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 Sri Lanka.

Complainant

CA - HCC 0200-201-2016 **Vs.**

High Court of Chilaw
Case No: HC 09/1999

1) Janaka Edward Croos

2) W. Joseph Wellington

Accused

And Now Between

1) Janaka Edward Croos

2) W. Joseph Wellington

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anil Silva, PC

for the 3rd Accused-Appellant (the first appellant)

Upul Kumarapperuma with Muza Lye and

Warshika Nayomi

for the 14th Accused-Appellant (the second appellant)

Sudharshana de Silva, DSG

for the Respondent

ARGUED ON : 31/03/2022

DECIDED ON : 08/06/2022

R. Gurusinghe, J.

The fourteen accused were indicted in the High Court of Chilaw for having committed the offences of unlawful assembly, the murder of Neville Nuton Miral and Kaspus Francis Miral and mischief of the property of Neville Nuton Miral. The first five charges were levelled against the 2nd, 3rd, 5th, 7th, 9th, 10th, 12th, 13th, and 14th accused, under sections 140, 146/296, 32/296 of the Penal Code.

Charge numbers 6, 7, and 8 were levelled against the 1st, 4th, 6th, 8th, and 11th accused, for having committed the mischief to the property of Neville Nuton Miral, an offence punishable under sections 146/409 and 32/409.

The 1st, 6th, 8th and 11th accused, had pleaded guilty to the charges levelled against them and the Judge convicted and sentenced them accordingly. The case against them was concluded.

Before the trial was concluded, the 2nd, 7th, 9th and 10th accused had died. The trial proceeded after making necessary changes to the indictment.

After trial, the 5th, 12th and 13th accused were acquitted. The 3rd and 14th accused were convicted for unlawful assembly and the murder of two persons were referred to in the indictment, as per counts 1, 2, and 3. The 3rd accused is the 1st appellant, and the 14th accused is the 2nd appellant. The 1st and 2nd appellants were sentenced to six months Rigorous Imprisonment for the first count and sentenced to death for the second and third counts.

Being aggrieved by the said conviction and sentence, the 3rd accused (1st appellant) and the 14th accused (2nd appellant), appealed to this court.

The facts of the case are briefly as follows:

The deceased Kaspus Francis Miral and Neville Nuton Miral are father and son, who resided in Kottapitiya Henwewa in Chilaw. The son lived with his wife (PW1) and ran a small boutique in the front portion of their house. The father, Kaspus Francis Miral, lived a few yards away from his son's house. On the 31st of January 1993, around 2.30 p.m a police vehicle from the Chilaw police station stopped in front of their boutique. About 4 to 5 police officers came in that vehicle. At that time, PW1 Doreen Manjula Miranda, the wife of the deceased Neville Nuton Miral was in the boutique. Some officers got down from the vehicle and they wanted to speak to her husband. PW1 went inside and informed her husband who was asleep at that time, that the police officers

wanted to talk to him. Then the deceased Neville Nuton Miral came out and spoke to the police officers. After about five minutes, the police officers went towards the lagoon in the same vehicle in search of illicit arrack. After some time, the police vehicle came back and stopped near the boutique. They brought three suspects. Two police officers stayed behind with the suspects. The police vehicle was driven again towards the lagoon and returned around 4.00 - 5.30 p.m. and took away the suspects and the police officers, who were waiting near the boutique.

After the police left, about 10 to 15 persons came to the boutique in search of the deceased Neville Nuton Miral. They abused the deceased, alleging that the deceased gave information to the police to seize their illicit arrack. They were armed with knives and clubs. The 7th accused said that he would kill the deceased. They broke the fence in front of the boutique and pelted stones at the boutique and assaulted the deceased with bricks. The deceased Neville Nuton ran to his brother's house, which was situated close by. He informed his father, the second deceased Kaspus Miral, that he wanted to go to the police station. The deceased Kaspus Miral thereafter came in a van to their boutique to accompany them to the Chilaw police station. The two deceased persons and PW1 got into the van which was driven by PW5 Sebastian. However, They were not able to proceed more than 150 ft. The 1st and 2nd appellants (13 and 14 accused) blocked the road by putting their bicycles across the road. As a result of that they had to stop the vehicle. The accused then dragged the two deceased out of the van and assaulted them with knives and clubs and murdered them on the spot. PW1 managed to escape from the place and was able to inform the police about the incident.

The defence case

The 1st appellant in his evidence stated that, he had attended a wedding in the morning and had gone to a funeral in the afternoon. He further added that he was aware of the murder of the two deceased, while he was on his way back home.

The 2nd appellant gave evidence stating that, he had been at the funeral of his relative the whole day and he had nothing to do with the murder. He said he had been in the village, but he was arrested only after about three months.

The first ground of appeal, argued by the counsel for the 1st appellant is that, the 1st appellant was convicted for murder on the basis of common intention, and the findings of the learned Trial Judge in this regard are completely erroneous.

The second ground of appeal is that his own counsel had asked certain questions implicating the 3rd and 14th accused and thereby, they were denied a fair trial.

The third ground of appeal is that the learned Trial Judge had compared the defence evidence with the prosecution evidence, which is wrong in law.

The grounds of appeal relied upon by the 2nd appellant is that the learned High Court Judge has failed to evaluate the evidence of the appellant and failed to give reasons for his decision.

The first argument was that the accused was convicted on the basis of common intention. The appellants were not convicted on the basis of the common intention. The learned High Court Judge has considered the participation of each accused in the commission of the crimes. The evidence clearly shows the participation of the two appellants in committing the crimes (vide pages 180, 181). In the evidence of PW1, the following questions and answers were given.

ප්‍ර: තමන් කිව්වා ජානක ආවා කියලා. පෙන්වන්න පුළුවන් ද?

උ: 2 වන විත්තිකරු ව පෙන්වයි. අධිචෝදනා පත්‍රයට අනුව 3 වන විත්තිකරු ව පෙන්වා සිටී.

On page 182

14 වන විත්තිකරු පෙන්වා සිටී.

ප්‍ර: අනෙක් ඇය?

උ: ගල් වලින් දමල ගැහැව්වා.

ප්‍ර: කවුරු කවුරු ද ගැහැව්වෙ?

උ: මාකස්, එඩ්වඩ් කaaස් (1st appellant), සුනිල්, රාසප්පා, මම බැලුවෙ ස්වාමී පුරුෂයාව බේරාගන්න.

ප්‍ර: කී දෙනෙක් ගල්වලින් ගහනවා දැක්කා ද?

උ: ජානක ගැහැව්වා (1st appellant), මාකස්, සුනිල්, ඒ හැර මම කෙලින් ඉදලා බලාගන හිටියෙ නෑ.

On Page 186

ප්‍ර: වෑන් රථයට නැගලා තමාලා මොකද කෙරුවෙ?

උ: කෙලින් පාරෙ ඇවිල්ලා හැරෙව්වා. ඒ වෙනකොට මේ ගොල්ලෝ දකින්න ඇවී, අපි තුංමන් හංදියට යන කොට වෙලින්ටන් (2nd appellant) සහ ජානක (1st appellant) ඇවිල්ලා හරස් කලා. අඩි 176 ක් විතර දුරක් පෙන්වයි.

ප්‍ර: අඩි 176 විතර ගමන් කරමින් ඉන්නකොට මොකද වුනෙ?

උ: ජානකයි (1st appellant), වෙලින්ටන්වයුයි ඇවිල්ලා වාහණය හරස් කලා.

On Page 188

ප්‍ර: ඊට පස්සෙ මොකක් ද වුනෙ ?

උ: පුරුෂයාගෙ තාත්තාට ජෝර්ජ් මිරැන්ඩොයි, ජානක කෘස් බිම දාගෙන පොලුවලින් ගැහැව්වා. තාත්තා වකුටු වෙලා සිටියා. තාත්තාට ගහනවා මම ඇස් දෙකෙන් දැක්කා.

In the evidence of PW4 on Page 205

ප්‍ර: ගල් ගහපු 5 දෙනාගේ නම් කියන්න?

උ: සුනිල් මිරැන්ඩා, එඩ්වඩ් කෘස් (1st appellant), ජෝර්ජ් මිලාර් එයාට සීනියා කියලා කියනවා.

On page 212

ප්‍ර: කවුද වෑන් එක ඉස්සරහාට බයිසිකල් තුන දැම්මේ?

උ: ජෝර්ජ් මිරැන්ඩා, වෙලින්ටන්, රාසප්පා, දැම්මේ.

The argument of the 1st appellant is that even if the 1st appellant had blocked the van in which the two deceased were travelling at that time, it is not sufficient to make the appellant liable because there was no evidence to show that they shared a common intention with the other accused, who caused the death of the deceased.

Section 146 of the Penal Code is as follows:

> 146. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing that offence, is a member of the same assembly is guilty of that offence.

Thus, according to section 146, there are two conditions that need to be satisfied in order for a person to be considered as a member of an unlawful assembly:

1. The person must be aware of one or more of the six facts, specified in section 138 of the penal Code which render the assembly unlawful.

2. The person should intentionally join the assembly or continue in it.

In the case of *Kulatunga vs Mudalihami 42 NLR 33* stated this;

"so far as each individual accused who was concerned, it had to be proved that he was a member of the unlawful assembly which he intentionally joined. Also that he knew the common object of the assembly."

In the instant case, there is evidence that the 1st and 2nd appellants were present at the time of pelting stones at the deceased boutique. The first appellant actively participated in pelting stones at the house of the deceased. The two appellants had obstructed the van going forward. The members of the unlawful assembly had dragged the deceased Kaspus Francis Miral, who was seated in the front seat of the van. The evidence is that the 1st appellant along with the 7th accused, assaulted the deceased on the head with clubs. The head injuries of Kaspus Francis Miral were such that the skull had multiple fractures and the brain was also damaged accordingly.

The only thing that we have got to see is whether the murder was committed in prosecution of the common object of the assembly, or such, as the members of that assembly knew that it was likely to be committed.

The members of the unlawful assembly first killed Kaspus Francis Miral and then took the 2nd deceased out of the van and killed him as well, on the spot.

The learned High Court Judge has observed that the appellants had not been withdrawn from the assembly at any time. If they were not aware that the assembly was likely to kill any of the deceased, atleast they could have withdrawn from it after the first deceased was killed. In these circumstances, it is not reasonable to infer that they were not aware that the assembly was likely to cause the death of a person.

Prof. G.L. Peiris, in his book titled "Offences Under the Penal Code of Ceylon" second edition at page 32, states as follows:

"In Ambalavanar (1892) 1 SCR 271, the accused were charged with "being members of unlawful assembly armed with cudgels and sticks which when used are likely to cause death." The Trial Court held, as a matter of law, that cudgels and sticks could not be regarded as weapons likely to cause death" when used as weapons of offence. The Supreme Court reversing this conclusion, preferred the view that a cudgel or even a stick might be used in such a way as to cause death and each case should depend on its own facts".

In this case, the evidence is that some of the members had knives and some had clubs. The doctor described that the injuries caused to the deceased should have been caused by heavy blunt trauma. The injuries could have been caused by heavy clubs or an iron bar.

There can be no doubt that when the accused indulged in beating the deceased with weapons like heavy clubs and knives, they must have known that murder was likely to be committed. When several persons attacked the deceased with

weapons like clubs, with the object of causing him serious injuries, they must have known that one or the other of those blows may likely cause death.

It is reasonable to infer that the appellants knew that they were likely to kill the two deceased in these circumstances. As far as the 2nd appellant is concerned, he should have withdrawn from the unlawful assembly at least after one person was killed. Of course, the first appellant himself participated in killing the first deceased. He cannot anyway escape from liability.

It is not necessary to have a pre-plan or pre-meeting of minds. It is sufficient that the offence was such that, the members knew it was likely to be committed.

Having considered the evidence of this case, I am satisfied that the appellants were very well aware that the unlawful assembly was likely to kill the two deceased. There was nothing to show that the appellants did not share the common object of the assembly. The appellants were not mere spectators or passers-by. They actively participated in the unlawful assembly.

For the reasons set out above, I affirm the conviction and the sentence imposed on the appellants.

The appeal of the accused-appellant is accordingly dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal