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, read with article 138 of the constitution of The Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of SriLanka.

Complainant

CA/HCC/0185/2017 **VS**

High Court of Gampaha
Case No:179/2006

(1) Mohomed Rasik Mohomad Irushan
(2) Sena Sarif Mohomad Naufer Alias Kalla Naufar
(3) Mohomed Buhari Mohomad Jifri
(4) Abdul Rasak Mohomad Pasi
(5) Mohomed Rasik Mohomad Minaur Alias Seenu
(6) Mohomadeen Mohomad Hamin

Accused

And now between

Mohomed Rasik Mohomad Minaur Alias Seenu

Accused– Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anuja Premarathne, PC with N. Rajapaksha and T Muthucumarana

for the 5th accused-appellant

Shanaka Wijesinghe PC, ASG for the respondent

ARGUED ON : 10/01/2022

DECIDED ON : 03/03/2022

R. Gurusinghe J.

The fifth accused-appellant (the appellant) was indicted in the high court of Gampaha along with five others. The charges were as follows:

1) On or about 23rdApril 1994, within the jurisdiction of this court were members of an unlawful assembly of which the common object was to

commit hurt and murder of Mohamad Usman Mohomad Housun and thereby committed an offence punishable under section 140 of the penal code;

2) that at the same time and place in the course of the same transaction that one or more of the members of the unlawful assembly caused the death of Mohamad Usman Mohomad Housun and thereby committed the offence of murder punishable under section 296 of the penal code read with section 146;

3) that at the same time, place and the same transaction that you did cause the death of Mohammed Usman Mohamed Housun and thereby committed the offence of murder punishable under section 296 of the penal code.

The third and sixth accused died during the pendency of the trial.

The prosecution led the evidence of PW1, PW3,PW2, PW4, PW10, PW7, PW8, PW6, PW22, PW9 and the court interpreter (Muraliyar) of the court.

PW1 and PW3 claim to be eyewitnesses. PW4 is the Judicial Medical Officer.

After trial, The Learned High Court Judge has discharged all the remaining accused from all charges, except the appellant.

The Learned High Court Judge has relied on the evidence of PW1 and PW3. Accordingly, as per the evidence of PW1 and PW3, the appellant stabbed the deceased on the back of his body near the shoulder, which caused the death of the deceased. The Learned High Court Judge has further pointed out in his judgment that there was no sufficient evidence to show that the other accused persons contributed to the death of the deceased beyond reasonable doubt.

The facts of the case are briefly as follows;

A mob of people, including the appellant, had taken the deceased out from the house of PW2. A large number of people, including the appellant had attacked the deceased. The deceased was then taken near a kottan tree where he was made to sit on the steps of an old meat shop. PW1, in his evidence, has stated that he saw the appellant stab the deceased on the shoulder when the deceased was sitting or lying near the kottan tree. (Page 77 of the brief)

The first and second accused were also present at that time. PW1 states that he was standing near a bamboo bush about 20 meters away from the place of the incident when he saw the appellant stabbing the deceased

After witnessing the stabbing, PW1 states that he got into a bus to go to the police station. According to the evidence of PW1, the bus passed by the place where the deceased was sitting and PW1 saw the deceased crossing the road after receiving the stab injury. PW1 has further stated in his evidence that he was on the bus about 20-30 minutes after the deceased was stabbed and that the bus did not stop even though the deceased was crossing the road. If the evidence of PW1 is to be believed, then the injury caused by the appellant cannot be fatal. (on pages 104 and 105) he said as follows:

ප්‍ර: **තමන් කියන විදියට මියගිය තැනැත්තා පාර හරහා පැන්නා?**

උ: **ඔව්**

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ප්‍ර: **එතකොට පිහියෙන් ඇන ඉවරය්?**

උ: **පිහියෙන් ඇනලා සෑහෙන වෙලාවකට පස්සෙ.**

ප්‍ර: **බස් එකේ එනවා කීවේ12.00 ට පමණ?**

උ: 12.30 ට **පමණ.**

ප්‍ර: 12.30 ට පමණ වනවිට තමන් දැක්කා මරනකරු පාර හරහා පනිනවා?

උ: ඔව්

ප්‍ර: පාර හරහා පැන්නද, පනින්න පුලුවන් වුනාද?:

උ: පනිනවා දැක්කා.

ප්‍ර: පාර හරහා පනිනවිට බාප්පා බස් එක අනෙක් පැත්තට ගියා?

උ: ගියා

ප්‍ර: තමන් එතකොට තමයි, දැක්කේ බෙල්ල මිරිකුවා?

උ: ඔව්

(On pages 116 and 117), PW1 further stated in the re-examination as follows:

ප්‍ර: පිහියෙන් ඇනීම සිදුවෙලා කොපමණ වෙලාවකට පස්සෙද බෙල්ල මිරිකනවා සිද්ධිය තමුන් දැකලා කොපමන වෙලාවක් ගියාද?

උ: පැය කාලක්, පැය 1/2ක් ගිහින්

ප්‍ර: පැය කාල, පැය බාගය අතර සිදුවෙන දේ තමුන් දැක්කේ නැහැ?

උ: නැහැ.

When this piece of evidence is compared with the evidence of the Judicial Medical Officer (the JMO), it is clear that the deceased was not in a position to walk after receiving the fatal injury. (On page 202), the doctor stated as follows:

ප්‍ර: මරණයට හේතුව මොක ක්ද?

උ: **හෘද වස්තුවට වුන පහරදීමක්.දරුණු පහර දීමක්.**

ප්‍ර: **ඒ පහරෙන් කොයි ආකාරයෙන්ද බලපෑමක් වෙන්න පුලුවන්?**

උ: පීඩනය **අඩුවී, ප්‍රෂර් එක අඩු වෙනවා, ඒ නිසා** කම්පනය **ඇති වෙන්න පුළුවන්**

ප්‍ර: **එවැනි** රෝගියෙකු **බේරගන්න පුළුවන් වන්නේ කොපමණ කාලයක් ඇතුලතද?**

උ: **එවැනි** රෝගියෙකු **විනාඩි කීහිපයකින් මරණයට පත් වෙනවා**

ප්‍ර: **හෘද වස්තුවට ඇති වූ තුවාල හැර අනෙක් තුවාල වලින් මරණ සිදුවෙන්න පුළුවන් ද?**

උ: පෙනහැල්ලේ **ක්‍රියාකාරිත්වය අඩුවීම නිසා ටික කාලයක් ගත වෙනවා**

ප්‍ර: **මරණයට හේතු වශයෙන් හෘදය වස්තුවට වුන තුවාලයකින් ස්වාභාවික තත්ත්වය යටතේ මරණය සිදුවිය හැකි තුවාලයක් ද?**

උ: **ඔව්**

ප්‍ර: **එම තැනැත්තා රෝහලකට ගෙන ගොස් සුව කරන්න පුළුවන්ද?**

උ: **බැහැ**

ප්‍ර: **එය අනිවාර්යෙන්ම මරණය ගෙන දෙන තුවාලයක් ද?**

උ: **ඔව්**

(On pages 204 and 205), the JMO answered the cross-examination questions as follows:

ප්‍ර: **ඔබතුමිය මෙහි බරපතල තුවාල ලෙස හඳුවන්නේ මොන තුවාල ද?**

උ: **හෘදවස්තුවෙ සිට** පෙනහැල්ලට**ඇති කල ඇනුම් තුවාලය**

ප්‍ර: **බරපතල තුවාලයක් තියෙනවාද?**

උ: පිටපැත්තේ ඇනීම් තුවාලය

ප්‍ර: මොන අංකයද කියලා කියන්න පුළුවන් ද?

උ: 'ඩී' කියන තුවාලය බරපතල තුවාලයක්

ප්‍ර: 'ඒ' කියන තුවාලය පපුවේ තිබෙන තුවාලයක් එය මරණය ගෙන දෙන තුවාලයක්ද?

උ: ඔව්.

ප්‍ර: එහෙම තුවාලයක් වුන පුද්ගලයෙකු කොපමණ වෙලාවක් ජීවත්වෙන්න පුළුවන් තත්වයේ සිටිනවාද?

උ: විනාඩි දහයකින් හෝ පහලොවකින් විතර මරණයට පත් වෙනවා.

ප්‍ර: එහෙම තුවාල වුන කෙනෙකුට සාමාන්‍යයෙන් ඉඳගෙන ඉන්න පුළුවන් කමක් තියෙනවාද?

උ: ඉඳගෙන ඉන්න හැකියාවක් නැහැ . බොහෝම ඉක්මනින් වැටෙන්න ඕනෑ.

(On page 206)

ප්‍ර: 'ජී' කියන කොන්දේ ඇති තුවාලය, බරපතල තුවාලයක්ද? (it should be 'D').

එයින් අනිවාර්‍යයෙන්ම මරණය සිදුවෙනවාද?

උ: ඉක්මන් ප්‍රතිකාර ලැබුනොත් බේරා ගන්න පුළුවන්.

Thus, the evidence of PW1 and the evidence of the JMO are contradictory. The deceased was not in any position to stand up or walk to the other side of the road after receiving the stab injury.

This injury 'D' is alleged to have been committed by the appellant as per the evidence of PW1 and PW3. The JMO states that injury 'D' is not necessarily a fatal injury. According to the JMO's evidence, the necessarily fatal injury was named as 'A.' The injury named as 'D' is described as a grievous injury and not necessarily a fatal injury.

There is no evidence as to who inflicted the injury named 'A.' PW1 states that he saw the deceased crossing the road about fifteen to thirty minutes after the appellant inflicted a stab injury on the shoulder of the deceased.

The Learned High Court Judge relied on the evidence of PW1. If the evidence of PW1 is believed, the deceased was able to walk even thirty minutes after receiving the stab injury. PW1 had not seen what happened to the deceased during his absence after that. PW1 and PW3 do not speak of any injury caused by the appellant on the anterior of the deceased. As per the JMO, after the deceased received the injury named 'A' on the chest, he would not be able to walk or even sit.

As per the evidence of PW3, the appellant had stabbed the deceased on the deceased's shoulder. After that, in two to three minutes, the police arrived. The police had taken the deceased to the hospital on a stretcher. This evidence completely contradicts the evidence of PW1.

There were many injuries on the deceased's body; out of these, only four were identified as grievous injuries, which were named 'A,''B,''C'and 'D' in the post mortem report produced in evidence as 'P2'. A diagram is also attached to it. Injuries' A', 'B,' and 'C' were on the anterior, and injury 'D' was on the posterior of the body of the deceased. Injuries 'B', 'C' and 'D' were grievous injuries. The injury named 'A' is the only injury described as a necessary fatal injury. According to the JMO's evidence, the death of the deceased was caused by the injury named 'A.'

Evidence of PW1 and PW3 is not compatible with each other. Either one of them or both of them are not telling the truth. PW1 is an accused in a case of murder that happened on the same day of the incident of this case. The deceased in that case is a relative of the accused in this case. Except for the second accused, all five other accused are relatives. PW1 is an interested witness and had a motive to see the appellant and the rest of the accused are convicted, and as such his evidence should be considered carefully.

It is not clear from the evidence who inflicted the injury named 'A' in the post mortem report. As per the evidence, there were several people who had attacked the deceased at several places.

In a situation where several accused had tried together based on common intention to secure a conviction of one accused out of several accused, the prosecution must establish beyond reasonable doubt that the convicted accused who in fact was responsible for the commission of the offence and not the rest of the accused.

In the case of *Karupiah Servai vs.The King 52NLR 227,* Dias J held that;

"the situation in which the prosecution found itself may be reduced to the following prepositions. (X The person who strangled the deceased) maybe 'A', 'B', or 'C', in order to secure the conviction of 'A', the prosecution had to establish beyond reasonable doubt that X is not 'B' or 'C'. It is then and only then that the guilt of 'A' can be said to have established beyond reasonable doubt".

PW1 said the first and second accused assaulted the deceased with clubs (on page 86) and that the (appellant), the fifth accused, stabbed the deceased only once.

(On Page 97)

ප්‍ර: **එක පාර ද ඇන්නෙ.**

උ: ඔව් එක පාරක් ඇන්නා.

According to the evidence of PW1, when the deceased was dragged upto the kottan tree, the appellant was not there. The appellant came to that place later. The sixth accused strangled the deceased. However, as per the doctor's evidence,there were no signs of strangulation on the neck of the deceased. (Page 114) PW1 reiterated that the appellant stabbed only once.

(On Page 114)

ප්‍ර: **තමන්** කියන විදියට එක පාරක් පිහියෙන් ඇන්නා තමුන් දැක්කේ?

උ: ඔව්.

As per the evidence of PW3 Subasinghe, the first accused assaulted the deceased with tiles. The third and fourth accused attacked the deceased with clubs.

(Page 124)

The third and fourth accused attacked the deceased with clubs and stones. The sixth accused stabbed the deceased near the hip (page 128, 129),and the sixth accused strangled the deceased

(බිම දාලා බෙල්ල මිරිකුවා)

(On Page 133, and 134), The appellant stabbed the deceased on the back .

ප්‍ර: කොන්ඩෙන් අල්ලලා නැඟිටෙව්වද?

උ: වැටිලා හිටියා, කොන්ඩෙන් අල්ලන විට භාගෙට ඉස්සුනා. ඒ ගමන් කොන්දට පිහියෙන් ඇන්නා.

ප්‍ර: ඊට පස්සේ පස්වෙනි විත්තිකරු මරණකරුට පිහියෙන් ඇන්නට පස්සෙ මොකක්ද සිදුවුනේ?

උ: විනාඩි දෙකක් තුනක් යනවිට පොලිසියෙන් ආවා.

PW 3 (on page 151), referring to the sixth accused, said;

ප්‍ර: කොතනටද තුවාල වුනේ?

උ: දකුණු හෝ වම් ඉන පැත්තට වෙන්ඩ. ඉන පැත්ත කැපිලා ගියා.

But this claim was not proved by medical evidence. As per the evidence of the JMO, there was no injury on the hip of the deceased.

(On Page 204) the doctor answered as follows:

ප්‍ර: එතකොට ඉනේ තියනවාද යම් තුවාලයක්

උ: නැහැ

This evidence shows that the evidence of PW3 is not reliable and therefore, PW3 is not a reliable witness.

PW3 had made a statement to the police on 19th May 1994, after Twenty Six days of the incident. His explanation was that he did not go to the police station as the accused were not arrested.

In *Haramanis vs.Somalatha [1998] 3 SriLR 365*, Jayasuriya J described the Test of Spontaneity and the Test of Contemporaneity as follows;

"The law in its wisdom requires that the statement should be made within a reasonable time. The test is whether it was made as early as could reasonably

be expected in the circumstances and whether there was or was not time for tutoring and concoction. It is a question of fact depending on the attendant circumstances of the case. No hard and fast rule can be laid down as to when a statement is sufficiently contemporaneous."

This explanation for 26 days delay is not plausible and acceptable.

In Jayawardena and others vs The State [2000] 3Sri LR 192, Hector Yapa J stated thus;

"It is needless to say that such a long delay without reasonable grounds would make the evidence of the complainant, who is the only witness to the robbery suspicious and unsatisfactory having regard to the test of spontaneity and contemporaneity. It is common knowledge that, when complaints are not made promptly after an incident, there is always room for false implication motivated by ill will or on hearsay material. Therefore in our view there is merit in this argument advanced by learned Counsel that it would be dangerous to act on the evidence of the complainant in view of the long delay which has not been satisfactorily explained."

The delay in making a statement by PW3 is not reasonable in the circumstances of this case. His evidence contradicts the evidence of the Judicial Medical Officer'.

The learned High Court Judge has relied upon the evidence of PW1 and PW3 (para 38 and 39 of the judgment) to convict the appellant. When considering the evidence of PW1 and PW3 with the evidence of the JMO, the evidence of PW1 and PW3 cannot coexist. The Learned High Court Judge described the injury named as 'A' as an injury caused with the intention of killing the deceased. However, the judgment is silent about who inflicted the injury 'A'.

Even if the evidence of PW1 and PW3 is believed, only conclusion that could be drawn from that evidence is that the appellant had inflicted the injury named as 'D', which is not a fatal injury.

The learned Additional Solicitor General for the respondent concedes that there is no evidence to establish a common intention among the accused. He also concedes that there was no sufficient evidence to convict the first, second and fourth accused. The third and sixth accused were deceased during the pendency of the trial. The learned Additional Solicitor General pointed out that the acquittal of the rest of the accused is correct.

As described above, the evidence of PW1 and PW3 was not reliable and the conviction cannot be sustained based onthat evidence. There is no evidence as to who inflicted the fatal injury to the deceased.

In these circumstances, the charges against the appellant have not been established beyond reasonable doubt. Therefore, the conviction and the sentence imposed on the appellant is set aside. The appellant is acquitted.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal