VITHANA AND ANOTHER
v
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 18/2003
HC AVISSAWELLA 60/2001
MAY 19, 2007

Penal Code Sections 32, 315, 294 – Murder – Culpable homicide – Intention contemplated under the 4 limbs of Section 294 – Constitution – Art 138 – Applicability – Common intention ingredients – Criminal Procedure Code Section 283. Failure on the part of Court either to accept or reject dock statement? Evaluation of evidence.

The two appellants were convicted of murder of K and C, and two offences under S315. In appeal it was contended.

(1) that there was failure on the part of the trial Judge to consider whether there was antecedent probability of death resulting from the injury inflicted as opposed to a mere likelihood of death resulting from the injury inflicted.

(2) that ingredients relating to the common intention had not been established.

(3) that the trial Judge had failed to evaluate the evidence and thereby violated S283 of the Criminal Procedure Code.

(4) that the trial Judge had come to an erroneous conclusion that the 1st appellant had handed over the weapons (P1+P2) to the Police when they were not handed over by him.

(5) that the trial Judge has not rejected or accepted the dock statement.

Held:

(1) The intention that is contemplated in the 1st limb of S294 is the intention to cause death which is commonly known as murderous intention, but the intention that is contemplated in the 3rd limb of S294 is the intention to cause bodily injury. This injury should be

sufficient, in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not the intention.

Per Sisira de Abrew, J.
"The ingredients that must be proved by the prosecution in order to prove a charge of murder under the 3rd limb of S294 are that:

(i) The accused inflicted a bodily injury on the victim.

(ii) The victim died as a result of the above bodily injury.

(iii) The accused had the intention to cause the bodily injury.

(iv) The above injury was sufficient to cause the death of the victim in the ordinary course of nature".

In the instant case the prosecution has established all four ingredients of S294."

(2) Applying Art 138 of the Constitution, it is apparent that the failure on the part of the trial Judge to consider the above aspect of the law is not sufficient to vitiate the convictions, it has not resulted in a failure of Justice.

(3) In a case of murder against the main accused under limb 3 of S294 the intention contemplated there, being the 'intention to cause bodily injury', one cannot expect the prosecution to prove the other accused shared common murderous intention when proving the charge against the other accused. In a situation of that nature, what the prosecution is expected to prove is that the other accused shared 'common criminal intention contemplated in limb 3 of S294 – common intention to cause bodily injury.

In the instant case, from the evidence it is crystal clear that the 2nd appellant had entertained a common intention to cause bodily harm to C with the 1st appellant which is the intention contemplated in limb 3 of S294.

(4) The trial Judge has evaluated the evidence, and had commenced the judgment by referring to the defence suggestion to the witness.

(5) It is true that the 1st appellant did not personally hand over the weapons to the Police, but the evidence of the Police was that the 1st appellant pointed out the weapon and the Police Officer took them into custody – at the time of recovery the 1st appellant was only 2 feet away from the Police Officer.

Per Sisira de Abrew, J.
"Though we do not condone the failure on the part of the trial Judge to arrive at a conclusion whether to accept or reject the dock statement, such failure has not occasioned a miscarriage of Justice".

APPEAL from the judgment of the High Court of Avissawella.

Cases referred to:

(1) *Mendis* v *Queen* – 54 NLR 177.
(2) *Virsa Singh* v *State of Punjab* – AIR (1958) SC 465 at 467.
(3) *Hajinder Singh* v *Delhi Administration* – AIR 1968 (SC) 867.
(4) *Mahadeo Ganpat Badwana* v *State of Maharashtra* – AIR 1977 SC 1756.
(5) *L.S.P. de Silva* v *Republic of Sri Lanka* – CA 124/2004 – CAM 28.2.2007.
(6) *Bakhawar* v *State of Haryana* – AIR 1979 – SC 1006.
(7) *Rajwant Singh* v *State of Kerala* – AIR 1966 (Sc) 1874 at 1878.
(8) *State of Maharashtra* v *Arun Savalaram* – 1989 – CR LJ 191.
(9) *Ande* v *State of Rajasthan* – AIR 1966 (SC) – 148 at 151.
(10) *Sumanasiri* v *A.G.* – 1991 – 1 Sri LR 309.

Dr. Ranjith Fernando for appellants.
Shavindra Fernando DSG for the Republic of Sri Lanka.

June 28, 2007

SISIRA DE ABREW, J.

Two appellants were convicted of the murder of V. Kusumawathi and the murder of T. Chaminda Kumara (hereinafter referred to as Chaminda) and sentenced to death. They were also convicted of two offences under section 315 of the Penal Code and sentenced to 12 months rigorous imprisonment (RI) on each count. This appeal is against the said convictions and the sentences. The facts of this case can be quite briefly summarized as follows: 01

Around 9.30 p.m. on15th August 1999 when Priyantha the husband of Kusumawathi was getting ready to have dinner with his friend Chaminda who came to his house little before the beginning of the incident, described by the prosecution, both appellants entered the house of Priyantha. The 1st appellant, armed with a *kithul* club went inside the house passing Priyantha and immediately thereafter Priyantha was attacked by the 2nd appellant with a sword when he blocked the 2nd appellant from going inside the house. Priyantha grappled with the 2nd appellant while Chaminda with the 1st appellant. Dilhani, the daughter of Priyantha, pushed the 2nd appellant away when he attempted to 10

attack Priyantha with the sword. The appellants made a request to settle the matter but the next moment without any provocation from the victims' party both appellants started attacking Chaminda with their weapons. Unable to witness the attack on Chaminda any longer Kusumawathi, the wife of Priyantha, requested them not to attack, then she too was attacked by both appellants. Thereupon both appellants intensified the attack on Priyantha. Both deceased persons and Priyantha received injuries. When Dilhani, who was about 12 years old, was dragged by the 2nd appellant near the father, the 1st appellant told him to release the child and as such she was released. Fearing further attack both Priyantha and his daughter Dilhani went into a room and locked themselves in. The appellants threatened Priyantha and Dilhani to tell the Police the appellants were wearing masks at the time of the incident and could not be identified.

One of the grounds urged by the learned Counsel for the appellant as militating against the maintenance of the convictions for murder was that the failure on the part of the learned trial judge to consider independently the degree of probability of causing death as a result of the injuries caused to Kusumawathi and Chaminda. In short failure on the part of the learned trial judge to consider whether there was great antecedent probability of death resulting from the injury inflicted, as opposed to a mere likelihood of death resulting from the injury. He cited *Mendis* v *Queen*[1] in support of his argument. In *Mendis* v *Queen*, Gratiaen, J. observed: "Where toxaemia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured person died of such toxaemia". **Held** by Gratiaen, J. "that as the injured man's death was not immediately referable to the injury actually inflicted but was traced to some condition which arose as a supervening link in the chain of causation, it was essential in such cases that the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that "in the ordinary course of nature" there was a very great probability (as opposed to a mere likelihood) (a) of the supervening condition arising as a consequence of the injury inflicted, and also (b) of such supervening condition resulting in death." In order to appreciate this argument it is necessary to

consider section 294 of the Penal Code which is reproduced below: *"Except in the cases hereinafter excepted, culpable homicide is murder -*

Firstly - if the act by which the death is caused is done with the intention of causing death; or

Secondly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly - If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly - If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

It is clear that the intention that is contemplated in the 1st limb of section 294 of the Penal Code (sec. 294) is the intention to cause death which is commonly known as murderous intention. But the intention that is contemplated in the third limb of sec. 294 is the intention to cause bodily injury. This injury should be sufficient, in the ordinary course of nature, to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not on the intention. This position is amply justified by illustration 'c' to sec. 294 which is reproduced below:

"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

This illustration says that 'A' is guilty of murder although he may not have intended to cause the death of 'Z'. This shows that prosecution can prove a charge of murder even if the accused, charged with murder, did not entertain murderous intention at the time of inflicting the bodily injury if the accused entertained an intention to inflict bodily injury and that this injury is sufficient, in the ordinary course nature, to cause the death of the victim. In my view

an accused person charged with murder cannot claim, when the victim has succumbed to the injury which is sufficient, in the ordinary course of nature, to cause death, that he did not intend to cause the death of the victim but he only intended to inflict bodily injury and that he should be exonerated from the charge of murder. This view is supported by the following opinion expressed by His Lordship Justice Bose in *Virsa Singh* v *State of Punjab*[2] at 467: "No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional." This judgment was cited with approval and applied in *Hajinder Singh* v *Delhi Administration*[3], *Mahadeo Ganpat Badwana* v *State of Maharashtra*[4]. His Lordship Ranjith Silva cited the above dictum with approval and applied in *L.S.P. de Silva* v *Republic of Sri Lanka*[5].

As was pointed out earlier the intention contemplated in the 3rd limb of sec. 294 is the intention to inflict a bodily injury. According to 3rd limb of sec. 294, this injury must be sufficient to cause death in the ordinary course of nature. The emphasis in the 3rd limb of sec. 294 is on the sufficiency of the injury in ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature which evidence must be elicited from the doctor who conducted the post-mortem who is called upon to express an opinion on the post-mortem report. The decision of the Indian Supreme Court in *Bakhtawar* v *State of Haryana*[6] lends support to the above view. Indian Supreme Court held as follows: "For the commission of the offence of murder it is not necessary that the accused should have the intention to cause death. It is now well settled that if it is proved that the accused had the intention to inflict the injuries actually suffered by the victim and such injuries are found to be sufficient in the ordinary course of nature to cause death, the ingredients of clause Thirdly, of sec. 300 of the Indian Penal Code are fulfilled and the accused must be held guilty of murder punishable under sec. 302 of the Indian Penal Code." Section 300 of the Indian Penal Code is in terms identical to sec. 294 of the Ceylon Penal Code.

Their Lordships of the Indian Supreme Court considered the provisions of sec. 300 of the Indian Penal Code in *Rajwant Singh* v *State of Kerala*(7) at 1878 and remarked thus: "Third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not."

In *Virsa Singh* v *State of Punjab (supra)*, Indian Supreme Court discussing the third limb of sec. 300 of the Indian Penal Code which is in terms identical with section 294 of the Ceylon Penal Code observed as follows: "To put it shortly, the prosecution must prove the following facts before it can bring a case under sec. 300 'thirdly';

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional or that some other kind of injury was intended.

Once these elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under sec. 300 thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature.

..... Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death." This judgment was cited with approval in so many later cases such as *Rajwant Singh* v *State of Kerala (supra)*, *Hajinder Singh* v *Delhi Administration (supra)* and *State of Maharashtra* v *Arun Savalaram*[8].

In *State of Maharashtra* v *Arun Savalaram (supra)* Indian Court observed thus: "For the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established."

In *Ande* v *State of Rajasthan*[9] at 151 Indian Supreme Court remarked thus: "The emphasis in clause thirdly is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and if the causing of the injury is intended, the offence is murder." This judgment was cited with approval and applied by the Indian Supreme Court in *Rajwant Singh* v *State of Kerala (supra)*.

In *Sumanasiri* v *A.G.*[10] Jayasuriya, J., held: "Clause 3 of sec. 294 requires that "the probability of death resulting from the injury inflicted was not merely likely but very great though not necessarily inevitable."

In the light of the above judicial decisions and the observation made by me, I set down here the ingredients that must be proved by the prosecution in order to prove a charge of murder under third limb of sec. 294.

1. The accused inflicted a bodily injury on the victim.
2. The victim died as a result of the above bodily injury.
3. The accused had the intention to cause the above bodily injury.

4. The above injury was sufficient to cause the death of the victim in the ordinary course of nature.

It must be noted that as was pointed out in *Virsa Singh case (supra)* the intention that is contemplated in third limb of sec. 294 is **the intention to cause bodily injury** and not the intention to cause bodily injury that is sufficient to cause death in the ordinary course of nature.

In the instant case, it is undisputed that 1st, 2nd and 3rd ingredients stated above had been established. Did the prosecution establish the 4th ingredient stated above? Dr. Niranjan referring to the injuries of Kusumawathi testified that 8th to 14th injuries are fatal in the ordinary course of nature. Referring Chaminda's injuries Dr. Niranjan testified that injury No. 1 is fatal in the ordinary course of nature. Thus the prosecution has establish the 4th ingredient stated above. Since the prosecution has established all four ingredients in 3rd limb of sec. 294, the offence of murder has been established. Failure on the part of the learned trial judge to consider the above aspect of the law, in my view, has not resulted in a failure of justice. In this regard I would like to consider the Article 138 of the Constitution which reads as follows:

"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, tribunal or other institution and sole and exclusive cognizance by way of appeal revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court of First Instance, tribunal, or other institution may have taken cognizance;

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

I apply the proviso to Article 138 of the Constitution and hold that the said failure on the part of the trial judge is not sufficient to vitiate the convictions. For the above reasons I hold that the

contention of the learned Counsel for the appellant is devoid of merit and wholly untenable.

Learned Counsel for the appellant next contended that the ingredients relating to the common intention had not been established by the prosecution. As regards this contention I must state here that the prosecution adduced evidence that both appellants had attacked Kusumawathi, Chaminda and Priyantha and as such the common intention had been well established. For the purpose of completeness I must mention here when the prosecution has established a charge of murder under **limb three** of sec. 294 against the main accused, one can't expect the prosecution to prove common intention to cause death of the victim which is the intention contemplated in **limb one** of sec. 294 and commonly known as the murderous intention against the other accused persons, charged on the basis of common intention. In such a situation in order to prove the charge of murder against the other accused, what the prosecution is expected to prove is that they (other accused) shared common 'criminal intention' contemplated in limb three of sec. 294. When the prosecution has established a charge of murder under **limb three** of sec. 294 against the main accused, and if the prosecution establishes that the other accused shared the common 'criminal intention' contemplated in **limb three** of sec. 294. i.e. the intention to cause bodily injury, the offence of murder against the other accused is established provided of course the other three ingredients of **limb three** of sec. 294 discussed above are proved. If I may put it in a nutshell, in a case of murder where the accused persons are charged under sections 32/296 of the Penal Code, when the prosecution established a charge of murder against the main accused under **limb three** of sec. 294, the intention contemplated there being the '**intention of cause bodily injury**', one cannot expect the prosecution to prove that other accused shared common **murderous intention** when proving the charge against the other accused. In a situation of that nature, what the prosecution is expected to prove is that the other accused shared 'common criminal intention' contemplated in **limb three** of sec. 294 i.e. the '**common intention to cause bodily injury**'.

In the instant case, the doctor testified that the injuries 8 to 14 of Kusumawathi are fatal in the ordinary course of nature. Injuries 8,

9,10, and 13 are cut injuries while injury no. 14 is a depressed fracture. Injury no. 14 which was corresponding to injury no. 11 was a contusion. It was in evidence that the 1st appellant attacked Kusumawathi with a club and 2nd appellant with a sword. It appears from the evidence that both appellants entertained intentions to cause bodily injuries to Kusumawathi and the injuries caused by both of them are sufficient to cause death in the ordinary course of nature. As regards the injuries caused to Chaminda, the injury no. 1 which is a deep cut from which brain substance was peeping out, the doctor said that this was fatal in the ordinary course of nature. Evidence revealed that Chaminda was attacked by both appellants. The 1st appellant was armed with a club and the 2nd appellant was with a sword.The injury no. 13 found on the body of Chaminda was a contusion. From the evidence it is crystal clear that the 2nd appellant had entertained a common intention to cause bodily injury to Chaminda with the 1st appellant which is the intention contemplated in limb three of section 294 and the injury caused by the 2nd appellant was sufficient in the ordinary course of nature to cause death. For the above reasons the contention that the prosecution had failed to prove common intention is untenable.

Learned Counsel for the appellant also contended that the learned trial Judge had failed to evaluate the evidence and thereby violated section 283 of the Criminal Procedure Code. The learned trial judge has commenced the judgment by referring to the defence suggestion to the witnesses. The suggestion of the defence was that this crime had been done by some people wearing masks. I have gone through the judgment of the learned trial judge and I am unable to agree with the contention of the learned Counsel for the appellant.

Learned Counsel for the appellant also contended that the learned trial Judge had come to the erroneous conclusion that the 1st appellant had handed over the weapons marked P1 and P2 to the police officer when in fact they had been handed over by the 1st appellant. I now turn to this contention. Evidence of the police officer was that the 1st appellant pointed out the weapons and the police officer took them into his custody. [*vide* 168 and 169 of the brief]. At the time of the recovery the 1st appellant was only two feet away from the police officer. It is true that the 1st appellant did not

personally hand over the weapons to the police officer. When one considers the evidence relating to the recovery of the weapons, the above contention should be rejected as there is no merit.

Learned Counsel for the appellant next contended that the learned trial Judge had not rejected or accepted the dock statements made by the appellants. The appellants, in their dock statements, denied the incident. Whilst we do not condone the failure on the part of the trial Judge to arrive at a conclusion whether to accept or reject the dock statement, such failure, in my view, has not occasioned a miscarriage of justice. I therefore apply the proviso to Article 138 of the Constitution and proceed to reject the said contention of the learned Counsel.

I have considered the evidence relating to the 4th count. In my view prosecution has not led sufficient evidence to prove the 4th count. When 2nd appellant dragged Dilhani near Priyantha, the 1st appellant told 2nd appellant to release the child. This evidence should be considered in favour of the 1st appellant. I acquit both appellants of the 4th count and set aside the sentence imposed on that count.

For the reasons set out in my judgment, I affirm the conviction and sentences on 1st, 2nd, and 3rd counts.

Subject to the variation in count no. 4 the appeal is dismissed.

SILVA, J. – I agree.

Appeal dismissed subject to variation.