SUMANASIRI
v.
ATTORNEY-GENERAL

COURT OF APPEAL
JAYASURIYA, J.,
DE SILVA, J.
C.A. NO. 141/96
H.C. KALUTARA NO. 136/94
JULY 27, 1998.

Criminal Law – Murder – Novus actus interveniens – Causation – Explanation 1 to section 393 of the Penal Code – Section 294 clause 3 of the Penal Code – Motive.

Held :

1. Death was traceable to the direct cranio-cerebral injury inflicted by the first accused-appellant on the head of the deceased with a heavy sledge hammer using considerable force. The prosecution case thus comes within the purview of clause 3 to section 294 of the Penal Code. An accused person is liable not only for the direct consequences of his act but he is equally liable for the consequences of any supervening condition which is directly traceable to his act.

2. If the original wound was still the operating cause and is a substantial cause and death can properly be said to be the result of the wound, although some other cause of death was also operating, the offence is murder, only if it can be said that the original wound was merely the setting in which another cause operates, can it be said that death did not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of its history can it be said that death does not flow from the original wound.

3. Any controvented issue relating to causation ought to be decided according to rational and common sense principles. Where there was no breach in the line of causation despite the fact that the surgical operation was performed at a time posterior to the infliction of the injury and at a point

of time anterior to the death, the offence is murder if the act is done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death (ie if the injury if left to nature without resorting to proper medical remedies and skilful treatment would cause death).

4. Clause 3 of section 294 requires that "the probability of death resulting from the injury inflicted was not merely likely but very great though not necessarily inevitable.

5. There is no burden on the prosecution to prove motive as a matter of law. As a matter of fact when the evidence of eyewitnesses is clear and easily intelligible the necessity to prove motive does not arise.

Cases referred to :

1. *Rex v. Mubila* – (1956) 1 SALR 31.
2. *Re Singharam Padyatchi* – AIR 1944 Madras 224.
3. *Queen v. Mendis* – 54 NLR 177, 180.
4. *Brandon v. Turvey* – (1905) AC 230.
5. *Rex v. Smith* – (1959) 2 All ER 193, 197.
6. *Rex v. J. C. Jordan* – (1956) 40 Cr. App. Rep. 152.
7. *Boiler Inspection and Insurance Company of Canada v. Sherwin Williams Company of Canada Ltd.* – (1951) AC 319, 339.
8. *Weld-Blundell v. Stephens* – (1920) AC 956, 986.
9. *Leyland Shipping Company v. Norwich Union Fire Insurance Society* – (1918) AC 350, 363.
10. *Hogan v. Bentick Collienes* – (1949) 1 ALL ER 588.
11. *R. v. John William Elwood – Court of Appeal Reports* 181 All India Reports manual vol. 17 (4th ed.) p 208.
12. *King v. Haramanis* – 48 NLR 403.
13. *King v. Appuhamy* – 46 NLR 128, 132.
14. *The Queen v. D. A. de S. Kularatne* – 71 NLR 529, 534.

APPEAL from judgment of the High Court of Kalutara.

Ranjit Abeysuriya, PC with *Ms. Priyadarshani Dias* and *Ms. M. Thalgodapitiya* for accused-appellant.

Buvaneka Aluwihare, SSC for Attorney-General.

Cur. adv. vult.

September 21, 1998.

JAYASURIYA, J.

Five accused were charged before the High Court of Kalutara on three counts upon an indictment and at the end of the trial which was presided over by a High Court Judge without a jury, the learned High Court Judge acquitted all five accused in respect of counts 1 and 2 of the indictment. Count 1 related to the commission of the offence of being members of an unlawful assembly, the common object of which was to cause hurt to Duwage Bandula *alias* Sumul. The second count related to a charge of the commission of the murder of Duwage Bandula *alias* Sumul in prosecution of the common object of the said unlawful assembly, an offence punishable under section 146 read with section 296 of the Penal Code. The third count related to the commission of the murder of the said Duwage Bandula *alias* Sumul by all the five accused, an offence punishable under section 296 of the Penal Code. The learned trial judge, at the conclusion of the trial, convicted the first accused-appellant in respect of the third count in the indictment, but acquitted all the other accused, (being the second to the fifth accused) on the basis that they were not actuated by a common intention and the act which caused the murder had been inflicted only by the first accused-appellant.

Three eyewitnesses, namely, Karunawathie, the mother of the deceased, Jayanthi, the sister of the deceased and witness Nilmini have given evidence to the effect that they saw the first accused inflicting a blow on the head of the deceased with a sizeable wedge hammer (මැටකුව). These eyewitnesses have testified to the effect that they witnessed the first accused-appellant inflicitng the said blow on the deceased's head *with considerable force*. They have further stated that as a result of the force with which the blow was inflicted, the instrument (මැටකුව) got wedged into the brain of the deceased and the first accused was unable to remove the instrument from the deceased's head and the deceased was dragged by pulling the wedged in hammer (මැටකුව) which was stuck to his head. These eye-witnesses, as observed by the trial judge, had given consistent versions

corroborating each other in regard to the said incident and, although they were subjected to a long-drawn cross-examination, the said protracted cross-examination had produced no impact whatsoever on their testimonial trustworthiness and credibility and the learned High Court Judge has correctly held that the contradiction VI did not relate to the core of the prosecution version and the ingredients which the prosecution was called upon to establish on this charge of murder.

The first accused-appellant made a statement from the Dock in which he alleged that the deceased and his two other friends named Sumith and Kularatne, had pursued him with deadly weapons in their hands and that the first accused had, on seeing the impending apprehension of danger to himself, retreated to his house and had armed himself with a wedge hammer (මැඩය) from the Smithy's workshop and that he had inflicted a blow on the deceased in the exercise of the right of self-defence. According to the Dock statement of the first accused, the first accused-appellant had inflicted this blow with the hammer (මැඩය) on the deceased's head at a compound which was in close proximity to the blacksmith's workshop. The learned trial judge has rejected the accused's version volunteered from the Dock, in view of the unchallenged real evidence adduced and the evidence given by the Inspector of Police, A. P. G. de Waas Gunawardena, who was the investigating officer into this crime [who was an Assistant Superintendent of Police at the time he gave evidence] and having regard to the evidence given by Thusew Hewage Nilmini. This evidence in regard to the positions where pools of blood and blood-stains were discovered and the drag marks on the sand occasioned by the dragging of the deceased from his own garden to a point close to the blacksmith's workshop, which according to the evidence, had been effected by the first accused and his friends [who happened to be the second to the fifth accused].

The aforesaid inspector investigating into this crime has, in his evidence, stated that in the compound in which the deceased lived and in which compound was affixed a rope manufacturing machine, there was a pool of blood and there were traces of blood from that

point right up to the roadway. He has also testified to the effect that there were visible drag marks on the sandy surface manifesting that some person had been possibly dragged along the ground. He has also stated that the smithy's workshop was situated opposite the house of a person named Awutin and between the timber shed and this blacksmith's workshop, there were extensive patches of blood on the ground and that there were also blood-stains and patches along the road leading to the smithy's workshop and the timber shed. Witness Nilmini, in her evidence, [which commences at page 139] has also referred to the aforesaid blood stains on the ground and the process by which the first accused dragged the decesad with the help of his friends and, thereafter, how the deceased was carried by the first accused and his friends towards the blacksmith's workshop.

The aforesaid evidence of the police officer and Nilmini has not been impugned and assailed in cross-examination by the experienced lawyer who appeared for the first accused at the trial. In the circumstances, the learned High Court Judge had very correctly and rightly rejected the said version of the first accused which was volunteered from the Dock.

In view of the convincing and relatively unimpugned evidence given by the three prosecution witnesses, learned President's Counsel appearing for the first accused-appellant did not purport to impugn the strong findings reached on such testimony by the trial judge and the rejection of the defence version by the trial judge, having regard to the cogent reasons adduced by the trial judge for such rejection. Learned President's Counsel, however, contended that on a consideration of the contents of the post-mortem examination report prepared by Dr. Sidney Premathiratne, the Judicial Medical Officer, which had been submitted to the Magistrate of Kalutara and on a consideration of the evidence given by the Judicial Medical Officer attached to the Kalutara Hospital, Dr. Mary Hemasiri, the accused ought to have been convicted on a charge of culpable homicide not amounting to murder and the conviction of the accused on the charge of murder was unsustainable.

Though Dr. Sidney Premathiratne, JMO, Colombo had certified, signed and forwarded the post-mortem report to the Magistrate of Kalutara, he was not present at the trial, as he had died prior to the adduction of evidence upon this prosecution. In the circumstances, Dr. Mary Hemasiri, the Judicial Medical Officer attached to the Kalutara Hospital, gave expert evidence and testified to the following effect before the High Court relying on the contents of document marked P2, which was the post-mortem examination report prepared by Dr. Sidney Premathiratne.

The aforesaid post-mortem report which was produced by the medical expert who gave evidence described the main injury caused by the infliction of a blow on the head of the deceased with the heavy (මුගුර) instrument (wedge hammer) as follows:

> Laceration of the brain in the left parietal lobe measuring *22 cm semicircular* over the surface, 5cm deep cutting the cortex and the medulla in a plane *(coronal)* directed backwards. There was purulent material in the subcranoid space. The brain was oozing out and odemateous. The cause of death was described as cranio cerebral injuries. These cerebral injuries could have been caused by a heavy flatbladed edged weapon.

In describing injuries listed as Nos. 1 to 4, it is said that they are consistent of being caused by a blunt weapon. That is a pointed reference to the non-fatal injuries. P2 disclosed as injuries Nos. 5 and 6, the surgical wounds occasioned by the performance of a surgical operation after the infliction of injury No. 10. Injury No. 5 is described as a semicircular surgical wound 115 mm on the left side above the ear. Injury No. 6 was described as 40 mm surgical wound below the aforesaid injury No. 5. At the trial, the medical expert who gave evidence was cross-examined by learned defence counsel appearing for the accused at the trial and evidence elicited on behalf of the defence that a surgeon had performed an operation on the patient after the infliction of injury No. 10. In the course of the argument in appeal, as the surgical operation was posterior both in time and in

causation to the infliction of the injury No. 10 and death resulted after the operation, it was contended that a *novus actus interveniens* had taken place which effected a breach in the line of causation. I propose to consider this submission *carefully* at a later point of time. The aforesaid medical expert, Dr. Mary Hemasiri, has stated that injury No. 10 has been inflicted with the exertion of considerable force and by employing a heavy instrument. As a result of this injury, he has stated, there was laceration of the brain, fracture of the parietal lobe of the brain and at the time of the post-mortem the brain was oedematous (swollen) and there was offensive exudation dripping from the brain. In Sinhalese he has stated thus in regard to the injury to the brain:

ඔහුගේ මොළයට සිදුවී ඇති හානිය නිසා ඔහුට මරණය ගෙන දියහැකි තුවාලයක් විය හැකිය. මොළයට ඒ වගේ තුවාලයක් තිබුනත් කොපමණ තරමේ තුවාලයක් තිබුනද කියා හරියට කියන්න බැහැ. ඔහුට මරණය නියත වශයෙන් සිදුවීමට ප්‍රමාණවත්ද කියන්න බැහැ. ස්ථිර වශයෙන් කියන්න පුළුවන් මොළයට සිදුවී ඇති තුවාල හේතුකොටගෙන ස්වභාවික කටයුතු අතරදි මරණය ගෙන දිය හැකි තුවාලයක් බවට. කැළැල් තුවාල දවස් 2, 3 කින් වේලී යනවා. මෙය හරියට කියන්න බැහැ. ධාරිත තුවාලයක්ද කියා. එම කැළැල් සුව වී තිබූ නිසා ධාරිත තුවාලද කැපුම් තුවාලද කියා හරියටම කියන්න බැහැ. ඒවා ඇද ගෙන යාම හේතුකොටගෙන සිදුවූ සීරීම් තුවාලවල කැළැල් විය හැකියි. . . . . වෑයෙන් ගැසුවා නම් එම තුවාලය සිදුවන්න පුළුවන් මෙවැනි ආයුධයකින් මොට පැත්තෙන් බරට වැදුනානම් මෙවැනි තුවාලයක් සිදුවන්න පුලුවන්. මරණයට හේතුව වශයෙන් දක්වා තිබෙන්නේ මොළයට සහ කටුවලට සිදුවී තිබෙන තුවාලය බවයි. බර, පැතැලි තලයක් ඇති කොණක් සහිත ආයුධයකින් මොළයට සිදුවූ තුවාලයක් නිසාය කියා. මරණයට හේතුව වශයෙන් දක්වා ඇත්තේ මෙසේය. පළමුවෙන් මොළයට සහ කටුවලට සිදුවූ තුවාල වශයෙන් දක්වා තිබෙනවා. ඊට අමතරව සඳහන් කර තිබෙනවා මොට ආයුධයකින් විය හැකියයි කරන ලද තුවාල සම්බන්ධව සාධක තිබූ බවට සඳහන් කර තිබෙනවා.

I now advert to the contention of the learned counsel that the proper legal finding in this factual situation would be a finding of guilty in respect to the offence of culpable homicide not amounting to murder and not the offence of murder itself. Having regard to the nature of the instrument utilised to inflict the injury, the site of

the injury and the force exerted to inflict the injury, an intention to cause death could reasonably be imputed to the accused in the attendant circumstances established upon this prosecution and, to that extent, the first clause of section 294 of the Penal Code seems to be applicable. The learned trial judge, however, has arrived at a finding in regard to the commission of the offence of murder relying on the third clause to section 294 of the Penal Code – "if the act 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*". Explanation 2 to section 293 lays down the criterion – which is would the injury, if left to nature without resorting to proper medical remedies and skilful treatment have resulted in death? Vide *Rex v. Mubila*,[1] where death is caused by a bodily injury, the person who causes such bodily injury shall be deemed to have caused death although by resorting to proper remedies and skilful treatment death might have been prevented. The contents of the post-mortem report marked P2 and the evidence of the medical expert who has testified at the trial, when taken in conjunction, clearly establish that there was *very great* antecedent probability of death resulting from the injury inflicted, as opposed to a mere likelihood of death resulting from the injury. There was laceration of the brain and fracture of the bones in the left parietal lobe extending over 22 cm semicircular over the surface and this injury was 5 cm deep and it had cut the cortex and the medulla and at the post-mortem there was purulent material in the sub-cranoid space and there was offensive exudation dripping from the brain. Thus, there was a grave cranio-cerebral injury caused to the brain. The probability of death resulting from the injury was not merely likely but there was a *very great antecedent probability* of death resulting from the injury. In *Re Singharam Padyatchi*[2] it was remarked that clause 3 of section 294 requires that "the probability of death resulting from the injury inflicted was not merely likely *but very great though not necessarily inevitable.*". This principle was cited with approval and applied by Justice Gratiaen in the decision of *Queen v. Mendis*[3]. Unlike in Mendis' case in which death resulted from supervening circumstances, in the present case death is traceable to the direct cranio-cerebral

injury inflicted by the first accused-appellant on the head of the deceased with a heavy wedge hammer whilst using considerable force for the infliction of the injury. In *Mendis'* case (*supra*) the Court of Criminal Appeal arrived at the conclusion that the injured person'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 and that *in such a situation* it was *essential* that the prosecution should, in preferring 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 great probability (*a*) of the supervening condition arising as a consequence of the injury inflicted, and also (*b*) such supervening condition resulting in death. In the present prosecution the position is slightly different and death has been proved to have been caused by the direct infliction of the cranio-cerebral injury by the first accused-appellant. In the circumstances, we are of the considered view that the learned trial judge was justified, on the material placed before him, to arrive at the finding that the prosecution case came within the purview of clause 3 to section 294 and that the accused has committed the offence of murder and not one of culpable homicide not amounting to murder on the basis that the injuries were merely likely to cause death.

Now I advert to the submission advanced by the learned President's Counsel on the footing of a *novus actus interveniens,* which is alleged to have effected a breach in the line of causation. An accused person is liable not only for the direct consequences of his act but he is equally liable for the *consequences of any supervening condition* which is *directly traceable* to his act. Vide Russel on Crimes 10th edition, vol. 1, page 471 and the decision of Lord Halsbury in *Brandon Ltd. v. Turvey*[4]. At the trial no attempt was made by the learned counsel who appeared for the defence to urge and elicit material that the operation performed by the surgeon was in any way abnormal or that it was inappropriate. The case which has been presented before the trial judge is one of the performance of a normal and proper operation performed with due diligence and adequate skill. This position was not impugned at all at the trial and

at the argument of the appeal, by the defence. In considering the submission of learned President's Counsel on the breach of the line of causation and the fact that the surgical operation was performed at a point of time posterior to the infliction of injury No.10 and at a point of time anterior to death, I would advert to the very pertinent dicta of Lord Parker, CJ. in *Rex v. Smith*[5].

> "It seems to the Court that if at the time of death the original wound is still an *operating* cause and a *substantial* cause, then death can properly be said to be the result of the wound, albeit that *some other* cause of death is *also operating*. Only if it can be said that the original wound is merely the *setting* in which another cause operates, can it be said that death does not result from the wound. Putting it in another way, only if the second cause is so *overwhelming* as to make the original wound merely part of its history can it be said that death does not flow from the wound."

There is not the slightest doubt in the present prosecution that injuries Nos. 9 and 10 described in the post-mortem report P2 were still a operating and a substantial cause and the death of the deceased can properly be said to be the result of injuries Nos. 9 and 10 which were inflicted by the first accused-appellant. Even in the decision in *Rex v. J. C. Jordan*[6] Justice Hallett observed thus:

> "We are disposed to accept it as the law that death resulting from any *normal* treatment employed to deal with a felonious injury, may be regarded as caused by the felonious injury. But the same principle does not apply where the treatment employed is abnormal and wholly inappropriate."

On a consideration of the principles laid down in these two judicial decisions, it is manifest that the contention raised by learned counsel for the first accused-appellant is wholly untenable and devoid of merit. Any controverted issue relating to causation ought to be decided according to rational and common sense principles. Vide *Boiler Inspector and Insurance Company of Canada v. Sherwin Williams*

Company of Canada Ltd.[7]; *Weld-Blundel v. Stephens*[8]; *Leyland Shipping Company v. Norwich Union Fire Insurance Society*[9] per Lord Dunedin "I think the case turns on a pure question of fact to be determined by common sense principles". *Hogan v. Bentick Collienes*[10].

Learned President's Counsel strongly urged before us that the prosecution had failed to establish a motive on the part of the first accused-appellant in committing this offence on the deceased. However, it must be observed one witness has stated thus in regard to the possible motive:

'ඒ දෙදෙනා මරණකරුයි විත්තිකරුයි අතර පොඩි හබයක් ඇති වුනා. ඒ ගැන විස්තර මම දන්නේ නැහැ.'

However, it must be emphasized that the failure on the part of the prosecution to establish a proved motive against the accused is not fatal to a conviction reached by the Court even in a case based entirely on circumstantial evidence. *R. v. John William Elwood*[11] Motive is not an ingredient of the offence in respect of which the accused has been indicted. The prosecutor and the prosecution witnesses have no opportunity of peering into the mind of the accused and therefore are not in a position to give affirmative evidence in regard to motive. Therefore, the law does not require the prosecution to establish motive. In *King v. Haramanis*[12] the principle was laid down that *as a matter of law* the prosecution is not bound to assign or prove a motive as to why a criminal act was done. But as *a matter of fact*, however, *where the facts are not clear* the absence of an intelligible motive *may* have the effect of creating a reasonable doubt in favour of the accused. But if the evidence is clear the question of a motive does not arise for consideration. If the facts are *not clear* the presence of an intelligible motive may help to ascertain and decide that which is not distinct and clear. Vide also the remarks of Justice Keuneman in *King v. Appuhamy*[13] to the same effect; for the distinction between the absence of proving motive and the proved absence of motive. Vide *The Queen v. D. A. De S. Kularatne*[14] and dicta of Justice Channell in *R. v. Elwood* (*supra*). In the particular

prosecution the eyewitnesses have given very clear, cogent, overwhelming and distinct evidence against the first accused in regard to the murderous infliction of the injury on the deceased's head with a wedge hammer. They have stood the test of cross-examination and the protracted cross-examination has made no dent whatsoever on their testimonial trusworthiness and credibility. As a *matter of law*, we hold there was no burden or onus on the prosecution to assign or prove a motive as to why the criminal act was done by the first accused-appellant. As a *matter of fact*, we hold that since the evidence of the eye-witnesses in this case is so clear and easily intelligible the necessity of proof of a motive does not arise at all in the attendant circumstances of this case. In circumstances, the lament made by learned President's Counsel that the prosecution has not proved a motive against the accused beyond reasonable doubt is a submission which is misconceived both in law and in fact and therefore is wholly unsustainable. We have spotlighted the only contentions urged before us at the argument of this appeal. We hold that these contentions are devoid of merit and are wholly untenable. In the result we dismiss the appeal of the first accused-appellant and uphold the finding and conviction on the charge of murder and the sentence imposed by the learned High Court of Kalutara.

DE SILVA, J. – I agree.

Appeal dismissed.