearing any clothes in his upper body in a highly agitated state. He has handed him a key, informing that he stopped the lorry on the road. It was

his evidence that before he could go near the lorry which was parked on the road, he was informed that there is a person entangled under the lorry. The witness has taken steps to get the person released and has observed that he was still alive. However, he has been informed by the hospital authorities that he has passed away upon admission. Later he has come to know that the person found entangled to the undercarriage of the lorry was a police constable named Silva attached to Modara Police.

The Judicial Medical Officers who have given evidence in this case has confirmed that the causes of death of the two deceased persons, namely, P Nishantha Silva and G Wasantha Jayalal Silva and injuries to the four injured persons were due to a road traffic accident.

When called for a defence at the conclusion of the prosecution case, the appellant has made a statement from the dock. He has stated that he was playing a game of cards with others at about 9.30 pm on the day of the incident at his house. It was his statement that as his wife wanted him to go to Luckysevenpura and pick her mother, and it was for that purpose he left his house in his lorry. After reaching the main road and while proceeding towards Panadura by the left lane of the road, he has seen a crowd of persons on the pavement and when he reached that point about 25-30 persons fell on to the road leaving no room for him to avoid collusion with them, although he attempted to take the lorry to the right side of the road. He has stated that although he initially stopped the vehicle, due to the fear of being assaulted he left the place and went to the Panadura Police and informed what happened.

Grounds of Appeal: -

The main contention of the learned Counsel for the appellant is that this was an unavoidable accident and not an intentional act, since there was no animosity between the deceased and the injured. It was contended further that the evidence of PW-01 was not credible in that regard.

Another argument pursued by the learned Counsel for the appellant was that since the learned trial judge has failed to analyze the charges against the appellant separately, the judgment cannot be considered as a proper judgment in terms of section 283 of the Code of Criminal Procedure Act.

It was the contention of the learned Deputy Solicitor General (DSG) for the Attorney General that although the learned trial judge has used the word 'ඔව්දැනාව' at the commencement of his judgment, it is abundantly clear from the judgment that all the charges against the appellant has been considered separately. It was contended that the learned trial judge has not shifted the burden to the appellant and he was well aware of the governing principles of evidence when he considered the evidence in the judgment.

Relying on the judgment of **Achala Wengappuli, J.** in the case **of A.W.Haprul Asad and another Vs. The Attorney General C.A. Case No-91-2013 decided on 21-06-2019** it was his contention that since this was a clear situation where the actions of the appellant come within the 4th limb of section 294 of the Penal Code, the judgment of the learned High Court judge should stand affirmed.

First Ground of Appeal: -

The learned Counsel for the appellants contention that PW-01 was not a credible witness appears to have been based on what he has said as to the location of the roads and the distances when he gave evidence and what happened when he and his mother went near the house of the appellant in order to meet him. I find that due to the lengthy evidence in chief and cross examination as to the locations of the roads and the distances, the witness has been confused in giving his evidence. However, since the appellant had admitted that it was the lorry driven by him that hit the deceased and the injured, I am of the view that the mentioned infirmities have no relevance to the facts in issue.

PW-01 has not seen the initial incident where a relative of him was assaulted and has not spoken about any involvement of the appellant to that incident. What he has seen was the presence of the appellant near the parked lorry and him driving towards him.

The evidence led in this action clearly establishes that the PW-01 and his mother had gone to the place where the appellant resided in order to meet him after hearing about a dispute the appellant's brother's children had with a relative of PW-01. By the time they reached the place, the initial incident appears to have been over. It is evident that PW-01 had to run back towards to Colombo-Galle main road in order to avoid being assaulted. According to the own admission of the appellant it was the lorry driven by him that crashed into the people, including the Police officers who were on the pavement of the main road, although it was his position that they fell onto the road.

I am unable to find any reason to find the evidence of PW-01 as not credible in the given the circumstances, hence, I find no merit in the ground of appeal.

Second Ground of Appeal: -

It has been proved that the byroad from where the appellant entered the main road was only a short distance away from the place of the incident. Hence, the appellant ought to have had the clear knowledge that in all probabilities death or serious injuries would occur to the people on the road when the lorry was driven in the manner he did.

In his judgment the learned trial judge has considered the evidence based on the intention to conclude that the appellant is guilty of murder. I am of the view that even if one can argue that there was no intention on the part of the appellant to commit murder, the appellant can still be found guilty based on his knowledge as per the fourth limb of section 294 of the Penal Code as rightly pointed out by the learned DSG and as the facts speaks for itself.

The relevant provision of the Penal Code reads as follows;

> **294. Except in the cases hereinafter excepted, culpable homicide is murder-**
>
> **...**
>
> ***Fourthly*- 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 is 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 book **Commentary on the Indian Penal Code (13th Edition) at page 979** has stated 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 the probable result and without any excuse for incurring the risk of causing the 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 anyone in particular."*

As the fourth limb of section 294 of the Penal Code only speaks of the knowledge, unlike the other three limbs of the section where it refers to the intention of doing an act, the difference between the words 'intention' and 'knowledge' needs to be looked at.

In the case of The **King Vs. Rengasamy 25 NLR 438** the Court of Criminal Appeal considering the above stated that;

> *"Intention is a conscious and voluntary act of the mind. It consists in desiring a particular result 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 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 in to cases of extreme rashness and disregard to human life. Illustration (d) under this section shows what 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 evidence led in the instant action has clearly established that the vehicle driven by the appellant had all the possibilities of avoiding the persons who were on the left-hand side of the road being hit. The appellant has shown no regard for the human life when he crashed onto the group of persons who apparently had no connection to the initial incident. He should have had the knowledge of the possible result of a person being hit by a vehicle like a lorry driven by him. This has resulted in the deaths of two individuals, including one of the Police officers who was present and injuries to four others. The appellant as an experienced driver should have clear knowledge that somebody who was hit by his vehicle being dragged on when he fled the place of the incident towards Panadura. When IP Ranaweera of Panadura Police inspected the vehicle, he has observed that the person entangled was still alive, which means that had he stopped the vehicle after the incident his life may have been saved.

This act itself establishes the scant disregard the appellant has shown to human life.

The excuse given by the appellant for the incident was that when he was passing the place of the incident the persons who were on the payment fell into his path and he had no time to avoid them being hit, cannot be considered a valid excuse. His position was that he was only driving to bring his mother-in-law from a place little distance away. The evidence clearly establishes that the lorry had entered the main road from a very short distance away from the place of the incident. Under the circumstances, if the vehicle was being driven in the normal manner as claimed, the speed of the vehicle would have to be much less given the distance from which it entered the main road and the place of the incident.

It is therefore clear that the actions of the appellant were without any excuse for incurring the risk of causing of such injury, hence, I find no merit in the second ground of appeal.

Third Ground of Appeal: -

There cannot be any argument that in a criminal case the burden of proof of its case beyond reasonable doubt is with the prosecution and the accused has to prove nothing.

It is abundantly clear from the judgment that the learned trial judge was well possessed of the relevant legal principles that should be considered, and in fact has considered the evidence on the basis that whether a reasonable explanation has been provided or a reasonable doubt has arisen on the evidence of the prosecution.

I find that the learned High Court judge in the process of considering the defence put forward by the appellant has commented that his failure to call the persons whom the prosecution witness claimed that travelled in the vehicle, as relevant under section 114 of the Evidence Ordinance. This was a misdirection.

However, it is my view that the mentioned misdirection has not caused any prejudice to the appellant as the conviction has been based on the evidence of the prosecution and not on the failures of the appellant.

Although it was contended by the learned Counsel for the appellant that the learned High Court judge has failed to analyze the six counts preferred against the appellant separately, I am in no position to agree with the contention. As pointed out correctly by the learned DSG, even though the learned high Court judge has used the word 'ඉවත්දෙනාව', that does not mean that the evidence has been considered on the basis of a single charge against the appellant.

It is very much clear that the incident where the deceased received fatal injuries and the four injured persons received their injuries have had happened within a short span of few milliseconds apart and at the same time. As such, it is impossible for a trial judge to compartmentalize the evidence in order to analyze against each of the counts separately. I find that the learned High Court judge has analyzed the evidence as he should have in a case of this nature and has come to his findings with reasoning, which warrants no interference from this Court. In view of the above, I find no basis for the third ground of appeal either.

The appeal therefore is dismissed, as I find no 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