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

In the matter of an appeal under Section 11 of High Court of Provinces: (Special Provisions) Act No. 19 of 1990, Section 331, 333 of the Criminal Procedure Code No. 15 of 1979.

Court of Appeal Case No:
HCC - 0019 - 0024 / 2017
High Court Badulla Case No:
Criminal / 01 / 2015

Democratic Socialist Republic of Sri Lanka.
Complainant

Vs.

1. Rajamantri Patabandige Somaratne.
2. Dissanayake Mudiyanselage Abeyratne.
3. Dharmapalitha Padmakumara Gamage.
4. Samarakoon Mudiyanselage Ruwan Pushpakumara.
5. Dissanayake Mudiyanselage Wijeratne.
6. Samarakoon Mudiyanselage Jayasundera.

Accused

AND NOW BETWEEN

1. Rajamantri Patabandige Somaratne.
2. Dissanayake Mudiyanselage Abeyratne.
3. Dharmapalitha Padmakumara Gamage.
4. Samarakoon Mudiyanselage Ruwan Pushpakumara.
5. Dissanayake Mudiyanselage Wijeratne.
6. Samarakoon Mudiyanselage Jayasundera.

Accused – Appellants

Vs.

The Attorney General,
Attorney Generals' Department,
Colombo 12.

Respondent.

Before : Menaka Wijesundera J.
B. Sasi Mahendran J.

Counsel : Anil Silva, P.C. with Shaluka Neranga for the 1st Accused – Appellant.
Neranjan Jayasinghe with D.D.K. Katugampola for the 2nd and 4th Accused – Appellants.
Saliya Peiris, P.C. with Thanuka Nandasiri for the

3rd Accused – Appellant.

Nalin Ladduwahetty, P.C. with Kavithri Ubeysekera, Rajitha Samarasekera and Menuka Premashantha for the 5th Accused – Appellant.

For the 6th Accused - Appellant - Nandasiri Yapa on 07.09.2017, Rohitha Rajapaksha on 09.10.207, Pradeep Fernando on 16.07.2018, Bhagya Herath on 03.12.2018.

Madhawa Tennakoon, D.S.G. for the State.

Argued on : 10.07.2023

Decided on : 08.08.2023

MENAKA WIJESUNDERA J.

The instant appeals have been lodged to set aside the judgment dated 09.01.2017 of the High Court of Badulla.

The accused appellants had been indicted on the basis of unlawful assembly to commit murder and hurt and in the alternative on the basis of common intention to commit murder and hurt.

The prosecution's narrative states that on 07.05.2014 around 6.30 in the evening, the deceased, along with his brother and three other relatives, had gone to a location to inspect a three-wheeler for a potential purchase. While waiting for the owner to arrive with the vehicle, a group of police officers, led by the first accused appellant, had arrived at the scene. The prosecution alleges that the group of police officers proceeded to assault the deceased and his companions, accusing them of engaging in treasure hunting. Thereafter, they had been taken in the police jeep and had been provided with dinner by the first accused appellant.

Thereafter, they had been brought to the Kandaketiya police station and had been in the cell and on the next day the parents had visited them and then the group had complained that they had been assaulted.

On the same day they had been taken to the hospital and then to the Magistrate and had been remanded for treasure hunting and to the prison officers the group had complained that they had been assaulted by the police, however, neither the magistrate nor the doctor had been informed of the assault.

Thereafter, the deceased had developed a difficulty in breathing and he had been entered to the remand hospital and he had died on the 9th of May. The brother of the deceased, who is the first witness for the prosecution, had stated that while they were in the same cell, his deceased brother informed him that the first accused appellant had assaulted him inside the jungle asking him whether he had been treasure hunting.

The Judicial Medical Officer (hereinafter referred to as the JMO) who conducted the post mortem had stated in evidence that the deceased has had 9 injuries and the first had been the fatal injury on the head which had caused extensive damage to the brain.

The version of the first accused appellant is that he had been the officer in charge (hereinafter referred to as the OIC) of the crime branch of the Kandaketiya police and on 07.05.2014 the OIC of the station had received a telephone call at about 8.45 p.m. saying that in the area of kandaketiya police station that some people were trying to excavate an archeological site. Hence, he had been asked to commence investigations and as such he had detailed the accused appellants from the 2nd to the 6th and the officer called Gratian to go to the place. As they had approached the place it had been pitch dark but he had seen the group arrested being in a fight with each other and they had been carrying heavy torch lights. As such the first accused appellant had to slap them to bring the group under control and upon doing

so, they had put them to the jeep and had been taken to a boutique and had been bought food by the first accused appellant. Thereafter, he had not dealt with them.

The OIC of the Kandeketiya police station had been called to give evidence and had corroborated the version of the 1st accused appellant and he had reiterated the position of the first accused appellant about the receipt of the information and the time of the out entry from the police station. The relevant portions had been marked in evidence. The inspector who had investigated the instant matter also had said in evidence in chief that the out entry of the 1st accused appellant had been at 9 p.m. and the receipt of the information received by the OIC had been at 8.45 p.m. which portions had also been marked in Court. (695 p).

According to the above stated evidence the time quoted by the witnesses of the prosecution is different from the time quoted by the defense but the position of the defense is corroborated by the notes put by the investigative officers which had been marked by the prosecution.

The officer Gratian who had been called to give evidence had said that the deceased was assaulted by the first accused appellant and not by the others.

The accused appellants from 2nd to the 6th had also said the same thing in their statements from the dock.

The first accused appellant in the evidence had said that he had to assault the deceased in order to bring the situation under control because at the time they reached the alleged place the witnesses of the prosecution had been fighting among themselves. However, during the cross examination he had admitted that he had not put notes with regard to the scuffle among the group but he had said the same thing in the affidavit filed in Supreme Court in the fundamental rights application filed by the prosecution witnesses, but the other accused had differed from their position in the Supreme Court.

However, this Court observes that according to the prosecution the incident had taken place around 6.30 p.m. and 7 p.m. but as per the defense the first information regarding the treasure hunting had been received at 8.45 p.m. and the police party departed on the instructions of the OIC at 9 p.m. This is substantiated by the evidence of the OIC and the notes put by the first accused appellant which had been marked through the evidence of the chief investigative officer of the prosecution. Hence the question arises as to the testimonial trustworthiness of the evidence of the prosecution lay witnesses who has said that the incident took place at 6.30 p.m.

Hence, both parties agree to the presence at the scene of crime and both parties agree that the group in the prosecution had been assaulted, but the question to be decided by this Court is as to what purpose the deceased and the others had been assaulted by the accused appellants.

The main prosecution witness is the brother of the deceased who initially claimed that all the accused assaulted them, but later contradicted himself by stating that only the first accused assaulted them. The other witnesses also did not implicate the remaining accused appellants, except for the first accused appellant, there are contradictions inter say and per say in the case for the prosecution.

Furthermore, the version of the defense is that the accused party had been carrying out a lawful duty and they had tried to exert force on a group who had been found in a godforsaken place at a very unforthcoming time and fighting among themselves and carrying illumination which does seem to be over whelming for their purpose of the visit to the place. Hence, the story of the prosecution appears to be very improbable and of without much merit.

Furthermore, the prosecution had relied on a dying declaration made to the brother of the deceased who had said in evidence that the brother had been taken away from the scene by the 1st accused appellant and he said that he was assaulted by him. However, the prosecution had not placed any

evidence to indicate as to what the other accused had been doing during those 45 minutes which casts a serious ambiguity as with regard to the fact whether all the accused along with the 1st shared the common murderous object to cause hurt to the deceased .

In terms of **section 32 of the Evidence Ordinance, No. 14 of 1895** (as amended) provides that any statements written or verbal of relevant facts made by a person who cannot be called as witnesses becomes relevant under certain circumstances.

Section 32 (1) of the Evidence Ordinance states as follows;

> *"When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question".*

Professor G.L. Peiris in his work "The Law of Evidence in Sri Lanka" has stated as follows;

> *"A statement, to be treated as admissible under section 32 (1) should satisfy the following criteria";*
>
> (a) The person making the statement should be dead at the time of the legal proceeding in the course of which the statement is sought to be admitted. It is not necessary, however, that the cause of death should have arisen prior to the making of the statement.
> (b) While the nature of the proceeding is not material, it is essential that the cause of the declarant's death should come into question in the relevant proceedings.
> (c) The statement should concern either the cause of death or any of the circumstances of the transaction which resulted in death.
> (d) Where the death of more than one person is caused during the same transaction, a dying declaration by any of the victims

constitutes admissible evidence also in respect of the circumstance's attendant on the death of the other or others.

(e) The competency of the deponent or declarant as a witness is a condition precedent of admissibility of the statement."

In the case of Mendis vs. Paramaswami[1] Basnayake, C.J. held that;

> *"Now section 32 is the only section of the Evidence Ordinance which permits the proof of relevant facts contained in statements made by 'deceased persons. The type of evidence permitted by the section is known as hearsay evidence. A statement of relevant facts cannot be admitted under the section unless the statement consists of the very words of the deceased person".*

It is well established law that in a criminal matter the proving of a charge levelled against an accused is the duty of the prosecution. If the time of incident has been challenged by the accused it is the duty of the prosecution to dispel any doubt which had arisen in their case and the prosecution must prove their charges beyond a reasonable doubt.

When this Court evaluates the evidence of the prosecution, we find that the time of the incident established by the prosecution had been seriously challenged by the defense, if that is so the rest of the evidence placed before this Court by the prosecution also cannot be relied upon especially in view of the discrepancies in the evidence of the prosecution witnesses inter say and per say.

The instant case has been based on the formation of an unlawful assembly to assault the deceased; hence the prosecution has to establish beyond a reasonable doubt that there were more than five persons participating and that they all shared the common object mentioned above. In the case of

[1] 62 NLR 302.

Jagathsena and others vs G.D.P.Perea and others[2] following has been held regrinding the principles of unlawful assembly,

> ***"The mere presence of a person in an unlawful assembly render him a member. Unless it is shown that he said or done something or omitted to do something which would make him a member of such unlawful assembly. The prosecution must place evidence pointing to each accused having done something from which the inference could be drawn that each entertained the object which is said to be the common object of such assembly……The common object can be collected from the nature of the assembly , the arms used by them ,the behavior of the assembly,…and subsequent conduct….It is not sufficient for such evidence to be sufficient for such evidence to be consistent with such inference but must be the only conclusion possible."***

As such in the instant case we find that the accused appellants had gone to the place of incident to carry out a legally bound duty and in doing so we see that the 1st accused appellant and others had assaulted the deceased and had caused injuries. Hence, we do not find the formation of an unlawful assembly although the numbers were right because the accused appellants had not shared an illegal object among themselves. Thereafter according to the much relied upon dying declaration the deceased had been taken away by the 1st accused appellant from the scene for a duration of 45 minutes which proves further that there was no common object shared among the accused appellants with regard to the assault of the deceased and also a clear conclusion cannot be drawn that it was the accused appellants and no one else caused the fatal injury on the deceased.

[2] (1992) 1 Sri L.R. 375.

The evidence against the 2nd to the sixth accused appellants are none with regard to the causing of injuries to the prosecution witnesses, and with regard to the assault of the deceased also the prosecution witnesses had not implicated the accused appellants from the 2nd to the 6th apart from witness number 1 who had contradicted himself.

Hence in view of the facts sated above we are of the view that there was no unlawful assembly formed during the incident and we see that the 2nd to the 6th accused appellants should be acquitted from all charges found guilty by the trial judge. Hence the appeal of the 2nd to the 6th accused appellants are hereby allowed.

The next question is with regard to the culpability of the 1st accused appellant.

From the evidence stated above we find that the 1st accused appellant had caused injuries to the deceased when he had been assigned a duty by his superior officer, then the question is whether he had exceeded the limit of restraint which a police officer is required to exercise at a time of resistance by a suspect when apprehending him or her.

We find that the deceased had suffered extensive damage to his brain and has had injuries caused by a blunt force. In view of the evidence analyzed above there is no evidence to draw the irresistible inference that the 1st accused appellant caused the fatal blow but there is evidence that the 1st accused appellant caused injuries to the deceased. At this juncture we specifically draw our attention to the submissions of the special prosecutor who had said in his submissions in the trial court that the charges against the appellants were not levelled on the basis that the accused appellants acted with the intention of causing murder of the deceased.

Hence, in view of the aforesaid reasons we conclude that it is only but fair to say that the 1st accused appellant has not displayed any intention to commit the murder of the deceased. Hence, we set aside the trial judge's finding of

murder against the 1st accused appellant but we see that the 1st accused appellant when assaulting the deceased had acted with the knowledge of causing his death for the reason that he had been a police officer of many years of experience and he had been duty bound to act with restraint in a situation of resistance.

As such we set aside the conviction and sentence entered by the trial judge against the 1st accused appellant and find him guilty for culpable homicide not amounting to murder on the basis of knowledge and impose a sentence of 07 years rigorous imprisonment from the date of the conviction by the trial judge.

As such the appeal of the 1st accused appellant dismissed subject to the above variation.

JUDGE OF THE COURT OF APPEAL

Sasi Mahendran J,

I Agree.

JUDGE OF THE COURT OF APPEAL