CYRIL ALIAS KULARATNE AND OTHERS
V.
THE STATE

COURT OF APPEAL
C. A. 134-139/85
H. C. KURUNEGALA NO. 22/81
RAMANATHAN J, W. N. D. PERERA J.
AND A. DE Z. GUNAWARDENA J.
NOVEMBER 14, 15, 16 and 17, 1988.

Criminal Law — Charges of unlawful assembly and murder — Requirement of proper directions to the jury regarding legally tenable verdicts.

At the conclusion of the trial the jury brought in a verdict which was not legally tenable. After re-direction by the Trial Judge, the 2nd verdict returned was also not sustainable on the evidence. The confusion that arose in regard to the verdict may not have arisen in this case, if the Trial Judge related the facts of this case to the law that would be applicable to the possible verdicts that could be brought against the accused. It is the duty of the Trial Judge to relate the facts of the case to the legally tenable verdicts that could be brought in a particular case.

Cases referred to:—

1. *Police Sergeant Kulatunga vs Mudalihamy* 42 NLR 33, 34.

2. *Lionel vs. Republic of Sri Lanka* 79 NLR 553, 574.

APPEAL from Judgment of the High Court of Kurunegala.

D. S. Wijesinghe for accused-appellants.

Moses Fernando Senior State Counsel for the State.

Cur. adv. vult.

December 12, 1988
A. DE. Z. GUNAWARDANA J.

In this case 7 accused were charged on the following counts in the High Court of Kurunegala.

(1) That on or about the 21st of August 1978, the said accused were members of an unlawful assembly, the common object of which was to cause hurt to Jayasinghe Mudiyanselage Jayasinghe Bandara and to commit

mischief to the boutique and bicycle belonging to the said Jayasinghe Bandara an offence punishable under section 140 of the Penal Code.

(2) That at the time and place aforesaid and in the course of the same transaction the said accused being members of an unlawful assembly commit the murder of the said Jayasinghe Bandara in prosecution of the said common object and are thereby guilty of an offence punishable under section 296 read with section 146 of the Penal Code.

(3) That at the time and place aforesaid and in the course of the same transaction the said accused being members of an unlawful assembly did commit mischief to a boutique and bicycle belonging to said Jayasinghe Bandara to the value of Rs. 2250/- in prosecution of the said common object and are thereby guilty of an offence punishabe under section 410 read with section 146 of the Penal Code.

(4) That at the time and place aforesaid and in the course of the same transaction the said accused committed the murder of said Jayasinghe Bandara and are thereby guilty of an offence punishable under section 296 read with section 32 of the Penal Code.

(5) That at the time and place aforesaid and in the course of the same transaction the said accused committed mischief to a boutique and bicycle belonging to said Jayasinghe Bandara to the value of Rs. 2250/- and are thereby guilty of an offence punishable under section 410 read with section 32 of the Penal Code.

After four witnesses had given evidence at the trial, the prosecuting State Counsel has made an application to amend the indictment to delete the allegation of "committting mischief to the boutique and bicycle" in count 1, on the basis that he would not be leading any evidence to substantiate the allegation of mischief. Thereafter the case proceeded to trial on count 1 as

amended, on the basis that the common object of unlawful assembly was only to cause hurt to Jayasinghe Bandara. At the conclusion of the prosecution case the Trial Judge directed the jury under section 220(1) of the Criminal Procedure Code, to acquit all accused on counts 3 and 5 as there was no evidence to substantiate these charges. Accordingly all accused were acquitted on counts 3 and 5. Thereafter the case proceeded only on counts 1, 2 and 4.

In consequence of an application made earlier by the Counsel for the defence to acquit the 4th accused as there was no evidence against him, the learned Trial Judge inquired from the prosecuting State Counsel after six witnesses had given evidence for the prosecution, whether he was going to call any witnesses who would testify against the 4th accused. On being informed by State Counsel that he would not be calling any evidence against the 4th accused, the learned Trial Judge directed the jury under section 220(1) of the Criminal Procedure Code to acquit the 4th accused. Accordingly at that stage the 4th accused was acquitted. Thereafter the Trial proceeded only against 1, 2, 3, 5, 6 and 7 accused.

At the conclusion of the trial, jury brought in their first verdict against the accused as follows:

Count 1 — all accused were found guilty of being members of an unlawful assembly.

Count 2 — only the 1st, 3rd and 7th accused were found guilty of having committed the murder the common object of the unlawful assembly and the other 3 accused namely the 2nd, 5th and 6th were acquitted on that count.

Count 4 — 1st, 3rd and 7th accused were found guilty of having committed the murder of Jayasinghe Bandara on the basis of common intention and the other three accused namely the 2nd, 5th and 6th were acquitted on that count too.

At this stage the learned State Counsel raised an objection to the 1st verdict of the jury and stated that it is not a legally sustainable verdict, and that the Trial Judge should redirect the jury in terms of the provisions of section 235(2) of the Criminal Procedure Code. The Counsel for the defence also had agreed to this suggestion. Thereafter the learned Trial Judge redirected the jury and informed them that if they found the accused guilty on count 1 they should find the accused guilty on count 2 as well, either for the offence stated in count 2 or for a lesser offence, as having comitted in prosecution of the common object. He had also redirected the jury on the liability that arises on the basis of common intention. After the said redirection the jury had retired and brought in the 2nd verdict which was as follows:

Count 1 — all accused guilty of being members of an unlawful assembly

Count 2 — all accused guilty of committing murder of the said Jayasinghe Bandara in prosecution of the common object of the unlawful assembly.

Count 4 — only the 1st, 3rd and 7th accused were found guilty of having committed the murder of the said Jayasinghe Bandara on the basis of common intention. The 2nd, 5th and 6th accused were acquitted on this count.

It is from this convictions and sentences that the accused have appealed to this Court.

According to witness Nandasena, the 1st witness called by the prosecution, the deceased came to return the watch which he had borrowed from him. The deceased came on a bicycle and met him whilst Nandasena was on his way to the field. Nandasena told the deceased that he cannot take it at that place and to keep it at the boutique of the deceased or to return it to his (Nandasena's) mother. After about 10 minutes Nandasena had heard shouts from the direction of his house. Then Nandasena had rushed back in the direction from where the noise came. When he went near the place of the incident which

was near Rosalin's house he saw his mother fallen. When he went near the scene he had seen Wijetilake, the 3rd accused stabbing the deceased Bandara who was fallen face upwards. He saw Jayakody the 7th accused holding the deceased. He had seen Kularatne, the 1st accused cutting the deceased with a sword. Having stabbed and cut the deceased in that manner, the 1st, 3rd and the 7th accused have dragged the deceased to the Ela and put him into it. He specifically states that the other 3 accused, i.e. the 2nd accused Seneviratne, the 5th accused Karunatilleke and the 6th accused Gamini were standing away from the place where the deceased was attacked. When asked for the exact distance at which they were standing he had said that they were standing at a distance of about 25 feet away from the place where the deceased was attacked. They were not with the three accused who attacked the deceased. The 1st, 3rd and 7th accused had dragged the deceased for a distance of about 4 to 5 fathoms to put him into the Ela. After having put the deceased into the Ela, Wijeyatilake the 3rd accused had come and threatened them not to give evidence and if they did so, they will also be killed and put into the Ela. He had heard somebody standing some distance away, stating that even 7 people could not kill the deceased. Thereafter Wijeyatilake, the 3rd accused had run and got into the Ela and did something like stabbing the deceased again. He had not seen clearly what 3rd accused did. He was very categorical that he did not see the 2nd, 5th and 6th accused doing anything to the deceased. They were standing at a distance of about 25 feet away from the other accused. The learned Counsel for the appellant conceded that there is no inconsistency in the evidence of this witness but submitted that his statement to the police was belated by two days. According to this witness he did not make a statement to the police on the day of the incident because he was threatened by the accused. It also transpired in evidence that this witness had been convicted for robbery, rape and also had been fined for manufacturing illicit liquor.

