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

In the matter of an appeal under 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

Court of Appeal Case No. HCC/321/19

Complainant

High Court of Colombo Case No. 6812/2013

Vs.

1. Mohomed Buhari Mohomed Razik
2. Pushparaj Delip Kumar

Accused

AND NOW BETWEEN

Pushparaj Delip Kumar

Accused-Appellant

Vs.

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

Complainant-Respondent

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

COUNSEL : Asitha Vipulanayake for the Accused-Appellant.
Chethiya Gunasekara, ASG for the Respondent.

WRITTEN SUBMISSION

TENDERED ON : 05.04.2021 (On behalf of the Accused-Appellant)
18.05.2022 & 23.06.2021 (On behalf of the Respondent)

ARGUED ON : 08.09.2022

DECIDED ON : 05.10.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant of this case was indicted before the High Court of Colombo along with the first accused for committing the murder of one Mohomad Musin Mohomad Rizwan on or about 21.11.2007, an offence punishable under Section 296 of the Penal Code read with Section 32 of the same. After granting bail at the initial stage of the case, the first accused absconded and the trial proceeded against him

in absentia. The second accused-appellant was present in court during the trial and he was represented by counsel. After the trial, both accused were convicted and sentenced to death by the learned High Court Judge of Colombo by his Judgment dated 05.08.2019. It is vital to be noted that the entire trial has been heard by the learned Judge who delivered the judgment.

This appeal has been preferred by the second 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 Additional Solicitor General for the respondent made oral submissions.

The grounds of appeal

Although, four grounds of appeal have been stated in the written submissions filed on behalf of the appellant, the learned counsel for the appellant confined his arguments to the following two grounds.

i. The learned High Court Judge has failed to adequately consider, properly assess, and evaluate the evidence led in the case.
ii. The learned High Court Judge has failed to evaluate the dock statement given by the appellant.

In brief, the incident

On the day in question, the 21st of November 2007, PW-8, Police Constable Athula, and PW-13, Civil Defence Officer (*Grama Aarakshaka Niladhari*), Suranga Suraweera, were on patrol duty. PW-8 stated in his evidence that he heard three gunshots coming from the direction of Church Street in *Wella Weediya* around 4.15 p.m. Then he saw two persons carrying guns chasing another person.

PW-13 chased the two men who were running, apprehended them, and arrested them. PW-13 has also given evidence corroborating PW-8's evidence regarding this incident. Both witnesses identified the appellant as one of the men arrested. These two witnesses also identified two weapons taken from the custody of the appellant and the first accused. PW-9, the Officer in Charge of *Aaduruppu Street* Police Station, Chief Inspector Bodhipaksha, corroborated this evidence and stated that he was informed about the arrest of two accused in this case and ordered that they be searched. The two accused were found with two pistols and two hand grenades, according to the chief inspector and the aforesaid two witnesses. Subsequently, the two accused were arrested by the *Aaduruppu Street* Police and the items recovered from them were handed over to the *Wella Weediya* Police. According to retired Sub Inspector Wijedasa, the distance between two police stations was about 200 or 250 meters.

During the police investigations, spent bullet casings and bullets were found at the crime scene. PW-12, the Deputy Government Analyst has formed his opinion that the two spent bullet casings recovered from the crime scene match with the pistol marked P-1 recovered from the first accused.

PW-11, the Assistant Judicial Medical Officer observed four gunshot injuries, and her opinion was that the death of the deceased was caused by a gunshot injury to the chest. Furthermore, the doctor formed the opinion that the shooter would have shot the deceased from a distance beyond 18 inches.

So, undisputedly, the death of the deceased has been caused as a result of gunshot injuries. PW-8 and PW-13 saw the appellant and the first accused, both of whom were carrying pistols, chasing a person.

They heard about three gunshots before they saw the chasing. Anyhow, no one has witnessed the shooting.

The first ground of appeal

The learned counsel for the appellant raised the following two arguments pertaining to the aforesaid first ground of appeal:

I. The improbability of hearing gunshot injuries around 4.15 and deceased dying at 4.20.
II. The improbability of the deceased to run after having gunshot injuries.

The improbability of hearing gunshot injuries around 4.15 and deceased dying at 4.20

The learned counsel for the appellant advanced an argument that gunshot injuries were heard by PW-8 and PW-13 around 4.15 p.m., and the deceased died at 4.20 p.m. according to the Post Mortem Report, therefore, it was not possible that the deceased who had run and fallen in *Dam Street* after suffering gunshot injuries to be taken to the National Hospital in Colombo within five minutes. Further, the learned counsel pointed out that the wife of the deceased PW-2 stated that she waited near the ICU in the hospital for half an hour and thereafter came to know about the death of her husband.

Firstly, it should be noted that just because the PW-2 knew of her husband's death after waiting about half an hour in the ICU does not mean that the death occurred after half an hour of the deceased being admitted to the hospital. It should be noted that PW-2 has also stated "යනකොටම නැති උනා කියලා කිව්වා" (Page 175 of the appeal brief). Therefore, the time of death cannot be ascertained on PW-2's evidence.

Secondly, the Assistant Judicial Medical Officer has not revealed how she ascertained the time of the death. The prosecutor failed to lead that evidence. The deceased may have died while being brought to the hospital. Even before that, his death could have occurred. Thus, there is no way of ascertaining the time of the death accurately.

Thirdly, it is to be noted that PW8 or PW13 has not stated the exact time that they heard the gunshots. It is apparent that they could not look at the time because as soon as they heard gunshots, they ran behind the appellant and the first accused to apprehend them. Hence, the said five-minutes difference could not be considered as an exact time difference.

Next, It should be considered what the learned counsel for the appellant is trying to raise by this argument. That argument can only make one point; it was not the person who was shot around 4.15 p.m., but another person who was shot and taken to the hospital, who may have died.

At this stage, it is pertinent to consider the by-standers evidence that was considered by the learned High Court Judge in terms of section 6 of the Evidence Ordinance. PW-2, the wife of the deceased also heard the gunshots. She stated in her evidence that the people who were at the crime scene when she went there informed her that two persons shot her husband and those two persons were caught by the police then and there. The learned High court Judge has correctly admitted the said evidence in terms of section 6 illustration(a) of the Evidence Ordinance as whatever was said or done by the by-standers at the incident or so shortly before or after the incident is a relevant fact.

Although the opportunity was given to the defence, PW-2 was not cross-examined by the learned defence counsel. Only the learned High

Court Judge asked few questions to clarify some points. Therefore, PW-2's evidence has never been challenged.

The Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General C.A Case No. 79/2011, decided on 04.04.2017 as follows:

" It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701 V.D Misra CJ held that *"whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.* Similarly in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP it was held that *"Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact."*

Hence, PW-2's evidence could be accepted without any dispute. When considering the aforesaid other circumstances and what PW-2 heard from by-standers, there is no least doubt or improbability that the person who died as a result of gunshot injuries was the person who was chased by the appellant and the first accused. Taking the evidence of the Government Analyst, the Assistant Judicial Medical Officer, PW-8, and PW-13 together, it could be concluded that the first accused caused the deceased's gunshot injuries by the pistol that he carried. The learned High Court Judge has correctly come to that conclusion.

The improbability of the deceased to run after having gunshot injuries

The other argument the learned counsel for the appellant advanced was whether the deceased was able to run after having the gunshot injuries. The learned Additional Solicitor General contended that the learned counsel for the appellant had not questioned the doctor and asserted that the deceased was unable to run after having the gunshot injuries.

This court considered the obligation of the prosecution to prove their case beyond a reasonable doubt. In her testimony, the Assistant Judicial Medical Officer stated that she could not give an exact answer on how long the deceased would live after the injuries. However, she stated that there was a chance that he would be alive for a short time. The deceased was found lying a short distance from the place of the shooting and not far away. The doctor has never said that the deceased could not walk or run within that short time that he was alive.

According to the evidence of PW-8 and PW-13, after hearing the gunshot injuries, they saw a person running and the appellant and the first accused chasing him. As previously stated, because it was apparent that the person running was the deceased, the prosecution has established that the deceased ran after the gunshots were fired on him.

Although the accused has no obligation to prove anything in a criminal case, in a situation where the prosecution has proved that the deceased ran, after having gunshot injuries as described above, and if the accused-appellant wanted to show that the deceased could not run after sustaining the gunshot injuries, the Assistant Judicial Medical Officer should have been questioned, and it should have been elicited from her by the defence counsel that the deceased could not run after

those injuries. The learned counsel who appeared in the High Court has not asked any question to that effect. In consequence, the learned counsel for the appellant would not succeed in his argument that the deceased could not run after the gunshot injuries.

The second ground of appeal

The second ground raised in this appeal by the learned counsel for the appellant has no merit because the learned High Court Judge has sufficiently dealt with the dock statement in his judgment under a separate subtopic. Despite the fact that the dock statement was merely a denial without giving an explanation for anything arising from the prosecution evidence against the appellant, the learned Judge has extensively and correctly dealt with the dock statement on pages 35, 36, and 37 of his judgment.

Establishing the commission of murder with common murderous intention based on circumstantial evidence.

There is no dispute on the fact that the deceased died as a result of gunshot injuries. However, nobody has witnessed the shooting of the deceased. Therefore, the fact that the appellant and the first accused were responsible for the murder of the deceased has to be established on circumstantial evidence.

As it was held in the cases of Junaiden Mohamed Haaris v. Hon. Attorney General - SC Appeal 118/17, decided on 09.11.2018, King v. Abeywickrama - 44 NLR 254, King v. Appuhamy - 46 NLR 128, Podisingho v. King - 53 NLR 49 and Don Sunny v. Attorney General (Amarapala murder case) (1998) 2 Sri L.R. 1, in proving a charge on circumstantial evidence, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of

circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

As previously stated, the evidence of the Assistant Judicial Medical Officer and the Government Analyst leads to the conclusion that the gunshot injuries of the deceased were caused by the pistol possessed by the first accused. The contention of the learned counsel for the appellant was that according to the Government Analyst's evidence, there was no firing with the pistol purportedly possessed by the appellant. Therefore, the learned counsel contended that the common murderous intention of the appellant has not been established.

According to the testimony of PW-8 and PW-13, after hearing the gunshots, the appellant and the first accused chased the deceased. They chased him while carrying pistols. So, it is obvious that the appellant's presence there was a participatory presence and not a mere presence. In the case of Wasalamuni Richard v. The State - 76 NLR 534 at page 546 it was held "that in the absence of an explanation from *Premadasa*, jury were entitled to draw the reasonable inference from all the circumstances that his presence at the scene was a "participatory presence" as distinct from a "mere presence" which would have entitled him to an acquittal." In other words, the said decision implies that if it is not a "mere presence" and if it is a "participatory presence", the accused is not entitled to an acquittal.

In the same judgment, it is also stated as follows; "The 3rd accused was present at the scene of the crime. Even if the evidence of assault by the 3rd accused on the deceased is not considered, the fact of the 3rd accused absconding after the incident and hiding the gun that was used and the fact of his silence against all this evidence would make the court draw an inference against the accused with regard to a pre-arranged plan with the 1st and the 2nd accused".

As explained previously, the circumstantial evidence in this case establishes that the first accused shot the deceased. It is also established that the appellant, who carried a pistol, chased the deceased with the first accused, who was also carrying a pistol. So, the appellant's presence at the scene was undoubtedly a "participatory presence."

The appellant and the first accused were apprehended by the police officer, PW-8 and PW-13 shortly after they witnessed the chasing. Like in the aforesaid Court of Appeal case, the appellant, in this case, has not given any explanation why he ran with the first accused while carrying a pistol. Instead, the appellant simply denied everything in his dock statement. The appellant stated in his dock statement that when he went to the *Aaduruppu Weediya* to buy some goods, police arrested him, which the learned High Court Judge correctly found to be an unacceptable denial. The police officer PW-8 and PW-13 have stated unequivocally that they apprehended the appellant and the first accused while chasing a man. There is no reason to doubt their testimony because the PW-8 and PW-13 who were on patrol duty had no reason to run behind them and arrest the unknown appellant and the first accused if they had done nothing.

It is to be noted once a participatory presence in furtherance of a common intention is established at the commencement of an incident, it was held in Sarath Kumara v. Attorney General-(CA 207/2008) - decided on 04.04.2014, that 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 this case, the appellant was not only physically present at the crime scene, but he also chased the deceased with the first accused while

carrying a pistol. Therefore, the learned High Court Judge was perfectly correct in deciding that the facts of the appellant chasing the deceased with the first accused who shot the deceased, the appellant also carrying a pistol, and the appellant fleeing from that place with the first accused draw only the inference as to the appellant's common murderous intention. In addition, the facts that pistols and hand grenades were possessed by both the accused, and that the deceased was shot by the first accused using the pistol he carried, clearly show the pre-arrangement for the murder. The appellant's mental sharing of the common murderous intention with the first accused is also precisely clear by the appellant's act of chasing the deceased with the first accused even after the deceased was shot.

It is also important to note that even if two people assault someone and that person dies as a result of the assault, both assailants may not be liable for murder on the basis of having a common murderous intention because one assailant may have had the murderous intention and the other may not have had the murderous intention but only to injure him. However, the case before us is different. Chasing the deceased who was shot and injured signifies that both of them had the only intention of killing him. Hence, I hold that the common murderous intention of the appellant has been established in this case.

Conclusion

For the reasons stated above, I hold that the learned High Court Judge has correctly convicted and sentenced the appellant for the offence of murder. Before concluding, I should state that the judgment of the learned High Court Judge is a well-considered judgment after carefully and correctly considering all aspects of the case and properly evaluating all evidence in the case. Therefore, I find no reason to interfere with the judgment.

Accordingly, the judgment and the sentence dated 05.08.2019 are affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL