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

In the matter of an Appeal Under and in terms of the Article 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Attorney General

Complainant

Court of Appeal

Case No. CA/HCC 03-04/2016

HC Jaffna Case No.

HC 1753/2014

Vs.

01. Sooriyakumar Ajanthan alias Ajanthan

02. Vignaraja Selventhiran

03. Sivathasan Thrishanthan alias Thinesh

Accused

AND NOW

01. Sooriyakumar Ajanthan alias Ajanthan

02. Shivadasan Thrishanthan alias Dinesh

Accused – Appellant

Vs.

Attorney General

Complainant- Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Nalin Ladduwahetty, P.C. with Kavithri Ubeysekara for the 1st Accused-Appellant.

Neranjan Jayasinghe for the 2nd Accused-Appellant.

Azard Navavi, SDSG for the Respondent.

Argued on : 24.01.2024

Decided on : 21.02.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 18.01.2016 of the High Court of Jaffna.

The 1st and the 3rd accused appellants have been indicted along with the currently absconding 2nd accused under the section 296, and 2 counts of section 380 of the Penal Code.

At the trial, the 1st and the 3rd accused appellant had pleaded not guilty and the 2nd accused had been absconding and the trial had commenced. At the conclusion of the trial, the 1st and the 3rd appellants along with the 2nd accused had been convicted for murder and the second count which is a charge of robbery of a vehicle which had been in the custody of the deceased.

The grounds of appeal raised by the 1st appellant was that,

1) **The trial judge evaluated the evidence for the prosecution and the defense erroneously,**
2) **Section 32 of the Evidence Ordinance not being properly considered.**

The grounds of appeal raised for the 3rd appellant was that,

1) **This being a case based on circumstantial evidence the case for the prosecution not being proved beyond a reasonable doubt.**

The entire appeal was considered by this Court on a translated brief.

The prosecution has led the evidence of the mother, the brother, and the brother-in-law of the deceased, the evidence of two army officers and the police and the doctor who conducted the post-mortem.

The deceased had been married with two children and had been living alone because he has had problems with his wife which had been testified to by the deceased wife and his family members.

On the 14th of December 2006, the mother of the deceased had gone to the house of the deceased and had seen four young boys in the house of the deceased trying to do a vehicle transaction. Among those 4 persons, the mother had identified the 1st and the 3rd appellants.

On the 15th of December which is the following day, the mother had been taken to the house of the deceased by the brother of the deceased because they had been informed that there had been an incident in the house of the deceased. When they had gone inside, they had seen the deceased dead on the bed which had been in the inner verandah to the house.

This has been corroborated by the brother and the brother in-law of the deceased.

They had been cross-examined to the deceased person's addiction to alcohol and the misunderstanding he has had with his wife and the fact that some of the material stated to Court has not been said in the statement to the police and at the inquest.

The wife of the deceased had said that the deceased had been addicted to consuming kassippu and that she had immense problems living with him as a result of which that she had started to live alone.

The incident had taken place at Mirisuvel in Jaffna which had been an uncleared area during the war. Hence on the 15th of December, an officer attached to the army while on duty had seen through his binoculars that two persons travelling in a van followed by a motor cycle had stopped and one of them in the van had thrown an object in to the paddy field nearby. He had immediately had got his subordinate officer to go and check and had seen it to be a blood stained pestle with something similar to human hair on it. He had retrieved the production and had handed over to the camp to which he has been attached to.

He had immediately warned the nearest check point to apprehend the said van and the motor cycle.

The officer who had been on duty at the road check point had not been able to apprehend the van but had apprehended the motor cycle in which the 1st appellant had been taken in to custody.

The doctor who had given evidence on the post-mortem report had said that the deceased had died of shock and hemorrhage due to injuries caused from a blunt weapon.

The doctor had identified two major injuries on the diseased which had been the cause of death and the pestle marked as P1 has been identified by the doctor as being a weapon which could be used in causing the type of injuries seen on the deceased.

Upon the conclusion of leading of evidence of the prosecution, the defense had been called and the appellants had given evidence on oath.

The testimony of the 1st appellant, had been that the two appellants and the 2nd accused had been acquaintances, and on the 14th of December 2006, they had gone to the house of the deceased for the exchange of motor-cycle of the 1st appellant and the deceased. The said transaction had not been completed and the second accused had wanted to purchase the van belonging to the deceased and for the said transaction they had gone on the 15th on which day the incident had taken place.

According to the 1st appellant he had gone to place his signature as a witness on the transfer form on the request of the 2nd accused. The deceased had been consuming kassippu from the bottle itself and he had argued with the 2nd accused asking for more money for the van and there had been an argument between the two and suddenly the deceased had gone in to the house and had brought a pestle and had tried to assault the 2nd accused and the 2nd accused had grabbed the pestle and had assaulted the deceased. The appellant on seeing the deceased falling bleeding, had fled on the motor-bicycle and he had been followed in the van by the 3rd appellant and the 2nd accused.

The van had over taken him and he had seen the van stopping and the 2nd accused throwing something and the van had fled and he had followed but he had been stopped by the army and questioned and had been taken to custody.

The 3rd appellant had more or less has corroborated the 1st appellant and he had said that he had gone on the 15th on the calling of the 2nd accused and he had seen the deceased bringing a pestle and trying to assault the 2nd accused and the 2nd accused had told the 3rd appellant to stay away and he had been struggling with the deceased.

He had seen the deceased fallen and he had seen the 1st appellant then fleeing from the scene on the motor-bicycle and he also had tried to alight the motor-bicycle but had failed and at that point the 2nd accused had started the van of the deceased which had been parked outside and he also had alighted the van and both had fled , and on the way the 2nd accused had thrown the blood stained pestle and he had been dropped off at his residence by the 2nd appellant and he had on next day had with the consent of the parents surrendered to police.

Hence on analyzing the evidence above, it is an undisputed by both parties that on the 14th and the 15th of December the appellants and the 2nd accused had gone to the house of the deceased.

It is also undisputed that the deceased died on the 15th at his residence in the presence of the appellants and the 2nd accused.

The prosecution who alleges that the appellants along with the 2nd accused committed the death of the deceased and the robbery of the motor bicycle of the deceased allege that the appellants along with the 2nd accused shared a common intention to kill the deceased and rob the motor-bicycle of the deceased.

But the prosecution has rested its case entirely on circumstantial evidence, and if that is so it is a well-established principle in the law of evidence that if a case is to be proved on circumstantial evidence the circumstances must draw the irresistible inference that it was the accuses and no one else who committed the said offences. If the charges have been preferred based on common intention, then the prosecution has to prove beyond a reasonable doubt that all accused shared a common intention and the presence of the accused at the scene should not be only a mere presence but a participatory one.

At this point, we draw our attention to the case of **Mapalagama Acharige Ariyaratne vs The Attorney General SC 31-1992 it has been held that "it is settled law that the inference of a common intention must be not merely a possible inference but a necessary inference that is to say an inference from which there is no escape".**

In the instant case the evidence against the 1st and the 3rd appellants are that as placed by the prosecution are as follows,

1) **On the 14th they had gone to the house of the deceased for a transaction of a motor-cycle,**

2) **On the following day the deceased was found dead by his relatives,**
3) **On the same day around the time the deceased was found dead, an army officer in the vicinity to the house of the deceased sees from a pair of binoculars the 3rd appellant along with another in a van disposing an object later which was found is alleged to be having a substance similar to human blood and hair but not sent to the Government Analyst for analysis.**
4) **At the check point nearest to the scene of crime, the 1st appellant is arrested with a motor cycle which had been transferred from the deceased.**

Hence, on the above circumstances placed by the prosecution and the police investigations which had said that 3rd appellant surrendered to police and the pestle recovered by the army had been identified to be sufficiently capable of causing the injuries on the deceased by the doctor raise the doubt that whether there is sufficient evidence to show that the two appellants had shared a common intention with the 2nd accused who was absconding to commit the two offences for which they had been convicted for by the trial judge.

But the trial judge, we observe that after analyzing the evidence of the prosecution had used the evidence of the defense to fill in the gaps of the prosecution, which we think is incorrect. (Pages 306 and 307 of the brief) It is the opinion of this Court that the trial judge had erred when he has concluded that the appellants had shared a common murderous intention among themselves because the circumstances put forward by the prosecution had been totally inadequate.

The trial judge cannot use the evidence of the defense to prove the case for the prosecution.

It has been held in the case of **James Silva vs The Republic of Sri Lanka (1980) 2SLR 167 which has cited the case of Jayasena vs The Queeen 72 NLR 313 had said that "it is a grave error of law for a trial judge to direct himself that he must examine the tenability of truthfulness of the evidence of the defense in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in or society; now enshrined in our constitution. There is not even a surface presumption of truth in the charge the accused has been indicted for. Therefore, to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence".**

It has further said by quoting Jayasena vs The Queen 72NLR 313 that "a satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defense in its totality without compartmentalizing and ask himself whether a prudent man, in the circumstances of the particular case, he believes the accused guilty or not guilty"

The prosecution when they have put forward a charge against an accused must prove its case beyond a reasonable doubt and the accused is presumed to be innocent until he is proved otherwise.

In the instant case, we find the circumstances put forward by the prosecution is wholly insufficient to draw the irresistible inference and the only inference that the appellants along with the 2nd accused shared a common murderous intention and committed the first and the second charges in the indictment for which they had been found guilty for.

Anyhow the evidence of the two appellants on oath had been that on the 14th they had gone to the deceased person's house along with the 2nd accused for a vehicle transaction and since it could not be concluded on that day the following day also they had gone and the deceased had been drunk and there had been an argument between the deceased and the second accused and during which the deceased had brought a pestle and had tried to assault the 2nd accused and the 2nd accused had taken the pestle and had assaulted back.

The two appellants had been mere bystanders and they had gone to the scene on the request of the 2nd accused.

The appellants had been cross-examined, but their evidence is uncontradicted.

Hence, this evidence of the appellants should not be used to fill in the gaps of the prosecution, which trial judge has done.

As such, when considering the above, we find that there is no adequate evidence led at the trial by the prosecution to prove beyond a reasonable doubt that the two appellants shared a common murderous intention with the accused absconding and to rob the vehicle referred to in the indictment and to commit his murder.

Hence the instant appeal is allowed and the conviction and the sentence imposed by the trial judge is hereby set aside and the 1st and the 3rd appellants are acquitted.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal