

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

CA-108/108 A/2015

Matara High Court

No.23/2007

1. Sirisena Marakkalage
Kurukulasooriya alias Atasiri.
2. Muthumala Patabandige Sunil
Shantha.
3. Nalin Dimuthu Marakkalage
Kurukulasooriya alias Atalokka.
4. Mutumala Patabandige Shiwantha
Kaushan Muthumala.
5. Muthumala Patabandige Chamath
Shiran Muthumala.
6. Pala Mandalige Buddhika
Indralatha Fernando.

ACCUSED – APPELLANT

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before : P.R. Walgama, J
: S. Devika de L. Tennekoon, J

Counsel : Gayan Perera with Prabha Perera for the 1st & 3rd Accused – Appellants.

: Darshana Kuruppu with Chinthaka Ududeniya for the 4th & 5th Accused – Appellants.

: Shavindra Fernando PC with Eliza Kandappa for the 2nd & 6th Accused – Appellant.

: Chethiya Gunasekara DSG for the A.G.

Argued on : 01.09.2016

Decided on : 27.02.2017

CASE-NO- CA /108/108A/ 2015- JUDGMENT- 27.02.2017

P.R. Walgama, J

The Accused – Appellants were on an indictment charging them with having committed murder by causing the death of one Abedeera Werawarne Patabandige Sarathchadra, an offence punishable under Section 296 of the Penal Code.

Filtering the unnecessary details, the facts which are necessary to be adumbrated for the adjudication of the instant appeal are as follows.

The trial at the court below had evaluated the testimony of three main witnesses viz a viz the daughter of the deceased, the son of the deceased and the evidence of the medical officer who performed the post-mortem of the deceased.

The mere incident of assault by the 3rd Accused – Appellant was witnessed by the daughter of the deceased, whose testimony reveals thus;

That the brother of this witness was playing cricket, and the father the deceased was standing close by, as the ball went near the deceased, when he bent down to pick the ball and it was at that time the 3rd Accused – Appellant popularly known as Atta Lokka has dealt the fatal blow which struck on the deceased's head. Further it was her version that after the attack when she went to the place where the deceased was fallen none of the accused were at the scene. More so the deceased body was little away from the place where he was attacked. It was the contention of the counsel for the 1st and the 3rd Accused – Appellants that the above witness in her statement to the police had stated that she came to know that the father was attacked when he bent down to pick the ball. The said suggestion was refuted by the witness. To cap it all it is said that it was the 3rd Accused – Appellant who dealt a blow to the deceased's head with a club. But she was confronted with her evidence at the magisterial inquiry wherein she has stated that Atasiri the 1st Accused – Appellant attacked the deceased with the club, but it was her categorical position that the 3rd Accused – Appellant dealt the fatal blow.

Further it was contended by the counsel for the above Appellants that the post-mortem report which is marked as P1 does not reveal any external injury on the head of the deceased. But nevertheless JMO has explained the nature of the injuries sustained by the deceased and had expressed the opinion that the injury No. 1 was fatal and the said injury had been caused by a blunt weapon, further it was also observed that there is no injuries on the forehead.

It is alleged by the counsel that the Learned High Court Judge has failed to analysed the discrepancy of the statement of the above witness made to the police and the evidence in the Magistrate Courts regarding the identity of the assailant. It is noted from the testimony of the above witness that non other than the 3rd Accused – Appellant has attacked the deceased. The mere fact that there is a discrepancy as to the assailant will not affect the case for the prosecution. In the instant case the 1st accused is the father of the 3rd accused. More importantly all the accused persons were known to the deceased family. Therefore this court is of the view that her evidence does not lack testimonial trustworthiness, and the said discrepancy will not deny a fair trial to the 3rd Accused – Appellant.

In the above setting I am persuaded to accept her evidence and see no incurable dent in the prosecution case.

In so far as the complicity of the other accused persons is concerned it is abundantly clear as per evidence of the above witness that they simply could not be convicted under section 296 of the Penal Code. According to the evidence of the above witness the prosecution has not been able to prove murderous intention of the other accused persons.

According to the above witness the other accused persons had assaulted the deceased with the hands and legs. Hence at best they could be charged only for causing hurt.

Hence in the said back drop the homicidal intention as described in the Section 294 of the Penal Code can be attributed only to the 3rd Accused – Appellant.

As another ground of appeal it is contended by the appellants that the above witness would have not seen the alleged attack. But it was her position that the body was taken away from the place of the incident to a place where the deceased met his doom.

Further it is common ground that there had been a dispute between these two families. The witness No. 2 son of the deceased who was 14 years of age has testified to the fact that the 1st Accused – Appellant

son the 3rd Accused- Appellant dealt the fatal blow. Thereafter the 1st 2nd, 4th 5th Accused – Appellants has assaulted the deceased with the hands and the legs. It is apparent that the 6th Accused – Appellant was indicted and convicted for the abusive words indicating to kill the deceased.

It is to be noted that all the accused persons were indicted for being members of an unlawful assembly in the prosecution of common object of which to commit murder of the deceased and thereby committing an offence under section 146 of the Penal Code. But it is so apparent that the prosecution was not in a position to establish the above element to punish these accused.

This Court has adverted to a judgement handed out by the Supreme Court of India in the case of GANGA RAM SHA AND OTHERS .VS. STATE OF BIHAR—DECIDED ON 27.01.2017 which observed thus;

“It is trite law that the common object of the unlawful assembly has to be inferred from the membership, the weapons used and the nature of the injuries as well as other surrounding circumstances. Intention of the members of the unlawful assembly can be gathered by nature, number and location of injuries inflicted”.(emphasis added)

Hence in the light of the above exposition of the law and facts it is abundantly clear that the instant

case the Accused – Appellants presence has not constituted an unlawful assembly to cause the death of the deceased.

Thus in the above factual and legal matrix this court is compelled to set aside the conviction for murder in respect of the 1st 2nd 4th 5th and 6th accused- appellants and enter instead an order of acquittal and thereby allow the appeal, but nevertheless will dismiss the appeal of the 3rd Accused – Appellant.

Accordingly appeal of the 3rd Accused-Appellant is dismissed, and appeals of the 1st, 2nd, 4th, 5th & 6th Accused –Appellants are allowed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree.

JUDGE OF THE COURT OF APPEAL