KUMARA DE SILVA AND 2 OTHERS VS. ATTORNEY GENERAL

COURT OF APPEAL
IMAM. J.
SARATH DE ABREW, J.
CA 4/2003
HC BALAPITIYA 332
NOVEMBER 28, 2006
MARCH 27, 2007
JUNE 27, 2007
AUGUST 29, 2007

Penal Code – Section 296 – Penal Code Section 32 – Offence of murder – culpable homicide not amounting to murder – Surrender of accused – does it amount to an inference of guilt? – Evidence Ordinance Section 2 (11), Section 27, Section 114 (f) – Evaluation of dock statement – Absence of common intention to attach vicarious liability – reconciling of two versions – Duty of an appellate Judge – guidelines

The 3 accused-appellants after trial without jury were convicted for the murder on the basis of common intention and sentenced to death.

It was contended that, the trial Judge made no efforts to reconcile the two totally contradicting reasons adduced by 2 eye witnesses that medical evidence does not support the version of the actions, and that presumption under Section 114 (4) should be involved against the prosecution and there were misdirection and that trial Judge failed to evaluation, reject or accept the dock statement.

Held

(1) Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge.

(2) Evidence must be weighed and never countered, in reviewing the veracity of a witness appellate Courts enforce certain rules and guidelines as they do not have the benefit of observing and questioning the witnesses first land.

(1) Court of Appeal may look into the witness's statement to the Police to test the version of witnesses

(2) Due weight should be attached to the opinion of the trial Judge

(3) Appellate Court should examine whether the trial Judge has drawn proper inferences from specific facts that are proved

(4) Where untainted evidence could be safely separated from inaccurate evidence due to faulty observation, exaggerations and embellishments, Court is entitled to act on such untainted evidence and discard and sever inaccurate and false evidence.

(3) Credibility of a witness may be impugned by employing the tests of probability and improbability consistence and inconsistence, interestedness and disinterestedness and spontaneity and belatedness.

(4) Question of an adverse presumption under Section 114 (f) arises only where a witness whose evidence is necessary to unfold the narrative is willfully withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case.

(5) Dock statement is an unsworn statement lacking the probative value of formal evidence tested and filtered through cross-examination it is still evidence of a lesser weightage recognized in our law.

Per Sarath de Abrew. J.

"Even though it is desirable that the Judge should have specifically stated her findings as to the credibility of the dock statements in my mind this alone has failed to constitute a failure of justice taking into consideration the direct evidence adduces against the accused".

(6) Careful perusal of the evidence led reveals that there is absolutely no evidence to establish the nexus between the two incidents and also that there was a pre-arranged plan among the accused to act in concert by sharing a common intention to kill the deceased. Trial Judge has clearly misdirected herself in arriving at this

conclusion what is based not on substantial evidence but on mere conjecture.

Per Sarath de Abrew. J.

"I am inclined to award the benefit of the doubt to the accused and detach them from the vicarious liability attached to the principle of common intention.

Held further

(7) No single injury caused by any single accused has created an antecedent probability of death. Charge of murder would fail.

(8) As to the mens rea of the accused at the time of assault there is no conclusive proof whether any one or more of the accused were harbouring an intention to cause death.

Per Sarath de Abrew. J.

"I hold that each of the accused committed the offence and inflicted the respective injuries on the deceased with the knowledge that, he is likely by such act to cause death – the more appropriate finding is a conviction for the offence of culpable homicide not amounting to murder on the basis of knowledge punishable under Section 297".

APPEAL from the judgment of the High Court Balapitiya.

Cases referred to:-

1. *King vs. Arnolis* – 44 NLR 370
2. *Jagathsena and others vs. G.D.D. Perera Inspector CID and Mrs. Sirimavo Bandaranayake* – 1992 – 1 Sri LR 371
3. *Keerthi Bandara vs. A.G.* – 2002 – 2 Sri LR 249 at 163
4. *Solicitor General vs. Nadarajah Muthurajah* – 79 (1) NLR 63
5. *Samaraweera vs. A.G.* – 1990 – 1 Sri LR 256
6. *Jinadasa vs. AG* – CA 36/97 – CAM 11.1.1999
7. *Wickremasuriya vs. Dedolena and others* – 1996 – 2 Sri LR 954
8. *In Re Walimunige John* – 76 NLR 488

9. *L. Gunapala and others vs. Republic of Sri Lanka* – CA 23-26/92 – CAM 23.3.93
10. *K. vs. Ranasinghe* – 47 NLR 373
11. *Wasalamuni Richard vs. State* 76 NLR 354
12. *Wijesinghe and 3 others vs. State* – 1984 – 3 Sri LR 155
13. *Wijithasiri and another vs. Republic of Sri Lanka* 1990 -1 Sri LR 56
14. *Sumanasena vs. A. G.* – 1999 – 2 Sri LR 137
15. *A.G. vs. Somadasa* – CA 82/98 C.A.M. 6.7.1999

Ranjith Abeysuriya PC with *Thanuja Rodrigo* for 1st and 2nd accused-appellants.

Vijitha Malalgoda DSG for the AG

November 15th 2007

SARATH DE ABREW. J.

The 1st, 2nd and 3rd Accused-Appellants were indicted before the High Court of Balapitiya with committing the offence of murder of one Saruge Niroshani on 11th July 1996 at Thotagamuwa, punishable under section 296 read with section 32 of the Penal Code. After trial without a jury all 03 Accused-Appellants were duly convicted for murder on the basis of common intention and sentenced to death by the learned trial Judge on 09.01.2003. Being aggrieved of the aforesaid conviction and sentence, the 1st, 2nd and 3rd Accused-Appellants (hereinafter sometimes referred to as the 1st, 2nd and 3rd Appellants respectively) have tendered this appeal to this Court.

This incident had occurred on 11th July 1996 at the Thotagamuwa Junction near Hikkaduwa aroung 11.00 a.m. At the trial before the High Court, two eye witnesses, Nirosha Priyadarshini (younger sister of the deceased) and Nandani

Mendis (a neighbor of the deceased) had given evidence for the prosecution, followed by I.P. Sunil Shantha (then O.I.C. Meetiyagoda Police) who had visited the scene around 3.30 p.m. that day. Thereafter forensic expert Professor Niriellage Chandrasiri of the Karapitiya Hospital had given evidence producing the Post-Mortum Report of the deceased marked P5. Thereafter P.C. 11360 Wimalasena of the Meetiyagoda Police had given evidence regarding the surrendering to the Police-Station of the 1st and 2nd Appellants on 13.07.1996, two days after the incident. Finally the Interpreter Mudaliyar of the High Court of Balapitiya had given evidence producing the statutory declaration of the Accused-Appellants given at the Non-Summary Inquiry. After the close of the prosecution case all 03 Appellants had not called other evidence but had made dock-statements denying involvement.

Before this Court evaluates the several contentions put forward by counsel for the Appellants and the Respondent, it is opportune to set forth the factual situation with regard to this incident as elicited from the evidence placed on record. The 3rd Accused-Appellant Kumarasiri was the husband of the deceased Niroshani who was estranged from Kumarasiri at the time of the incident and was living with her 06 years old son and sister Nirosha Priyadarshini in their house by the sea at Thotagamuwa.

While the deceased sought greener pastures in the Middle-East and returned to the island after about 01 year around 02 months prior to the incident, the 3rd Accused-Appellant Kumarasiri had taken up residence in the nearby village of Kalupe with a mistress one Sudunona. The 2nd Accused-Appellant and 3rd Accused-Appellants were the uncle and younger brother of this mistress Sudunona respectively.

