JAYASOORIYA
v.
STATE

COURT OF APPEAL.
HECTOR YAPA, J.
KULATILAKE J.
C.A. NO. 6/99.
H. C. KURUNEGALA 102/96
10TH NOVEMBER, 1999.

Murder - Penal Code S. 296 and S. 297 - Common intention S. 32 and S. 314 - Prevention of Crimes Ordinance S. 5 and 6 - Dock statement - Dying deposition - Evidence Ordinance S. 32(1) - Post mortem Report - Not properly admitted - Motive

The accused - appellant was indicted on two counts, one under S. 296 read with S. 32 and the other under S. 314. He was found guilty of culpable homicide not amounting to murder in respect of the 1st count and guilty on the 2nd count. Since the accused - appellant had previous convictions, in terms of S.6 of the Prevention of Crimes Ordinance a further sentence of 2 years R. I was also imposed, to operate after the accused-appellant has served the sentence passed on the 1st and 2nd Counts.

It was contended that -

(i) The High court Judge has misdirected himself in not admitting the dying deposition in the manner required by law.

(ii) That the High Court had not approached the case, considering the question whether the accused-appellant with the other two persons entertained a common intention to cause injury or whether there was individual liability on their part.

(iii) That the post mortem Report (PMR) was not properly admitted.

Held :

(1) It is clear that Court has not considered the words spoken to by the deceased as a dying deposition. However that material was legally permissible to be led at the trial in terms of S. 32(1) of the Evidence Ordinance.

The failure on the part of court to treat the words spoken to by the deceased as a dying deposition subject to the infirmities, has not caused prejudice to the accused-appellant, for the reason that there is also other evidence from which an inference of guilt could be drawn by court.

(2) It appears that court has not considered the individual liability of the accused-appellant on the basis that the other two persons may have participated in the attack. However one cannot disregard the words spoken to by the decased and the evidence given by Sisira Kumara, which clearly show that the accused-appellant had been the assailant. Basically, the dock statement, other than denying the allegation against him, did not provide any material to suggest that any other persons attacked the deceased.

(3) It appears that the Counsel who appeared for the accused - appellant in the High Court has not raised any objection to the manner in which the medical evidence and the PMR were admitted at the trial the Doctor who performed the post mortem examination and the Doctor who prepared the PMR were not called.

Appeal from the Judgement of the High Court of Kurunegala.

Dr. Ranjith Fernando with Ms Anoja Jayaratne and Ms Sandamali Munasinghe for accused - appellant.

Ms Priyadharshani Dias assigned.

Ms Prasanthi Mahindaratne S.C. for Attorney General.

Cur. adv. vult.

November 10, 1999.

HECTOR YAPA, J.

The accused-appellant in this case was indicted under two counts. In the first count he was charged with two others unknown to the prosecution, for the commission of the murder of R. A. Sarathchandra on 17.01.1992, an offence punishable under Section 296 read with Section 32 of the Penal Code. In the second count, the accused-appellant was charged with having caused hurt to R. A. Sisira Kumara, an offence punishable under Section 314 of the Penal Code. After trial before the High Court Judge sitting without a jury, the accused-appellant was found quilty of culpable homicide not amounting to murder in respect of the 1st count, (on the basis of knowledge) under Section 297 of the Penal Code. He was also found quilty on the second count. Thereafter learned High Court Judge sentenced the accused-appellant to a term of 10 years rigorous imprisonment on the 1st count and one year rigorous imprisonment on the second count and made order

that the said sentences were to run concurrently. Since the accused-appellant had previous convictions against him, learned High Court Judge acting in terms of Section 6 of the Prevention of Crimes Ordinance imposed on him a further sentence of 2 years rigorous imprisonment and directed that this sentence of two years should operate after the accused-appellant has served the sentences passed on the 1st and 2nd counts. In addition the accused-appellant was ordered to be under police supervision for a period of 4 years.

Prosecution in this case led the evidence of Dr. Ratnayake, Sisira Kumara, Sirisena and Police Sergeant Karunaratne. Witness Sisira Kumara who was staying about 10 yards away from the house of the deceased, gave evidence and stated that on 17.01.1992 around midnight, he heard the cries of the deceased and therefore he ran to the house of the deceased. Having gone there, he had observed a bottle lamp burning in the house and the deceased fallen there in a prostrate position and the accused-appellant standing one foot away from the deceased with a club in hand. Thereupon the accused-appellant had attacked the witness Sisira Kumara with a knife and further had given him two club blows and left the place. Thereafter Sisira Kumara had taken the deceased to his house and had made arrangements to dispatch the deceased to hospital. Sisira Kumara further stated that when he questioned the deceased, he had told the witness that he was attacked by the accused-appellant who had come to rob his chain. The other witness Sirisena, father of Sisira Kumara, stated that on 17.01.1992 around midnight he heard the cries of the deceased and when he got up, he had observed three people running away on the road. After the arrest of the accused-appellant on 27.04.1992, there had been an identification parade held on 04.05.1992, where the accused-appellant had been identified by witness Sisira Kumara. Dr. Ratnayake gave evidence on the post mortem report prepared by J. M. O. Colombo from the notes made by Dr. (Mrs) N. R. Mahajuedeen Asst. J. M. O. Colombo, at the examination of the deceased body on 21.01.1992. According to

the post mortem report marked P2, the deceased had seven injuries. The injury No. 4, a superficial laceration 1 1/2" x 1/2" on the top of the head which had caused damage to the deceased's brain was fatal. Other injuries were three abrasions, one contusion, one bruise and a sutured incised wound close to injury No. 4. The cause of death had been due to cranio-cerebral injuries caused by blunt trauma. The prosecution also produced a broken club which was in three pieces marked as P1A, P1B and P1C respectively recovered from the scene of the incident. According to the police officer who arrested the accused-appellant, he had been absconding after the commission of the offence.

After the close of the prosecution case, when the learned High Court Judge called for a defence, the accused-appellant made a dock statement denying the allegation and stated that after he was arrested by the police, he was assaulted and shown to the person who identified him at the identification parade.

At the hearing of this appeal learned Senior Counsel for the accused-appellant submitted that the learned High Court Judge has misdirected himself in not admitting the dying deposition of the deceased, in the manner required by law. As submitted by Counsel, it would appear from the judgment of the High Court Judge, that he has not treated the evidence given by witness Sisira Kumara relating to the words spoken to by the deceased as to the manner he came to be injured, as a dying deposition. Learned High Court Judge has merely referred to what has been stated by the deceased to Sisira Kumara, namely that he (deceased) was attacked by the accused-appellant. It was contended by Counsel that the High Court Judge should have treated this material coming from the deceased as a dying deposition, eliciting from the witness the very words (verbatim) as spoken to by the deceased. In addition learned High Court Judge should have given his mind to the infirmity, that the deceased has not been subjected to cross-examination and further he should have considered it safe to look for corroboration. As stated above, it is clear that the High Court Judge has not considered the words spoken to by the deceased as a dying deposition in this case. However this material was legally permissible to be led at the trial in

terms of Section 32(1) of the Evidence Ordinance. Therefore the failure on the part of the High Court Judge to treat the words spoken to by the deceased as a dying deposition subject to the infirmity referred to by Counsel has not in our view, caused prejudice to the accused-appellant, for the reason that there is also the evidence of Sisira Kumara from which an inference of guilt on the part of the accused-appellant could be drawn by the Court. Further if corroboration was required regard to the words spoken to by the deceased, such corroboration was available from the evidence given by witness Sisira Kumara. It should also be noted that the learned trial Judge was satisfied with the testimonial trustworthiness of the witness Sisira Kumara.

Another submission that was made by learned Counsel for the accused-appellant was that this case was based on the principle of common intention in that the accused-appellant has been charged along with two other persons unknown to the prosecution. Therefore, Counsel contented that the trial Judge has not approached the case on that basis, considering the question whether the accused-appellant with other two persons entertained a common intention to cause injury to the deceased or whether there was individual liability on their part. Counsel referred us to the evidence of Sirisena, who stated that soon after he heard the cries of the deceased, he got up and found that his son had gone to the deceased's house and at that stage he saw three persons running away on the road. Counsel pointed out that since there was a broken club (three pieces) at the scene and the fact that according to witness Sisira Kumara the accused-appellant was having another club in his hand, it may well be that the other two persons also had taken part in the assault on the deceased. In the circumstances, Counsel contended that there was a duty cast on the High Court Judge to consider the individual liability on the part of the accused-appellant and the other two persons. When one examines the judgment of the learned High Court Judge, it would appear that he has not considered the individual liability of the accused-appellant on the basis that the other two persons may have participated in the attack on the deceased. However on this matter one cannot disregard the words spoken to by the deceased and the evidence given by

Sisira Kumara, which clearly show without doubt that the accused-appellant had been the assailant in this case. Besides the accused-appellant in his dock statement other than denying the allegation against him, did not provide any material to suggest that any other persons attacked the deceased. Further as submitted by learned State Counsel, since the presence of the accused-appellant at the scene of the crime had been clearly established, even if the trial Judge considered the question of individual liability of the accused-appellant, still having regard to the available evidence in the case against him, it was not possible to reach a conclusion different from what was reached by the trial Judge, namely that the accused-appellant was guilty of culpable homicide not amounting to murder on the basis of knowledge. Besides the accused-appellant has failed to explain away the incriminating circumstances proved against him by the prosecution.

Another point that was raised by learned Counsel for the accused-appellant was that the medical evidence and the post mortem report in this case have not been properly admitted. Perhaps the reason being that the doctor who performed the post mortem examination and the doctor who prepared the post mortem report were not called as witnesses. However it would appear from the proceedings in this case, that the Counsel who appeared for the accused-appellant before the High Court has not raised any objection with regard to the manner in which the medical evidence and the post mortem report were admitted at the trial. If however such an objection was taken at the High Court trial, prosecuting Counsel may have taken action at least to call the J. M. O. Colombo, who prepared the post mortem report. Besides it may be noted that Section 414 of the Code of Criminal Procedure Act, No. 15 of 1979, is wide enough to permit the procedure that was adopted to admit the post mortem report in this case.

Finally, it was urged by learned Counsel for the accused-appellant that, even assuming the finding that the accused-appellant was guilty of culpable homicide not amounting to murder on the basis of knowledge is warranted, Counsel contended that the material in the case showed that

the motive on the part of the accused-appellant in this instance had been to commit robbery. Further there was evidence to show that the deceased himself was a person who had previously faced a charge of murder and therefore there was every likelihood that the deceased may have resisted the presence of the accused-appellant and thereby making him (accused-appellant) to commit the said offence in order to defend himself. In these circumstances learned Counsel submitted that the sentence of 10 years rigorous imprisonment imposed on the accused-appellant in respect of count No. 1, which is the maximum sentence provided by law, was excessive and moved the Court to consider a reduction in the said sentence.

We have carefully considered the submission that was made by Counsel with regard to the sentence of 10 years rigorous imprisonment imposed on the accused-appellant by the High Court Judge in respect of count 1. Having regard to the extenuating circumstances of this case, we are of the view that the ends of justice would be met in this case by reducing the sentence of 10 years rigorous imprisonment imposed on the accused-appellant in respect of count 1, to a term of 8 years rigorous imprisonment. Further we affirm the sentence imposed on the accused-appellant in respect of count 2, and make order that the sentences imposed on count 1 and count 2, which would run concurrently be operative and effective from 23.03.1999, which was the date of the conviction. However we will not interfere with the sentence of 2 years rigorous imprisonment and the 4 years police supervision that have been ordered by the High Court Judge in terms of Sections 5 & 6 of the Prevention of Crimes Ordinance. The sentence of 2 years rigorous imprisonment and the four years police supervision ordered in terms of the Prevention of Crimes Ordinance will be operative after the sentences imposed on the 1st and 2nd counts in the indictment are served. Subject to the above variation in the sentence in respect of count 1, we dismiss the appeal of the accused-appellant.

KULATILAKA, J. I agree.

Sentence Varied

Appeal dismissed.