IN THE COURT OF APPEAL OF THE DEMOCRATIC 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

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

Complainant

C.A. Case No. 054/19

High Court of Kegalle
Case No. 2781/08

Vs.

1. Andra Hendige Upul Nilantha Alias Rana
2. K. T. Shantha Milan Fernando

Accused

AND NOW BETWEEN

Andra Hendige Upul Nilantha
Alias Rana

Accused –Appellant

Vs.

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

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : Saliya Peiris PC with Pasindu Thilakarathne for the Accused-Appellant

Suharshi Herath, SSC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 10.09.2019 (On behalf of the Accused Appellant)

21.11.2019 (On behalf of the Respondent)

ARGUED ON : 08.02.2022

DECIDED ON : 10.03.2022

WICKUM A. KALUARACHCHI, J.

The first Accused-appellant together with the second accused was indicted in the High Court of Kegalle for having committed the following offences.

i. On or about 20.04.2005, committing the offence punishable under Section 140 of the Penal Code, being a member of an unlawful assembly in which the common object was a robbery.

ii. Committing the murder, the offence punishable under section 296 of the Penal Code read with Section 146 of the same as a member of an unlawful assembly.

iii. Committing the robbery, the offence punishable under Section 380 of the Penal Code read with Section 146 of the same as a member of an unlawful assembly.

iv. Committing the offence of murder punishable under Section 296 of the Penal Code read with Section 32.

v. Committing the offence of robbery punishable under Section 380 of the Penal Code read with Section 32.

Accordingly, the first, second and third charges are based on unlawful assembly. The fourth and fifth charges are based on common intention.

Prosecution evidence discloses about three or four person's involvement in the crime. No witness has stated more than four persons' involvement. In such circumstances, first, second and third counts have been brought without any basis.

The learned High Court Judge acquitted the 2nd accused from all five charges. The first accused-appellant was convicted for the 4th and 5th counts and a ten-year sentence for the 5th count and death sentence for the 4th count were imposed. The 1st accused-appellant preferred this appeal against the said conviction and sentence. At the hearing of the appeal, the learned President's Counsel for the appellant and the learned Senior State Counsel for the respondent made oral submissions. Prior to the hearing, both parties tendered their written submissions.

Briefly, the facts relating to the case are as follows. The Incident took place in a betting center namely 'Sporting Times' located on the first floor of a building. The floor was divided into two parts. Manager's room and satellite room were in one part and the other part was for the customers. Four persons entered the manager's room through the door which was open for the cashier to leave. Thereafter, those persons forcibly opened the safe and took the money. The deceased was also inside that room. One of the persons shot at the deceased. At the same time, the receiver of the land phone was pulled out and it was thrown away. After the building was locked while the other employees,

including the deceased, were inside the building, those persons left the premises.

When the defence was called after the prosecution case was closed, the appellant made a dock statement and stated that "On the date, I went to the betting center, there was a commotion at this place and the telephone was fallen down. Thereafter, I kept it on the table."

The contentions of the learned President's Counsel for the appellant were based on the following three main grounds.

1. A common murderous intention on the part of the appellant had not been proved by the prosecution.
2. The circumstantial evidence against the appellant was not properly evaluated.
3. The learned High Court judge failed to evaluate the contradictions in prosecution witnesses.

Although the aforesaid grounds are stated in the written submissions tendered on behalf of the appellant, the learned President's Counsel did not make submissions regarding contradictions. However, in the written submission, it was mentioned that PW 18 had stated that the telephone receiver was found under the table of the cashier and PW 15 stated that PW 18 had told him that the telephone receiver was found in the manager's room. Although, this has been pointed out as a contradiction, PW 15 has said that he stayed outside of the premises until PW 18 entered the crime scene. Furthermore, PW 15 clearly stated that he did not know exactly where the receiver was and PW 18 told him that the receiver was on the floor of the manager's room. In addition, PW 2 stated while describing the incident, that the cashier's table was in the manager's room (page 110 of the appeal brief). Therefore, it is clear that there is no contradiction between the evidence of PW 18 and PW 15 on that point.

First, I proceed to consider whether the conviction for the 5th count is correct. Evidence has been led in respect of the identification parades held. At that time, 1st accused was the 4th suspect. He has been identified by PW 3 in the identification parade. After identifying, he had said that the person involved has a similar face to the 1st accused. Also, a specific action performed by the 1st accused was not said by the PW 3. Because of these infirmities, the learned High Court Judge decided not to act on the identification done in the identification parade. In these circumstances, it has to be decided whether committing the offence of robbery by the appellant has been proved.

In Podisingho Vs. King - 53 NLR 49, Gunawardane Vs. The Republic of Sri Lanka - (1981) 2 Sri L.R 315, Don Sunny Vs. Attorney General – (1998) 2 Sri L.R 1 and several other judicial authorities, it has been held that it is incumbent on the prosecution to establish that the circumstances the prosecution relied on are consistent only with the guilt of the accused-appellant and inconsistent with any reasonable hypothesis of his innocence.

In this case, the fingerprint registrar's expert opinion has not been challenged by the learned defence counsel. Expert evidence establishes that the 1st accused's fingerprints and a palm print were on the receiver. The argument advanced by the learned President's Counsel for the appellant was that the behavior of a person who is agitated during a commotion is in an unexpected way and thus keeping the receiver on the table by the appellant as described in his dock statement could be happened. Therefore, He contended that the accused appellant's dock statement has not been properly considered.

In reply, the learned Senior State Counsel contended that according to the evidence of PW 18, the receiver was found under the cashier's table. PW 1 stated in his evidence that one person among the gang who came for the robbery grabbed the receiver of the phone, pulled it out and at

that moment, the receiver broke off from the telephone. During this commotion, PW 2 had crawled under the cashier's table and she also testified that the receiver slipped close to her legs. So, the evidence that the telephone receiver was pulled out and fell under the cashier's table is well corroborated by each other's evidence.

In addition, the fact that the receiver which was pulled out was under the table has not been challenged on behalf of the accused-appellant. The appellant stated in his dock statement that he kept the receiver on the table. It is obvious, if he did so, he kept it after it had been thrown out by one of the persons in the gang. But when the PW18, the registrar of fingerprints went there for examination after the incident, the receiver was not on the table but it was under the table. The said item of evidence has also not been challenged on behalf of the appellant. In such circumstances, it is apparent that in fact, the receiver had not been kept on the table as stated by the appellant in his dock statement. Therefore, the learned High Court Judge is correct in rejecting this unbelievable dock statement.

Undisputedly, the unchallenged evidence of this case clearly establishes that robbery was taken place in this place. Moreover, it was clearly elicited from the evidence that the land phone was in the restricted area for the customers. Hence, pulling out the receiver had to be done by a member of the gang and expert evidence on finger print proves that it has been done by the appellant. In considering the entirety of the evidence, it is well established now, the appellant committed the robbery with others in the gang. Therefore, the learned High Court Judge is correct in deciding that the 1st accused-appellant has committed the offence of robbery, as the only inference that could be drawn by the aforesaid circumstantial evidence is that the appellant is guilty of the offence of robbery.

Accordingly, the conviction in respect of the 5th count has to be affirmed. For an offence under Section 380 of the Penal Code, an accused shall be punished with rigorous imprisonment for a term which may extend to 10 years and shall also be liable to a fine. The learned High Court Judge imposed a ten-year sentence and a sum of rupees Ten thousand as a fine for the 5th count. Therefore, the sentence imposed by the learned High Court Judge is neither illegal nor wrong in principle. When considering the nature of the crime, I hold that the sentence is not excessive.

Now, this court has to examine whether the appellant had the murderous intention to convict him for the 4th count. The learned President's Counsel for the appellant contended that even if it was proved that the appellant was part of the gang which committed the robbery, nevertheless it has to be established that he shared a common murderous intention. He contended further that under Section 32 of the Penal Code, liability cannot be imputed merely because the participants were members of a gang that committed the robbery. He submitted that the prosecution has to establish beyond reasonable doubt that the appellant shared a common intention in committing the murder of the deceased. I agree that the said legal position regarding the common intention stated by the learned President's Counsel is correct.

In reply, the learned Senior State Counsel for the respondent contended that the common intention can arise in the spur of the moment and since the deceased was a barrier for the appellant and others to accomplish their initial common intention of robbery, the most logical inference is that the murderous common intention arose in that spur of the moment. In addition, the learned Senior State Counsel submitted that the gang came with a gun and they had the common intention of shooting if the necessity arises. The learned Senior State Counsel

pointed out further that the manner in which they acted falls under the second limb of Section 294 of the Penal Code.

Series of Judicial Authorities in respect of the common intention has been tendered by both the learned President's Counsel and the learned Senior State Counsel to substantiate their arguments. Undoubtedly, participation by each accused person in the *actus reus* of the offence and the sharing of the requisite *mens rea* among all the accused persons are required to establish common intention. In addition, the mental sharing must be evidenced by a criminal act or illegal omission manifesting the state of mind to be liable under Section 32 of the Penal Code.

Although the learned counsel for both parties argued at length about the common intention, it is my view that the doctrine of common intention need not be applied to determine the instant action. The appellant himself admitted by his dock statement that he was at the aforesaid betting center at the time of the crime. The prosecution established that the said gang entered the restricted area for the customers to commit this crime. Fingerprint expert's unchallenged evidence establishes that the 1st accused-appellant's fingerprints and palmprint were there on the telephone receiver which was thrown out in that area. Therefore, it is well established that the appellant was one of the persons in the gang who committed the robbery.

The next matter to be considered is whether the member of the gang who shot at the deceased was established? The witness PW 3 stated in his evidence that the appellant shot at the television. The relevant questions and answers are as follows:

ප්‍ර: මෙම විත්තිකූඩුවේ සිටින විත්තිකරු එදා ඔය ස්ථානයට ආවා කියලා තමන් හඳුනා ගත්තාද ?

උ: ඔව්. (page 138 of the brief)

ප්‍ර: දැන් අද හඳුනාගත්ත විත්තිකරු තමන්ගේ ආයතනයට ඇවිත් මොනවා කරනවාද දැක්කේ ?

උ: වෙඩි තියනවා දැක්කා. ටී. වී. එකට වෙඩි තියනවා දැක්කා.

ප්‍ර: මෙම විත්තිකරුත් ආයතනයට ඇවිත් වෙඩි තියනවා දැක්කාද?

උ: ඔහු තමයි ටී. වී. එකට වෙඩි තිබ්බේ. (page 139 of the brief)

In cross examination also PW 3 has said that he saw the four persons.

ප්‍ර: දැන් ඒක නිසා ඒ ආපු හතර දෙනාගේ මුහුණවල් මතක තියා ගන්න තමුන්ට උවමනාවක් තිබ්බේ නැහැනේ?

උ: නැහැ ඉතින් අපි යනකොට දැක්කා.

ප්‍ර: යනකොට දැක්කා?

උ: ඔව්. (page 142 of the brief)

It is vital to be noted that it has never been challenged on behalf of the appellant that the appellant shot at the television. In cross-examination, PW 3 was asked only 14 questions. Although it was revealed in cross-examination that the PW 3 identified the appellant in the Identification Parade and stated that the person who participated in the robbery was someone with a face like this, in cross-examining the PW 3 in the High Court, it was not suggested to the PW 3 that at least the appellant was not the person who shot at the television.

It is important to be noted that although the identification of the appellant by the PW 3 in the identification parade is not precise as such, it is a fact that PW 3 identified the 1st accused-appellant in the identification parade. When the fingerprint expert proves that the appellant's fingerprints and palm print were in the telephone receiver and the evidence of the witnesses reveals that one person of the gang pulled and thrown out the receiver, it is well established that the PW 3 had identified the appellant very correctly as one of the persons came for the robbery. Now, when taking the evidence of PW 3 and unchallenged expert evidence together, the appellant's identity has

been precisely proved. Therefore, PW 3's evidence that the appellant shot at the television could be accepted without any reasonable doubt.

It is clearly established by the aforesaid circumstances that the appellant was possessed with a gun at the time of the crime and there was no evidence whatsoever that the gang had more than one gun. Also, it is an undisputed fact that the cause of death of the deceased was due to gunshot injuries. Prosecution witnesses also testified that one of the gang members shot at the deceased. As only the appellant was armed with a gun, it is evident that he shot the deceased and there was no possibility whatsoever for anybody else to shoot the deceased. Therefore, the doctrine of common intention need not be considered here. In the circumstances, the only inference that could be drawn is that the accused-appellant and no one else shot the deceased.

An argument can be advanced that he only shot at the television but the same shot went on to the deceased also and he had no intention of killing the deceased. That could happen because no one says how many gunshots were fired. Also, no one saw the appellant shoot the deceased. They heard gunshots and then the deceased was laying on the floor covered in blood. For such a situation, the fourth limb to Section 294 of the Penal Code applies. The fourth limb to Section 294 states 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 is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

In this place, there were several people. The appellant was armed with a gun and it is obvious that there was an imminent danger of causing death to somebody if a shot had been fired. The appellant fired at the television. So, if the death of the deceased occurred as a result of the said firing, the appellant is guilty for the offence of murder in terms of

the said fourth limb to Section 294 of the Penal Code. Hence, even in those circumstances, it is established that the appellant has committed the murder.

As decided in several judicial authorities, in deciding a case on circumstantial evidence, the inference that can be arrived at should be consistent with the guilt of the accused only and inconsistent with his innocence. In the instant action, the only inference that can be arrived at under the aforesaid circumstances is that the appellant and no one else shot at the deceased and committed the offence of murder.

The learned High Court Judge took a slightly different view in convicting the appellant for the 4th count. However, I hold that the learned High Court Judge's conclusion that the first accused-appellant is guilty of the charge of murder is correct in law for the reasons stated above.

Accordingly, I uphold the conviction and the sentence imposed on the appellant for the 4th and 5th counts.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL