

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal under
section 331 of the Criminal
Procedure Code.

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

Court of Appeal Case

No. HCC/400-402/19

Complainant

High Court of Colombo

Case No. 9759/99

Vs.

1. Weerasekera Mudiyaaselage
Prabath Ruwan
2. Kadiravlu Sugumaran
3. Weerasekera Mudiyaaselage
Upali Priyashantha

Accused

AND NOW BETWEEN

1. Weerasekera Mudiyaanselage
Prabath Ruwan
2. Kadiravelu Sugumaran
3. Weerasekera Mudiyaanselage
Upali Priyashantha

Accused-Appellants

Vs.

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

Complainant-Respondent

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

COUNSEL : N. Jayasinghe with Jaliya Samarasinghe for the
Accused-Appellants.

Maheshika Silva, DSG for the Respondent.

WRITTEN SUBMISSION

TENDERED ON : 11.01.2021 (On behalf of the Accused-Appellant)
 22.02.2021 (On behalf of the Respondent)

ARGUED ON : 09.06.2022

DECIDED ON : 27.07.2022

WICKUM A. KALUARACHCHI, J.

Four persons were indicted for committing the murder of John Susilawathie on or about 15.10.1991, an offence punishable under Section 296 of the Penal Code. The four accused were tried without a Jury. The fourth accused died before the Judgement was pronounced. After the trial, the learned High Court Judge of Colombo convicted the 1st, 2nd, and 3rd accused-appellants by his Judgment dated 21.06.2019

and imposed the death sentence. This appeal has been preferred by the 1st, 2nd, and 3rd accused against the said conviction and sentence.

Written submissions on behalf of both parties were filed prior to the hearing. At the hearing of the appeal, the learned counsel for the appellant and the learned Deputy Solicitor General made oral submissions

This unfortunate incident occurred on 15.10.1991. According to the evidence of the deceased's mother (PW1), all four accused came to her house together while she was seated at her doorstep, jumped over her head, and went inside. Following that, the accused stabbed the deceased and assaulted her with her hands and all four accused ran out of the house together.

The learned counsel for the appellant made his submissions on the following grounds:

- I. Has the learned Judge properly considered contradictions in the evidence of the 2nd eye-witness for the prosecution?
- II. Has the learned trial Judge considered properly the omission in the evidence of the 2nd eye-witness for the prosecution with regard to the dying declaration said to have been made by the deceased?
- III. Did the said eye-witness identify the knife?
- IV. Is it proper to use the doctrine of common intention to determine the liability of accused persons?
- V. Is the impugned Judgment of the High Court, based on or supported by the evidence led at trial?

In this case, there are two eyewitnesses. According to PW1, she witnessed the stabbing and identified the accused-appellants. According to PW2, she only saw the last part of the incident and

identified the accused-appellants. The learned counsel for the appellants did not challenge the identification of the accused-appellants. PW1 stated that the appellants were their relatives. It was also revealed that the appellants were well-known to these two witnesses.

1st ground of appeal - Contradictions

It was mentioned by the learned counsel for the appellants that the second eyewitness for the prosecution stated in her testimony that she went outside to take a bath and returned to her house after hearing PW1's cries. She has also stated that the four accused ran away as soon as she entered the house. The learned counsel for the appellants pointed out that PW1 stated in her testimony that PW2 was at home at that time. The learned High Court Judge's view was, that if PW1 did not see PW2 walk out of the house, she might have believed PW2 was still inside. There is a strong possibility for that to happen because PW2 had gone for a bath to a place very close to her house. In any case, no doubt is cast as a result of that flaw because PW2 has never stated that she saw the stabbing. She had only spoken about what she had seen. She had seen all four accused coming out of her house and running away. She also saw one of the accused armed with a knife.

The learned counsel for the appellants also contended that there is a contradiction as to which accused possessed the knife. Naturally, she would not remember who possessed the knife in such an exciting situation. However, her evidence that she saw one person with a knife would not become unbelievable for the reason that she couldn't tell precisely which accused was armed with a knife. It is important to note the following Indian judgment, which is extremely relevant in this situation. In Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753, The Indian Supreme Court held as follows:

“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person’s mind, whereas it might go unnoticed on the part of another.

Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on”.

The aforesaid portion of the Indian Supreme Court Judgment is cited in the case of A.K. Kamal Rasika Amarasinghe V. OIC Special Investigation Unit and Hon. Attorney General - SC Appeal No.140/2010 – Special Leave to Appeal No.118/10, decided on 18.07.2018.

For the reasons stated above, I hold that the aforementioned contradictions have no impact on the credibility of the witnesses' testimony.

2nd ground of appeal – Omission pertaining to a Dying Declaration

The omission that was brought to the attention of the Court was related to a dying declaration in which PW2 stated that the deceased told her that Upul (3rd accused) kept a cushion on her and pressed. However, it was revealed in the High Court, that PW2 did not state

about this dying declaration to the police, in the inquest, or in the non-summery inquiry. I agree that it is a material omission. Therefore, it is safe to disregard the aforementioned dying declaration when determining the action. However, upon perusing the learned High Court Judge's Judgment, it is clear that the learned Judge did not base his decision on this dying declaration.

However, the learned High Court Judge has taken into account another dying declaration. The learned counsel for the appellant formed no argument in relation to the aforementioned other dying declaration. Prior to the date of the incident, the deceased had made several complaints to the police, alleging that the accused were pelting stones at her house and cracking unsuitable jokes. The deceased had called the Bambalapitiya Police on the date of the incident and informed them that she was being teased in an unacceptable manner by the accused and that her house was being pelted with stones. IP Suwaris Fernando's evidence elicited this information. The said statement of the deceased was taken into account by the learned High Court Judge in terms of section 32 of the Evidence Ordinance as a dying declaration.

It was held in The King V. Mudalihami – 47 NLR 149 that the statement admissible under section 32 (1) of the Evidence Ordinance may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed.

In Ajith Samarakoon V. The Republic (Kobaigane Murder Case) it was held that “evidence volunteered by the mother of the deceased in regard to the entirety of what her daughter Nilanthi narrated to her before she left the parental home on that day is admissible in evidence – section 32(1). The statement of the deceased to her mother is a fact inextricably interwoven and connected to the circumstances of the

shooting and setting on fire which resulted in her death”. It was held further in the said case that “where the evidence is relevant otherwise than as motive alone and where there is a close proximate relationship between the happening of that event and the murderous assault, such circumstance would constitute a circumstance of the transaction”.

According to the decisions of the aforementioned judicial authorities, the learned High Court Judge has correctly considered the deceased's other statement as a dying declaration in terms of section 32 of the Evidence Ordinance.

Therefore, the issue of whether the said dying declaration was properly considered would not arise, as the learned High Court Judge’s conclusion was not based on the dying declaration that was relevant to the omission brought to the notice of the court.

3rd ground of appeal – Identifying the knife

The learned counsel for the appellant contended that, while PW2 identified and marked the knife during the examination in chief as the knife used for stabbing, she later stated during cross-examination that it was not the knife she saw. The learned Deputy Solicitor General submitted that the learned High Court Judge has carefully considered the aforementioned piece of evidence.

I believe it is unnecessary to consider whether the learned Judge's analysis in respect of the knife is correct or not because identifying the knife is not essential to prove the charge against the appellants. The fact that PW2 observed one of the accused armed with a knife is evident. Also, it is to be noted that it is extremely difficult for anyone to identify a knife used in an incident like this. In this case, seeing one of the accused-appellants armed with a knife is sufficient because medical evidence establishes that the deceased died as a result of stab

injuries to the chest. If PW2 saw the appellants running out of the house with a knife soon after the deceased was stabbed inside the house, the only inference that could be drawn is that the appellants stabbed the deceased and caused her death. Therefore, even though the PW2 did not properly identify the knife, it is not a material factor to be considered.

4th ground of appeal – Common Intention

The contention of the learned counsel for the appellant in respect of this ground is that there is no evidence regarding common murderous intention, pre-arrangement, or sharing of the intention, and no evidence of any overt act. The learned Deputy Solicitor General contended in reply that the manner in which the stabbing occurred clearly demonstrates the common murderous intention of the appellants.

PW1 has stated that all four accused (3 appellants and the accused who died) came together to her house when she was seated at her doorstep, jumped over her head, went inside the house, and stabbed the deceased. PW1 also stated that the 1st and 3rd appellants were armed with knives. Furthermore, PW2 stated that she witnessed all four accused who were in the house coming outside from her house and running. She also saw that one of the accused was armed with a knife when they ran out of the house. Soon after the appellants ran out, the deceased was found inside the house, lying in a pool of blood. The doctor testified that she died as a result of the stab injuries. As previously stated, the identification of the appellants by the witnesses is also not an issue. Hence, the common intention of the appellants to murder the deceased is well established.

In the case of The Queen V. Mahatun - 61 NLR 540 it was held that “Under section 32 of the Penal Code, when a criminal act is committed

by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each, such as if it were done by him alone.

To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment”.

The aforesaid decision gives answers to the arguments of the learned counsel for the appellant regarding common murderous intention and pre-arrangement or sharing of the intention. The facts that all three accused-appellants with the other accused who died came together to the house where the deceased was, stabbed the deceased, and ran out of the house together armed with a knife clearly establish the common murderous intention of all three appellants.

In Sarath Kumara V. Attorney General – C.A. No. 207/2008, Decided on 04.04.2014, it was held that “.....once a participatory presence in furtherance of a common intention is established at the commencement of an incident, there is no requirement that both perpetrators should be physically present at the culmination of the event, unless it could be shown by some overt act that one perpetrator deliberately withdrew from the situation to disengage and detach himself from vicarious liability.”

In the instant action, all appellants were present until all the incidents related to the murder were completed. The important point emanating from the aforesaid judicial authority is that if an accused claims that he had no murderous common intention with others to commit the

crime, establishing an overt act of disengaging himself from vicarious liability is up to the accused who claims that he had no common intention with others to commit the crime. Hence, it is not the duty of the prosecution to establish an overt act, as contended by the learned counsel for the appellants. In the circumstances, the evidence in this case clearly demonstrates that the appellants murdered the deceased with a common murderous intention. Therefore, I regret that I am unable to agree with the contention of the learned counsel for the appellants that the doctrine of common intention has not been properly applied to determine the liability of the appellants in this case.

5th ground of appeal – Judgment was not supported by the evidence led at the trial.

On this ground, the learned counsel summarized all of his arguments and contended that the learned High Court Judge did not properly evaluate the evidence and did not properly consider the doctrine of common intention and dying declaration.

However, for the reasons stated above, I am unable to agree with the contention of the learned counsel for the appellant. The learned High Court Judge has dealt with the contradictions marked. However, the learned counsel for the appellant made no submissions regarding any other contradiction other than those addressed by this court. The learned High Court Judge has correctly evaluated the eye-witnesses' evidence, dying declaration, position taken up by the appellants in their dock statements and correctly concluded that the charge against the appellants has proved beyond reasonable doubt.

Finally, the learned counsel for the appellants urged to reduce the sentence, if the conviction is found to be correct in law. The learned Counsel did not advance an argument that the learned High Court Judge could have considered the lessor offence of culpable homicide

not amounting to murder. He entirely focused all of his arguments on the basis that the charge of murder against the appellants has not been proved beyond a reasonable doubt. In the circumstances, I regret that the learned counsel's request could not be considered, as the only possible sentence for murder is the death sentence, according to law.

For the foregoing reasons, I affirm the conviction and the sentence imposed on the appellants and dismiss the appeal.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL