GUNASIRI
AND
TWO OTHERS
VS
REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J.
ABEYRATNE J.
CA 116/2003.
HC BALAPITIYA NO. 111.
FEBRUARY 27, 2009.
MARCH 2, 3, 4, 2009.

Penal Code - Section 296 - Section 294 (1) - Section 294 (3) - Murder - common intention - Dock statement - Test of promptness - Alibi - Failure to put his case in cross examination - Presumption? - Duty of Judges in criminal cases.

The three accused-appellants were convicted for the murder of one A and were sentenced to death. The 1st appellant - withdrew his appeal. The 1st and 3rd accused-appellant are brothers, the 2nd accused-appellant is the brother in law of the 1st and 3rd accused-appellants.

The 2nd accused-appellant contended that he did not share common murderous intention with the 1st and 3rd accused-appellants, and further contended that, he did not figure in the incident - right from the beginning. The 3rd accused-appellant's position was that witness R - wife of the deceased was an unreliable witness and that his dock statement has not been considered by the trial Judge, where in his dock statement he had taken up the position that he was not at the scene but at the temple.

Held:

(1) To establish the existence of a common intention it is not essential to prove that the criminal act was done pursuant to a pre-arranged plan. A common intention can come into existence without a prearrangement. It can be formed on the spur of the movement.

(2) In a case of murder when two or more accused persons are charged on the basis of common intention, the prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow. If the prosecution proves that the other accused person shared a common criminal intention envisaged in Section 294(1) or Section 294 (3) with the person who struck the fatal blow, the former is liable for the offence of murder.

Held further:

(3) The evidence of R satisfies the test of consistency, the test of probability, she is a reliable witness.

(4) Although the 3rd accused appellant raised an alibi in his dock statement he failed to suggest his position to the prosecution witnesses.

It is a rule of essential justice that when ever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted. The failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was a false one.

(5) In evaluating a dock statement the trial Judge must consider the following principles:

(1) If the dock statement is believed it must be acted upon.

(2) If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed.

(3) Dock statement of one accused should not be used against the other.

Per Sisira de Abrew. J:

"The trial Judge has not complied with the 1st principle stated above, I have earlier expressed the view that the defence of alibi is an after thought, and I therefore hold that the failure to comply with the above stated 1st principle has not caused prejudice to the accused appellant - The trial Judge has complied with the 2nd principle and had not used the dock statement - of the 3rd accused appellant against the others".

Per Sisira de Abrew. J:

"It is unfortunate that the trial Judge has taken 2 years to hear and conclude this case although it could have been concluded within 7 days. This kind of sloppy conduct will result in an erosion of public confidence in the judicial system of the country. Criminal trials must be heard on a day to day basis. Justice demands the adoption of the said procedure by judges in lower courts. The adoption of the said procedure will retain public confidence in the judicial system and help both the trial Judge and Counsel in the discharge of their duties."

APPEAL from a judgment of the High Court of Balapitiya.

Cases referred to:-

1. *Queen vs. Mahathun* 61 NLR 540.
2. *Ramalochan vs. Queen* 1956 Al 475 (PC)
3. *Ariyadasa vs. The Queen* 68 NLR66 at 71
4. *Sarwan Singh vs. State of Punjab* 2002 AIR SC iii at 3652, 3656 Indian Supreme Court
5. *Bobby Mathew vs. State of Karnatake* 2004 Cr. LJ 3003
6. *Kularatne vs. Queen* - 71 NLR 529

Ranjith Abeysuriya PC for 2nd accused-appellant

Bulathsinghalage for 3rd accused-appelant

Yasantha Kodagoda DSG for respondent

Cur.adv.vult

March 4, 2009

SISIRA DE ABREW, J.

Heard both counsel in support of their respective cases. The 1st accused-appellant at the very inception of this argument withdrew his appeal. The accused-appellants in this case were convicted for the murder of a man named Weerakkodi Ariyadasa and were sentenced to death. This appeal is against the said conviction and the sentence.

The facts of this case may be briefly summarized as follows:

Ratnawali who is the wife of the deceased person, is the sister of the 1st and the 3rd accused appellants who are brothers.

The 2nd accused-appellant is the brother-in-law of the 1st and the 3rd accused-appellants. On the day of the incident around 7.30 p.m., the 1st accused-appellant came to the house of the deceased and took him away saying that he wanted to discuss a certain matter with the deceased person. The deceased person at this time took a club and went with the 1st accused-appellant. Fifteen minutes later Ratnawali, on an information given by Margret, a neighbour, that the deceased person has got involved in a brawl, went near the house of Dayananda. She then found her husband lying fallen on the ground. When she shouted as to who did this all 3 accused appellants armed with weapons arrived at the scene. The 1st accused appellant and the 3rd accused appellant were respectively armed with a manna knife and a sword while the 2nd accused with a club. The 1st accused at this stage when questioned by Ratnawali as to what they did, addressed her in the following language: "We will kill him and look after you and the children". When the 2nd accused-appellant raised his club saying that you too will be assaulted, the 3rd accused uttered the following words: "Don't attack her. She is our sister." The 3rd accused further uttered the following words "He is still alive attack him". Thereupon all 3 accused appellants attacked the deceased with their weapons. When the deceased person worshipped, the 1st accused appellant attacked his hand. Ratnawali says in her evidence that she identified the accused appellants and her husband with the aid of the light that was shedding from the house of Dayananda. When the witness tried to go to the police station, three accused-appellants prevented her from going to the police station. However Ratnawali made a complaint to the police station around 10.00 p.m.

Learned President's Counsel appearing for the 2nd accused appellant contended that the 2nd accused did not share a common murderous intention with the 1st and the 3rd accused appellants and therefore he could not have been convicted for the offence of murder. This was the main submission made by the learned President's Counsel. In trying to substantiate the above ground, learned President's Counsel submitted that the 2nd accused did not figure in the incident right from the beginning. He tried to contend that there was no pre-arranged plan. In finding an answer to this submission, I would like to consider the judicial decision in *Queen vs. Mahathun*[1] wherein the Court of Criminal Appeal held thus: "To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment."

Learned President's Counsel further contended that the death of the deceased had not been caused by the 2nd accused appellant. He therefore contends that the 2nd accused appellant could not be found guilty for the offence of murder. Although the learned President's Counsel contended so, the evidence indicates that the 2nd accused appellant attacked the deceased with the club in his hand. Medical evidence indicates that the deceased person was subjected to an assault with a club. In finding an answer to the submissions made by the learned President's Counsel, it is relevant to consider the Judicial decision of the Privy Council in *Ramalochan vs. Queen*[2] which was considered by His Lordship Justice T. S. Fernando in *Ariyadasa Vs. the Queen*[3] at 71. In Ramalochan's case, the appellant Ramalochan had been charged with murder. The evidence was circumstantial and right up to the stage when Ramalochan, who testified on his own behalf, came to be cross examined, the case for the prosecution had been that Ramalochan himself had killed the deceased. In the course of the cross examination of Ramalochan by the counsel for the prosecution, the latter suggested to the witness that the fatal blow was struck

not by him (Ramalochan), but by another man - who was not on trial - and that the appellant aided and abetted this other man. It was contended on behalf of Ramalochan that improper prejudice had been caused to his defence by this alleged change of front on the part of the prosecution. As to this Court observed: "Their Lordships are unable to take the view that there was any illegitimate or improper exercise of counsel's right and duty to cross examine the accused. The crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or not the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck off the girl's head or was a party to someone else doing so was immaterial. In either case he was guilty of murder....."

Having considered the principle laid down in the above judicial decision, I may express the following view. In a case of murder when two or more accused persons are charged on the basis of common intention, the prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow. If the prosecution proves that the other accused person shared a common criminal intention envisaged in section 294 (1) or 294 (3) of the Penal Code with the person who struck the fatal blow, the former (the other accused) is liable for the offence of murder. On a consideration of the principle laid down in the above judicial decision it is manifest that the contention raised by the learned President's Counsel for the 2nd accused appellant is wholly untenable and devoid of merit. For the above reasons I reject the submissions of the learned President's Counsel.

Learned counsel appearing for the 3rd accused appellant submitted that witness Ratnawali was an unreliable witness. I shall now consider this contention. In this connection the following matters are relevant:

(1) Detailed description of the incident including the words spoken by the 1st accused appellant and the 3rd accused appellant given by Ratnawali.

(2) Corroboration of her evidence by the observation at the scene. According to the Investigating Officer, he found trampled grass near the house of Dayananda. He observed blood stains, blood stained sarong, manna knife and a pair of slippers at the scene. This sarong was later identified by the wife of the deceased as that of the deceased.

Ratnawali on the same day around 10.00 p.m. made a complaint to the police. Therefore her evidence satisfies the test of promptness. According to her evidence the 1st accused attacked the deceased person when he was worshiping. She failed to mention this fact in her statement. Apart from this, there were no major contradictions or omissions marked in her evidence. Therefore her evidence satisfies the test of consistency. Upon the information given by Margret she rushed to the scene of the offence and shouted as to who did this. Without delay she made a complaint to the police. When I consider all these matters I hold the view that her evidence satisfies the test of probability. When I consider all these matters, I hold the view that Ratnawali is a reliable witness and therefore reject the submission made by the learned counsel appearing for the 3rd accused appellant.

The learned counsel appearing for the 3rd accused appellant next contended that the dock statement of the 3rd accused appellant had not been considered by the learned trial Judge.

The 3rd accused appellant in his dock statement took up the position that at the relevant time he was not at the scene but at the temple. He further stated that at this time his uncle and the priest of the temple were with him at the temple. He further stated that both these witnesses are dead now. In the next sentence he stated that the priest had gone

to India on a pilgrimage. I therefore note that he contradicted his own statement made in the dock.

Although the 3rd accused appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses indicating the name of the priest. The trial commenced on 29/11/2001 and the defence case was concluded on 19/9/2003. Thus during a period of 2 years he failed to move Court to get summons on the priest.

Although the 3rd accused appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of *Sarwan Singh vs. State of Punjab*[4] at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in *Bobby Mathew vs. State of Karnataka*[5]

Applying the principles laid down in the above judicial decision, I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was a false one. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused appellant is an afterthought.

In evaluating a dock statement the Trial Judge must consider the following principles:

(1) If the dock statement is believed it must be acted upon.

(2) If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed

(3) Dock statement of one accused person should not be used against the other persons. Vide *Kularatne vs. the Queen* [6]

The learned Trial Judge in this case has not complied with the 1st principle stated above. I have earlier expressed the view that the defence of alibi raised by the 3rd accused is an afterthought. I therefore hold that the failure to comply with the 1st principle stated above by the learned trial Judge has not caused prejudice to the accused appellant. The learned trial Judge, at page 283 of the brief, has complied with the 2nd principle stated above. The learned trial Judge has not used the dock statement of the 3rd accused appellant against the others. For the above reasons, I reject the submission made by the learned counsel for the 3rd accused appellant as there is no merit in it. I would like to make the following observation in this case. It is unfortunate that the trial Judge has taken 2 years to hear and conclude this case although it could have been concluded within 7 days. This kind of sloppy conduct will result in erosion of public confidence in the judicial system of this country. Criminal Trials must be heard on a day to day basis. Justice demands the adoption of the said procedure by the Judges in lower Courts. The adoption of the said procedure will retain public confidence in the judicial system and help both the trial judge and counsel in the discharge of their duties.

For the aforementioned reasons I hold that there is no merit in this appeal. I therefore upholding the judgment, conviction and the sentence of the learned trial judge, dismiss these appeals as devoid of merit.

ABEYRATHNE, J. - I agree.

Appeals dismissed.