C.A. 271-271/2012

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

In the matter of an appeal against the Order of the High Court under Section 331 of the Code of Criminal Procedure Act No 15 of 1979 as amended.

1.Sellathththurai Pakeetharan

2.Sellaththurai Sri

3.Rasaiya Pakeetharan

4.SomasundaramCalisto

5.Thurai Thanavanthan

Accused-Appellants

C.A.Case No:-271-275/2012

H.C.Jaffna Case No:-1133/2007

V.

The Attorney General

Attorney General's Department,

Colombo 12.

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-Dr.Ranjith Fernando for the 1st, 2nd and 3rd Accused-appellants

Saliya Peiris with Upendra Walagampaya for the 4th Accused-Appellant

Indica Mallawarachchi for the 5th Accused-Appellant

P.Kumararathnam D.S.G for the Respondent

Argued On:-24.02.2015/23.03.2015

Written Submissions:-05.05.2015/06.05.2015./08.05.2015

Decided On:-28.09.2015

H.N.J.Perera, J.

The accused-appellants were indicted in the High Court of Jaffna on 11 counts.

Count 1:- that on or about the 3rd August , 2005 the accused-appellants named in the indictment were guilty of being members of an unlawful assembly with the common object of causing hurt to Dharmarajah Sivanathan, thereby, committing an offence punishable under section 146 of the Penal Code.

Count 2:- that at the same time and place and in the course of the same transaction they caused the death of the afore-named Dharmarajah Sivananthan, thereby committing an offence punishable under section 296/146 of the Peal Code.

Count 3:- that at the same time and place and in the course of the same transaction, caused hurt to Sithamparam Sivananthan thereby

committing an offence punishable under section 314/146 of the Penal Code.

Count 4:- that at the same time and place and in the course of the same transaction, caused hurt to Nadarajah Baskaran, thereby committing an offence punishable under section 314/146 of the Penal Code.

Count 5:- that at the same time and place and in the course of the same transaction, caused hurt to Kandasamy Sihatharan thereby committing an offence punishable under section 314/146 of the Penal Code.

Count 6:- that at the same time and place and in the course of the same transaction, caused hurt to Thanikasalam Thayabaran thereby committing an offence punishable under section 314/146 of the Penal Code.

Counts 7,8,9,10 and 11 are alternative counts relating to section 296 charge and section 314 charges respectively presented on the footing of common intention.

After trial before a Jury on 5th December 2012, of the 11 counts the jury found the accused-appellants guilty of counts 1,2,3,5,6,7,10,11 and on count No. 8 except the 2nd accused all the others were found guilty. The Jury also acquitted the accused-appellants on counts 4 and 9. Accordingly the 1st accused was sentenced to 19 ½ years, 2nd to 18 ½ years, 3rd to 21 ½ years, and the 4th to 21 ½ years and the 5th accused-appellant to 21 ½ years.

When this matter was taken up for argument before this court, the Counsel for the accused-appellants stated to court that they will confine this appeal to the sentence imposed on the accused-appellants by the learned trial Judge.

It transpires from the evidence led at the trial that the incident originated as a result of a dispute between two villages in the Northern Province

over a temporary bridge which had been constructed using sand bags being destroyed. On the day in question the deceased accompanied by witness Thayabaran upon witnessing an altercation on the road on their way to a boutique around 7.p.m had tried to intervene and settle the dispute between the parties at which point the persons who were engaged in the said altercation had attacked the deceased and witness Thayabaran. It was submitted that the Learned High Court Judge has arrived at a categorical finding that the accused-appellants did not entertain a common murderous intention but that they had the knowledge that death would ensue from their acts. The accused-appellants had been sentenced to 15 years on culpable homicide not amounting to murder notwithstanding the purported basis of Knowledge which carries a maximum sentence of 10 years R.I. under section 297 of the Penal Code. Even further although all counts relate to same transaction, the same day, same incident the Hurt charges were ordered to run consecutively.

The learned Senior State Counsel accepted the position that the learned trial Judge had failed to adequately charge the Jury with regard to the 2nd limb of section 297 and that the Jury had failed to give mind to the said matter. He also adverted to the fact that the learned trial Judge should not have sentenced the accused-appellants on both counts No 2 and 7 but should have sentenced the accused-appellants on one or the other. Charges under count 7 to 11 are alternative charges based on common intention.

It was further submitted that the learned trial Judge did not call upon the accused-appellants to plead mitigation and after the verdict immediately passed sentence on them. The learned trial Judge had failed to consider that all the accused-appellants are 1st offenders with no pending cases and the 3rd accused-appellant was only a 21 year old L.L.B Law student at the time.

In this case it is not disputed that there was no pre-meditation on the part of the accused-appellants. No evidence of any previous enmity or even a remote motive. The fact that the incident occurred on the road further negates any pre plan on the part of the accused-appellants and indicates it was a chance meeting. The evidence led in this case clearly demonstrate that the accused-appellants did not seek after the deceased but the incident originated as a result of the deceased trying to intervene and settle an ongoing dispute.

It was contended on behalf of the accused-appellants that the evidence led in this case further indicates that the incident had lasted only few minutes which further demonstrates that the accused-appellants did not act in a cruel and brutal manner. Evidence also indicate that the weapons used by the accused-appellants were in the nature of sticks or wooden clubs which had been uprooted from a fence at the time of the incident and no lethal cutting weapons had been used by the accused-appellants. The 4th accused-appellant was only 18 years at the time of the incident took place. The 5th accused-appellant was only 22 years. The 3rd accused-appellant only 21 years, LLB Law student at the time of the incident took place.

I have carefully considered the submissions of learned Counsel regarding the sentence.

Basnayake A.C.J in the case of Attorney General V. H.N.De Silva 57 N.L.R 121 observed as follows:-

"A judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective."

Therefore after considering all the above circumstances we set aside the sentence of imprisonment imposed by the learned trial Judge on count 2 and 7 of the indictment and sentence the accused-appellants to a term of 10 years rigorous imprisonment on each of the said counts. We further affirm the sentences imposed by the learned trial Judge on all other counts. We further direct that the Sentences of imprisonment imposed on all counts to run concurrently. We also direct that the said sentences be implemented from the date of conviction namely 5th December 2012.

Subject to the variation of the sentence the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL