WEERAWARDENE AND TWO OTHERS
v.
ATTORNEY-GENERAL

COURT OF APPEAL.
GUNASEKERA, J. (P/CA) AND
DE SILVA, J.
C. A. 77-79/95.
H. C. HAMBANTOTA 09/95.
JULY 07, 1997.

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended – Section 32 Penal Code – Section 32(2) Evidence Ordinance – Admission of a purported Post Mortem Examination Report with rough notes – Violation of section 414 of the Code of Criminal Procedure Act – Evidence of sole witness tainted with infirmities – Applicability of section 315 – Criminal Procedure Code.

Held:

(i) The learned trial Judge erred in law in admitting a purported Post Mortem Examination Report which contained some rough notes made by the DMO who was dead at the time the trial was taken up. This evidence led through another witness is in violation of section 414 of the Code of Criminal Procedure Act.

> "It is regretted to observe that Rekawa Karune who is referred to by witness Edwin carrying an iron spike, had not been made an accused nor is there any reference made to him in the body of the Indictment that the three accused appellants had committed this offence along with Rekawa Karune. Some of the injuries that were found on the body of the deceased, specially the five stab injuries which had pierced the lung can be attributable to having being caused by a pointed weapon like a spike".

(ii) In the absence of any reference made to Rekawa Karune in the body of the indictment as a person with whom the appellants committed this crime, the principles of vicarious liability under section 32 Penal Code cannot be attributed to the 1st and 2nd accused-appellants.

(iii) There is no direct or circumstantial evidence to implicate the 3rd accused-appellant. The prosecution had failed to establish which of the injuries that were

found on the body of the deceased were caused by the 1st and 2nd accused appellants.

APPEAL from judgment of the High Court of Hambantota.

Case referred to:

1. *King v. Aranolis* – 44 NLR 370.

Dr. Ranjith Fernando with *Ms. Kishali Pinto-Jayawardena* for 1st and 2nd accused-appellants.

Ranjith Abeysuriya, P.C., with *Ms Priyadharshani Dias* and *Ms. Mrinali Thalgodapitiya* for 3rd accused-appellant.

Kapila Waidyaratne S.S.C. for Attorney-General.

Cur. adv. vult.

July 08, 1997.
GUNASEKERA, J. (P/CA)

In this case the three accused-appellants were indicted with having caused the death of a specified person, to wit: police constable 1655 Weerasinghe Arachchige Lionel on or about 1st December, 1988 by causing injuries with knives and sharp cutting weapons punishable under section 2(1) (a) read with section 2(2) (1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended and section 32 of the Penal Code.

After trial before a judge of the High Court the accused-appellants were found guilty of the offence and sentenced to life imprisonment.

According to the facts as stated and testified to by Weerasinghe Arachchige Edwin, the father of the deceased, his son the deceased was attached to the Hungama Police Station as a Reserve Police Constable, which police station was about 1/2 a mile away from his residence. At about 6.30 in the morning on 01.12.1988 after his morning ablutions when he came with a bucket, he had heard a shout "අප්පා. අප්පා". He had identified the voice as that of his son and proceeded in the direction from where the shout came along the

main road. As he came along the main road he claims to have seen the 3rd accused armed with a knife coming in the opposite direction on a bicycle. He had passed him without any incident and has proceeded towards Hungama he had seen the 1st and 2nd accused-appellants along with a person by the name of Rekawe Karune dragging his deceased son who was injured, towards the embankment near the Hatagala culvert. On seeing him the accused-appellants had run away. He had immediately gone to the Hungama Police Station and made a complaint to Inspector Ekanayake who was the O.I.C. of the Hungama Police Station. Inspector Ekanayake along with a police party and Edwin had come in a police jeep to the place where the injured, was fallen and taken him in the jeep to the Tangalle hospital. According to Inspector Ekanayake before they passed the Hungama town he had got the impression that the deceased had succumbed to the injuries. At the hospital the deceased had been pronounced dead upon admission. Inspector Ekanayake had made a note and directed police sergeant Hettiarachchi to proceed with the investigations since Inspector Ekanayake had to be in Hambantota to attend a meeting with the co-ordinating officer. From the Tangalle hospital Edwin had gone back to the police station and made a formal complaint at 8.20 in the morning. In that statement he had implicated the 1st and 2nd accused along with Rekawa Karune and he had referred to the 3rd accused riding a bicycle towards his direction armed.

The post mortem on the body of the deceased Lionel apparently had been conducted by Dr. Ranjan Abeysekera who was the D.M.O. of the Tangalle hospital. The deceased according to the medical evidence had several stab injuries on the front side of the chest, the back of the right upper arm, on the head and cut injuries on the back of left chest and acid burns on the right loin area. The cause of death had been due to cardio respiratory failure following multiple injuries to the chest which had pierced his lung.

At the hearing of this appeal Dr. Fernando appearing for the 1st and 2nd accused-appellant submitted that the learned trial Judge

had erred in law in admitting a purported Post Mortem Examination report which according to Dr. Mahinda contained some rough notes made by Dr. Abeysekera who was dead at the time the trial was taken up. It is the evidence of Dr. Mahinda that he had recovered some rough notes made by Dr. Ranjan Abeysekera from a drawer of the hospital after receiving summons, he himself had made some entries including the cause of death and signed the said report at the time he gave evidence at the trial. We are in agreement with learned Counsel for the 1st and 2nd accused-appellants that this evidence which was led through Dr. Mahinda, had been in violation of the provisions of section 414 of the Code of Criminal Procedure Act. We are also of the view that the notes made by Dr. Ranjan Abeysekera could have been properly admitted in terms of section 32(2) of the Evidence Ordinance as they contained contemporaneous notes made by a public officer in the discharge of his professional duties.

Dr. Fernando also contended that it was not safe to have acted on the evidence of the sole witness Edwin whose evidence has been tainted with a number of infirmities. The learned trial judge in his judgment has considered Edwin to be an eye witness to the incident when in fact the evidence of Edwin is that when he went in the direction of the Hatagala culvert after hearing the shout of his son "අප්පේ, අප්පේ". that he had seen the 1st and 2nd accused-appellants along with Rekawa Karune dragging the deceased who was injured, by his legs towards the embankment. No where in the evidence does Edwin say that he saw a single injury being inflicted by anyone of the accused-appellants (or Rekawa Karune who was not indicted) on the body of the deceased and accordingly Edwin could not in our view have been considered to have been an eye witness.

Edwin claims to have seen an axe in the hand of the 1st accused-appellant, a kris knife in the hand of the 2nd accused and an iron spike in the hand of Rekawa Karune. The injuries found on the body of the deceased appeared to be consistent with having being caused by sharp pointed weapons like a kris knife or an iron spike which injuries had resulted in death.

Although the indictment against the three accused-appellants had been prepared and forwarded by officers attached to a special unit in the Attorney-General's Department. It is regretted to observe that Rekawa Karune who is referred to by witness Edwin had not been made an accused nor is there any reference made to him in the body of the indictment that the three accused-appellants had committed this offence along with Rekawa Karune. Some of the injuries that were found on the body of the deceased specially the five stab injuries which had pierced the lung can be attributable to having being caused by a pointed weapon like a spike. In the absence of any reference made to Rekawa Karune in the body of the indictment as a person with whom the appellants committed this crime, the principles of vicarious liability under section 32 of the Penal Code cannot be attributed to the 1st and 2nd accused-appellants, and there is no evidence that the 3rd accused-appellant had participated in the crime as according to the evidence of Edwin, the 3rd accused-appellant had happened to come along the road on a bicycle armed with a knife. There is no direct or circumstantial evidence to implicate the 3rd accused-appellant. The prosecution has failed to establish which of the injuries that were found on the body of the deceased were caused by the 1st and the 2nd accused-appellants. This being the state of the evidence one cannot say with certainty as to which of the injuries were inflicted by the 1st and 2nd accused-appellants. Had the fatal injuries been caused by Rekawa Karune since he has not been made an accused, his acts cannot be attributed in our view to the 1st and 2nd accused-appellants. The medical evidence does not say that apart from the five stab injuries which had pierced the lung that any of the other injuries that were found on the body were fatal in the ordinary course of nature or were fatal.

Learned Counsel for the 1st and 2nd accused-appellants has drawn our attention to the case *King v. Aranolis*[1] which held that "where in a charge of murder the case was presented to the jury by the Crown on the basis that two persons committed the offence in furtherance of a common intention and there was no evidence upon which the jury could say there was a common intention or that the one or the other inflicted the injury, which resulted in the

death of the deceased, that a conviction, for murder could not be sustained".

We are inclined to agree with the principles set out in the judgment cited by learned Counsel.

Mr. Ranjith Abeysuriya President's Counsel appearing on behalf of the 3rd accused-appellant submitted that even if the evidence of Edwin was accepted in toto that there is nothing in his evidence to implicate his client and the learned trial Judge should have considered the case of the 3rd accused separately from that of the 1st and 2nd accused-appellants. We are in agreement with this contention of learned President's Counsel.

From the record it appears that although the date of offence is 01.12.1988 that the 3rd accused had surrendered on 02.01.1990, the 1st in January 1992 and the 2nd was arrested in September 1992. It is also to be observed that this case had come up in the Magistrate's Court of Hambantota on more than 80 occasions commencing from 14.12.1989 and during that period that the three accused-appellants had been sent for rehabilitation by the Jayalath Commission and they have been in custody from the date the 1st and the 3rd accused surrendered and the date the 2nd accused was arrested. Having regard to the submissions made by learned Counsel and the evidence led we are of the view that there is no basis upon the evidence to have found the 3rd accused-appellant guilty of any offence. Therefore we set aside the conviction of the 3rd accused and the sentence of life imprisonment imposed on him and acquit him.

In regard to the 1st and 2nd accused-appellants we are of the view on the evidence of Edwin which had been accepted by the learned trial Judge that they could have been found guilty of an offence punishable under section 315 of the Penal Code. Therefore we set aside the conviction of the 1st and 2nd accused-appellants for murder and the sentence of life imprisonment imposed on them.

We find 1st and 2nd accused-appellants guilty of an offence under section 315 of the Penal Code. Taking into consideration the period of incarceration of the appellants we impose a term of 2 years Rigorous Imprisonment on the 1st and 2nd accused-appellants and suspend the operation of that sentence for a period of 7 years. Learned High Court Judge is to comply with the provision of section 303(4) and (6) of the Code of Criminal Procedure Act. Subject to this variation the appeal of the 1st and 2nd accused-appellants are dismissed. The appeal of the 3rd accused-appellant is allowed.

J. A. N. DE SILVA, J. – I agree.

1st and 2nd accused appellants – sentence varied.

3rd accused appellant – acquitted.