On 11th July 1996, the morning of the day of the incident, around 10 a.m., the deceased who had gone towards the Hikkaduwa market, had returned in a huff and told her sister witness Priyadarshini that the 3rd Appellant Kumarasiri's mistress had assaulted her and bit her arm. Thereafter the deceased had left torwards Thotagamuwa junction in an angry mood. When witness Priyadarshini inquired from the deceased as to where she was going, the deceased had replied angrily "I will look after my problems".

On the sea side of the Colombo-Galle main road at Thotagamuwa there were 03 houses close to the sea.

The deceased and her sister witness Priyadrshini lived in the house towards Ambalangoda while witness Nandani Mendis lived with her sister-in-law Geetha Iranganie in the house towards Hikkaduwa town. The latter Geetha Iranganie, who had given evidence at the Inquest and also at the Non-Summary Inquiry, though listed as a prosecution witness, has not been called to give evidence at the trial. The house in the middle which was closed at the time of the incident belonged to one Jayantha. Nandani Mendis was cooking the mid-day meal at her house while her sister-in-law Geetha Iranganie was at the entrance to their house looking out towards the main road and Thotagamuwa Junction.

Against this backdrop, Priyadarshini had come out of her house to get a cooking item from Geetha's house but on noticing a crowed gathered by the Thotagamuwa Junction, she had crossed the road towards the land side and approached the scene. According to her, from a distance of about 04 yards, she had seen the 3rd Appellant Kumarsiri pulling out a knife from his waist and stabbing the deceased

who was on the land side of the road. The deceased had then crossed the road and run towards the sea side. While the deceased was helf way across the road the 1st Accused-Appellant Chandana had come running from somewhere and stabbed the deceased on the back of the shoulder. Having crossed the road the deceased had fallen face downwards on the sea side. At this very moment the 2nd Accused-Appellant Janaka too had appeared from somewhere and had stabbed the deceased on her under-belly. Witness Priyadarshini had then raised cries and had seen the 3rd Accused Kumarasiri going towards Kalupe on his motor cycle with the 1st Accused Chandana who had uttered an obscenity and pointed the knife at Priyadarshini threatening to stab her too. 2nd Accused Janaka too had ridden towards Kalupe on his push bicycle. Thereupon with the help of a relation, witness Priyadarshini had taken the deceased to Karapitiya Hospital in a passing vehicle, where she was pronounced dead. On the journey to the Hospital the deceased had not spoken.

The other eye witness Nandani Mendis has testified that, on being alerted by her sister-in-law Geetha Iranganie, she had come out of her house and had seen two unknown persons chasing after the deceased and stabbing her towards the back of her house whereupon the deceased fell down face downwards. The knives used by these unknown assailants were comprised of white coloured blades.

The 1st Accused Chandana and 2nd Accused Janaka had surrendered themselves to the Meetiyagoda Police Station two days later. Their position was that as the Police were looking for them in connection with this incident they come to the Police Station. A knife marked P4 was recovered from the 1st Accused's possession at the time he surrendered. Another knife marked P3 was recovered on a statement

made by the 2nd Accused in accordance with section 27 of the Evidence Ordinance.

Professor Niriellege Chandrasiri has testified to 10 external injuries on the body of the deceased out of which 09 were stab injuries. None of the injuries by itself were necessarily fatal. Injuries No. 3 (back of the chest), No. 7 (to the left of the lower part of the stomach) and No. 08 (on the lower abdomen just over the genital area) were likely in the ordinary course of events to cause death. Combination of injuries number 3, 7 and 8 constituted a very great antecedent probability of death due to shock and hemorrhage which constituted the cause of death. There is no clear-cut evidence as to which accused inflicted which injury, other than the evidence of Priyadarshini.

Having perused the entirety of the proceedings, the judgment of the learned trial Judge, the evidence led at the High Court trial, the Information Book Extracts and the most helpful written submissions and case law authorities tendered to Court, I now proceed to deal with the several grounds of appeal urged on behalf of the 1st and 2nd Appellants and the 3rd Appellant by their respective counsel, in the light of the oral and written submissions tendered on behalf of the Attorney-General.

The following contentions have been raised on behalf of the 1st and 2nd Appellants.

(1) The learned trial Judge has made no effort in her judgment to reconcile the two totally contrasting versions adduced by the two eyewitnesses who had given evidence, namely Nilusa Priyadarshini and Nandani Mendis, in which event the reasonable doubt thereby generated should accrue to the advantage of the 1st and 2nd Appellants.

(2) The conduct of the 1st and 2nd Accused in going to Meetiyagoda Police station to surrender does not necessarily warrant an inference of guilt on their part, inasmuch as there is no concrete and incriminating evidence to establish that P3, and P4, the two knives thus recovered, were necessarily the weapons used to commit the offence.

(3) The medical evidence does not support the version of eyewitness Priyadarshini in that although the latter speaks of only 03 stab blows, the medical evidence has revealed 09 stab blows. Further the assertion that the deceased was bleeding from her hand after being bitten by the mistress of the 3rd Accused is not supported by the medical evidence.

(4) Witness Priyadarshini could not have been an eyewitness as she could not have seen the incident from where she was.

In addition to the above, the learned counsel for the 3rd Accused-Appellant has raised the following most significant contentions.

(1) Credibility of eyewitness Nirosha Priyadarshini is open to question.

(2) Effect of not calling eyewitness Geetha Iranganie – the presumption under section 114(f) of the Evidence Ordinance should be invoked against the prosecution.

(3) The learned trial Judge has misdirected herself in arriving at the erroneous conclusion that the 03 Accused persons were acting in furtherance of a common murderous intention.

(4) Failure of the learned trial Judge to evaluate, reject or accept the dock statements of the Accused persons.

(5) In the absence of evidence as to which of the accused dealt the fatal blow, in view of *(king vs. Arnolis)*[1], all accused persons should be acquitted of the charge of murder, in the absence of common intention to attach vicarious liability.

On the other hand, the learned Deputy Solicitor-General countered the above arguments by quoting extensively from the evidence of Priyadarshini in the following manner.

(1) Witness Priyadarshini had seen the initial stages of the incident from her position on the land side Thotagamuwa Junction until the deceased crossed the road and fell down, while witness Nandani Mendis coming out of her house on the sea side had witnessed the latter part of the incident on the sea side involving the 1st Accused and the 2nd Accused only who were from Kalupe and strangers to the area.

(2) The medical evidence revealing 09 stab injuries could be reconciled with the evidence of Priyadarshini who spoke of only 03 stab injuries as the majority of the injuries were found in three major areas of the body spoken on by Priyadarshini, namely the shoulder, neck and arms, back side of the chest and abdomen.

(3) An adverse inference under section 114(f) of the Evidence Ordinance could not be drawn due to the failure by the prosecution to call eyewitness Geetha Iranganie as the prosecution was mainly relying on the evidence of Priyadarshini who had witnessed the incident from its inception.

(4) There was sufficient material for the learned trial Judge to come to a finding that all the three Accused were acting in furtherance of a common murderous intention as there were several pointers and circumstance that they were acting according to a pre-arranged plan coupled with their subsequent conduct in leaving the scene of the crime towards Kalupe together.

(5) The learned trial Judge has given due consideration to the contradictions and omissions marked at the trial in relation to the evidence of eyewitness Priyadarshini and rejected them so as to not to affect her credibility as borne out in pages 251, 252, 253 ad 265 of the judgment.

Of the several contentions adduced above, the primary question that has to be answered first and foremost is the question of credibility of eyewitness Priyadarshini. The learned trial Judge has accepted her evidence inspite of the contradictions and omissions marked by the defence and has attempted to reconcile her evidence with that of Nandani Mendis and the medical evidence. Credibility is a question of fact, not of law. Appeal Court Judges repeatedly stress the importance of the trial Judge's observations of the demeanour of witnesses in deciding questions of fact. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge, since he or she is in the best position to hear and observe witnesses. In such a situation the Appellate courts will be slow to interfere with the findings of the trial Judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility.

Evidence must be weighed and never counted. In reviewing the veracity of a witness Appellate Courts employ certain rules and guidelines as they do not have the benefit of observing and questioning the witness first-hand.

(a) The Court of Appeal may look into the witness's statement to the police to test the version of witness.

Eg: *Jagathsena and others vs. G.D.D. Perera, Inspector, C I D and Mrs. Sirimavo Bandaranaike* [2]

Eg: *Keerthi Bandara vs. Attorney-General* [3]

(b) Due weight should be attached to the opinion of the trial Judge.

(c) The Appellate court should examine whether the trial Judge has drawn proper inferences from specific facts that are proved.

Eg: *The Solicitor General vs. Nadarajah Muthurajah* [4]

(d) Where untainted evidence could be safely separated from inaccurate evidence due to faulty observation, exaggerations and embellishments, Court is entitled to act on such untainted evidence and discard and sever inaccurate and false evidence.

Eg: *Samaraweera vs. Attorney-General* [5]

Eg: *Jinadasa vs. Attorney General* [6]

(e) Credibility of a witness may be impugned by employing the tests of probability and improbability, consistency and inconsistency, interestedness and disinterestedness and spontaneity and belatedness.

Eg: *Wickramasuriya vs. Dedoleena and others* [7]

On a perusal of the judgement of the learned trial Judge it is apparent that she has given adequate consideration to the several contradictions and omissions marked by the defence and arrived at a finding that they do not go to the root of Priyadarshini's evidence (page 365 of the original

record). On an examination of her statement to the police too it is quite apparent that she has made a spontaneous complaint to the police involving all three accused persons within 04 hours of the incident. The incident had occurred on 11.07.96. She had given evidence at the High Court trial over 05 years later on 20.09.2001. Therefore any omissions and contradictions that surfaced at the trial could be attributed to faulty memory rather that deliberately giving false evidence. Even thought she was an interested witness being the sister of the deceased, a ring of truth and garb of consistency is woven through the fabric of her evidence as she had continued to involve all 03 accused persons in the same sequence right from her police complaint up to the evidence adduced at the trial.

Another bone of contention was that though Priyadarshini speaks of only 03 stab blows one each by each of the accused, medical evidence has revealed 09 such stab injuries. In this context I am inclined to accept the contention of the learned Deputy Solicitor General that other than stab injury number 05 on the front portion of the chest, all their stab injuries were located on 03 major areas of the body as described by Priyadarshini, namely

(a) The shoulder, right and left arms

(b) Back side of the chest

(c) Lower abdomen.

Furthermore, it is quire feasible that witness Priyadarshini had witnessed the initial stages of the incident from the land side of the road at Thotagamuwa Junction, whereas the other eyewitness Nandani Mendis, who had been busy cooking the mid-day meal inside her house on the sea side, had come out on being alerted by her sister-in-law

Geetha Iranganies cries and therefore had witnessed only the latter stages of the incident involving only the 1st and 2nd Accused. It may well be that from her position across the road Priyadarshini was unable to witness any further stab blows as the 1st and 2nd Accused gave chase to the deceased. Due to the crowed gathering at the scene and the passage of traffic along the main Colombo-Galle road it could very well be a faulty observation on the part of Priyadarshini when she spoke of the 2nd Accused dealing a single blow on the lower abdomen of the deceased, and stated that the blow went through the body and the 2nd Accused drew out the knife from the body though the blade of the knife, whereas in fact medical evidence has established that there were two stab injuries on the lower abdomen.

As clearly demonstrated at pages 264 and 265 of the original record, the learned trial Judge has definitely made an attempt to reconcile the evidence of Priyadarshini with that of Nandani Mendis and the medical evidence and arrived at a reasonable finding that they could be reconciled logically.

In view of the above findings, I am inclined to reject the several contentions urged by the Appellants as to the credibility of witness Priyadarshini and as to the non-reconcilability of her evidence with that of Nandani Mendis and the medical evidence. Therefore I hold that the learned trial Judge has not misdirected herself in acting on the evidence of Priyadarshini and Nandani Mendis.

Another contention raised on behalf of the 3rd Appellant was that an adverse inference against the prosecution should have been drawn under section 114(f) of the Evidence Ordinance due to the failure on the part of the prosecution to call Geetha Iranganie, as eyewitness listed in the

indictment. Inspection of the Information Book Extracts reveal that Geetha Iranganie was an eyewitness who may have given a different version to that of Priyadarshini with regard to the involvement of the 3rd Accused. It is however apparent that even though Geetha Iranganie had given a description of the assailants who attacked the deceased on the sea side, her evidence would not have thrown further light on the identity of the perpetrators as the police have apparently failed to hold an identification parade. Not calling Geetha Iranganie therefore could not have caused material prejudice to the defence or provided sufficient ground to vitiate the conviction. The prosecution is not bound to call all the eyewitnesses listed in the indictment. If she was adverse to the prosecution, the defence was always at liberty to call her as a defence witness. This principle is enunciated in the case of *Wilimunige John* [8] where it was held that the question of an adverse presumption under Section 114(f) of the Evidence Ordinance arises only where a witness whose evidence is necessary to unfold the narrative is willfully withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case. As the prosecution has relied on the evidence of Priyadarshini who had described the incident from its inception, suppressed evidence of Geetha Iranganie cannot be said to supply any vital missing ling in the narrative, unless it could be shown that her evidence would bridge a gap or lacuna in the evidence of Priyadarshini and Nandani Mendis. Due to the aforesaid reasons I reject this contention adduced on behalf of the 3rd Appellant.

The 3rd Appellant has also taken up the position that failure on the part of the learned trial Judge to evaluate the dock-statements of the Appellants and come to a finding

of acceptance or rejection of same would create an intermediary position which should have injected a reasonable doubt to the prosecution case. Even though a dock statement is an unworn statement lacking the probative value of formal evidence tested and filtered through cross-examination, it is still evidence of a lesser weightage recognized in our law. In the case of *L. Gunapala and others vs. The Republic of Sri Lanka* [9] it has been held that if a dock statement raised a reasonable doubt as to the prosecution case, the defence must succeed and that a dock statement of one accused should not be used against another accused.

Perusal of the dock statements of the Accused-Appellant reveal that no specific plea of evidence such as an alibi has been raised by any of the accused but only a brief blanket denial of involvement. There has been no attempt to explain the incriminating circumstances against the accused. The dock statements have not introduced fresh material or evidence into the case formulating novel issues other than bare denials of involvement. In the light of cogent incriminating evidence adduced by the prosecution against the accused, the learned trial Judge has the duty to decide whether such dock-statements create a reasonable doubt as to the veracity of the prosecution version. Even though the learned trial Judge has not formally rejected the above dock-statements in so may words, a perusal of page 266 of the original record would reveal that impliedly she has rejected the dock statements. Even though it is desirable that the learned trial Judge should have specifically stated her findings as to the credibility of the dock-statements, in my mind, this alone has failed to constitute a failure of justice taking into consideration the direct evidence adduced against the accused. Therefore this contention too should fail.

The final contention of the Appellants now left to be examined is the argument of paramount importance as to the lack of sufficient material to draw an inescapable conclusion that the Accused were acting in furtherance of a common intention or common murderous intention. I am inclined to agree with this proposition for the following reasons.

As evidenced in her judgment at page 266 of the record the learned trial Judge has apparently based her conclusion as to the formation of common intention on purely conjecture as follows."මෙම සිද්ධියකට පෙර මරනකාරිය සහ 3 වන චූදිතගේ අනියම් බිරිඳ අතර ඇතිවූ ආරවුල නිසා මොවුන් තිදෙනා පොදු චේතනාවකින් යුක්තව මිය ගිය තැනැත්තිය ඝාතනය කිරීමට සැලසුම් කළ බවට නිගමනය කළ හැකිය." Careful perusal of the evidence led in this case reveals that there is absolutely no evidence to establish the nexus between the two incidents and also that there was a pre-arranged plan among the accused to act in concert by sharing a common intention to kill the deceased. Hence the learned trial Judge has clearly misdirected herself in arriving at this conclusion which is based not on substantial evidence but on more conjecture, for the following reasons.

(a) Existence of a common intention, let alone a common murderous intention, must be proved beyond reasonable doubt.

(b) Prosecution must establish beyond doubt the existence of a pre-arranged plan or proof of a simultaneous participating presence. (eg: *King vs Ranasinghe*[10] and (*Wasalamuni Richard vs. State*[11]

(c) The learned trial Judge has failed to appreciate that it is trite law that the inference of common intention should never be reached unless it is a necessary inference deductible from the circumstances of the case as an

inference from which there is no escape. Eg: *Wijesinghe and 03 others vs. State*[12]

(d) The learned trial Judge has also failed to consider the case against each accused separately before attaching vicarious liability under the principle of common intention Eg: *Wijithasiri and another vs. The Republic of Sri Lanka*[13]

(e) The question of similar intention as opposed to common intention has not been considered by the learned trial Judge.

(f) In the absence of evidence of pre-concert or a pre-arranged plan, proof of a common motive coupled with common subsequent conduct by itself is not sufficient to draw a necessary inference of common intention from which there is no escape.

The evidence led in this case has established that the deceased had a quarrel with the mistress of the 3rd Accused around 10 a.m. on the fateful day of 11.07.96. Priyadarshini under cross-examination (page 93 of the record) had even admitted that the deceased had assaulted and cut the mistress of the 3rd Accused. The evidence led in the case had also established that the 1st Accused and 2nd Accused were the uncle and brother of the mistress Sudunona. Therefore there arises a motive for the 03 Accused persons to attack the deceased. In *Sumanasena vs. Attorney General*[14] it has been held that once a cogent and intelligible motive has been established, that fact considerably advances and strengthens the prosecution case. The evidence led has also established that soon after the attack on the deceased, the 3rd and 1st Accused together in a motor-cycle and the 2nd accused in a push cycle rode towards Kalupe. By the time they left the

scene, the accused seemingly appear to have developed a concert by their subsequent conduct in leaving the scene together. However this does not necessarily lead to the inescapable conclusion that they attacked the deceased sharing a common intention for the following reasons.

(a) There is no evidence of arrival together or simultaneous participating presence of all 03 Accused at the commencement of the attack. According to Priyadarshini the 1st Accused arrived from a different direction after the 3rd Accused stabbed. Similarly the 2nd Accused had arrived after the 1st Accused stabbed.

(b) There is no evidence of any words uttered or any other overt act to indicate they were sharing a common murderous intention.

(c) Evidence of Nandani Mendis discloses that two unknown assailiants chased after and attacked the deceased. There is no evidence to establish that they were the 1st and 2nd Accused, acting in common concert.

(d) There is no evidence to exclude the possibility that the 03 Accused persons arrived at the scene almost simultaneously independent of each other and commenced the attack on the deceased harbouring a similar intention.

Due to the aforesaid reasons I am inclined to award the benefit to the doubt to the accused and detach them from the vicarious liability attached to the principle of common intention.

Therefore it is now left to examine the liability and complicity of each accused based on the evidence with regard to their individual acts. Evidence of Priyandarshini has established beyond reasonable doubt that all 03

Accused stabbed the deceased. Evidence of motive too has been established under section 8(1) of the Evidence Ordinance. Subsequent conduct by surrendering at the police station with the P4 knife in his possession has been proved against the 1st Accused. Recovery of P3 knife on a Evidence Ordinance Section 27 statement has been proved against the 2nd Accused. Although there is no conclusive proof that P3 and P4 were used in the attack, medical evidence has confirmed that the injuries inflicted could have been caused with either P3 or P4. Therefore the prosecution has established beyond doubt the complicity of each of the accused in the death of the deceased.

The medical evidence reveals 09 stab wounds out of which injury No. 03 (back of the chest), injury no. 07 (lower abdomen) and injury no. 08 (lower abdomen just above the genital area) were likely to cause the death of the deceased. Page 165 of the record reveals that only a combination of injuries number 03, 07 and 08 could have constituted an antecedent probability of death sufficient in the ordinary course of events to cause death. The fact remains that there was not a single necessarily fatal injury. The facts of this case could be distinguished from that of *King vs. Arnolis (Supra)*, where only one fatal blow was dealt and there was no evidence as to which of the accused did it.

In apportioning guilt according to their individual acts it is necessary to revert back to Priyadarshini's evidence.

(a) Priyadrshini (at page 96 of the Record) has testified that the 3rd Accused dealt a blow on the shoulder of the deceased. The only stab wound on the shoulder is injury no. 02 which was 3.5 centimeters deep cutting through the flesh and muscle.

(b) According to Priyadarshini, the 1st Accused stabbed on the back of the chest, which could be injury no. 03 or 04 or both. Injury no: 3 penetrating the lungs constituted a possible threat to life.

(c) According to Priyadarshini, the 2nd Accused stabbed on the lower abdomen, which could be injury no. 07 or 08 or both. Both injuries no: 7 and 8 separately constituted a likelihood of causing death.

In all these the weapon used was a dangerous weapon and the location of the injury and the force of the blow was such that it is sufficient to impute knowledge on the part of the accused that bodies injury caused thereby could possibly lead to death.

In order to establish a charge of murder under section 294(3) of the Penal Code there must be material which would enable the Judge to hold that in the ordinary course of nature the injury or injuries caused by a particular accused were sufficient to cause death as opposed to a mere likelihood of causing death. Eg: *Attorney General vs. Somadasa* [15].

In this case no single injury caused by any single accused has created an antecedent probability of death. According to medical evidence only a combination of injuries no. 3, 7 and 8 inflicted by different accused persons has resulted in probability of death resulting in the normal course of events due to shock and heamorrhage. Therefore the charge of murder should fail, as against all 03 accused persons in respect of their individual acts.

As to the mens rea of the accused at the time of the assault there is no conclusive proof whether any one or more of the accused were harbouring an intention to cause the death of the deceased. If they so intended they could have easily caused a necessarily fatal injury to a more vulnerable

part of the body such at the neck or the heart. Resolving the doubt in favour of the Accused I hold that each of the accused committed the offence and inflicted the respective injuries on the deceased with the knowledge that he is likely by such act to cause death. Therefore the more appropriate finding is a conviction for the offence of culpable homicide not amounting to murder on the basis of knowledge, punishable under section 297 of the Penal code.

Therefore, having regard to all the circumstances of this case the following orders are made in respect of all 03 Accused Appellants.

(1) We set aside the conviction and sentence for murder of the learned trial Judge of Balapitiya dated 09.01.2003 and instead substitute a conviction for calpable homicide not amounting to murder on the basis of knowledge punishable under Section 297 of the Penal Code.

(2) We impose a sentence of 07 years R. I on each accused and a fine of Rs. 25,000/= each, in default of which we order a further term of imprisonment for 05 years. The learned High court Judge of Balapitiya is further directed to allow a period of 03 months for each of the accused to pay the fine.

(3) Having regard to the fact that the accused have no previous convictions and are incarcerated from the date of the conviction, we further make order that the 07 years each prison term on each accused should operate from 09.01.2003, namely the date of the conviction.

(4) The Registrar is directed to send a copy of this judgment to the High Court of Balapitiya. Accordingly, Appeals are partly allowed.

IMAM, J. – I agree.

appeals partly allowed