Thereafter the prosecution led the evidence of Lenchina, the mother of the earlier witness Nandasena. She had heard somebody shouting "එයා අපේ සෙරාණත වගේලා". Having heard that shout she had gone to the scene and seen the deceased fallen face

upwards. She had seen Kularatne, the 1st accused, Seneviratne 2nd accused, Wije 3rd accused, Karune the 5th accused and Jayakody the 7th accused assaulting the deceased with weapons. They were on the body of the deceased. Although she said that all were armed, she was unable to identify the type of weapon that each accused had in his hand. She lost her temper when she saw the accused attacking the deceased. A little while later she lost consciousness. Thereafter she regained consciousness, and she saw the 3rd accused dragging the deceased and putting him into the Ela. Thereafter the 1st, 2nd, 3rd and the 7th accused came and threatened them not to give evidence and that, if they did, they would be cut and put into the Ela. When she was cross-examined as to the type of weapons that were in the hands of the accused she had said that she could not remember. She had identified a knife in the hands of the 3rd accused but had failed to recall having seen any weapons in the hands of any of the other accused. When she was asked why she did not make a statement to the police on the day of the incident, she had said that she was scared because she was threatened by the accused. Her statement had been recorded by the police 2 days afterwards. Counsel for the appellant submitted that her evidence had been rejected by the jury because it was not coherant. He further submitted that she being an old lady had not been able to recall the incident properly. In addition she had lost consciousness twice that same day, once, while the attack was on and for the second time, later in the night, the same day. Hence her memory could have been affected. He submitted that her evidence was unsatisfactory, and no credence should be placed on it. In fact from the verdict of the jury it is clear, that jury has not believed her, when they acquitted the 2nd, 5th and 6th accused. Although according to her, 2nd and 5th accused were also two of the persons, who attacked the deceased. In our view the jury was correct in placing no credance on the evidence of this witness because of the unsatisfactory nature of her evidence.

The next witness called by the prosecution was Seelawathie. According to her when she was in the house she heard a shout "එලෙව් අල්ලා ගනියව් " when she came to the place of the incident, she had seen the 1st accused Kularatne, 2nd accused Seneviratne,

3rd accused Wije, 5th accused Karune, 6th accused Gamini and the 7th accused Jayakody. She had seen these accused having an alteracation (ඔවුහු වෙහෙර) with the deceased. She had seen the 3rd accused stabbing the deceased with a knife, on the back of his chest. Then she had shouted for someone to come to help. She had seen Lenchina coming there at that time. She was chased away by the accused when she tried to intervene. According to her Lenchina lost consciousness shortly afterwards. Thereafter Lenchina's son Nandasena also came there. Having attacked the deceased, they had dragged the deceased and put him in the Ela. According to her, 3 people dragged the deceased. She had heard someone shouting "although there are six people, you all could not kill that man." Thereafter the 3rd accused had jumped into the Ela and did something like cutting the neck of the deceased. The accused also had threatened her saying that if anyone gives evidence that person will be cut and put into the Ela. This witness had made her 1st statement to the police the day after the incident but had not mentioned any of these details. Her explanation for not doing so was that she was threatened. She had come out with the details only in the 2nd statement which she had made 2 days later. In cross examination, she had admitted that she uttered falsehoods in her first statement. She had not mentioned about the presence of Nandasena in her 1st or 2nd statement. Although she insisted that she told the police that some person shouted that, even though there were 6 people they could not kill the deceased, it was shown that she had not stated so; in her police statement. She had failed to mention to the police that the 3rd accused stabbed the deceased. In her 1st statement she had stated that on 21.8.78, that is, the day of the incident, that she had gone to the house of her sister. She denied having stated so to the police. But was proved that she had told the police so, in her 1st statement. Although she stated that she did not mention anything about the accused in her 1st statement, it was proved that in fact she had mentioned the name of the 1st accused, as having seen coming running towards her on the road, that day. This contradiction was marked as VI. According to her, the 3rd accused kept the head of the deceased on his lap and stabbed him. But she has not mentioned this in her statement to the police. She has stated that she identified the weapons in the hands of some of the accused. In her statement

to the police however, she had merely mentioned that the others had clubs and other weapons; this contradiction was marked as V2. Learned Counsel for the appellant submitted that in view of these contradictions and deficiencies in her evidence and further buttressed by fact that she had admitted having made a false statement to the police, her evidence was not worthy of credit. It is clear that the jury had also taken the same view and they had disbelieved her. We are of the view that there is much merit in this submission, and that the jury had rightly discredited her evidence.

According to the medical evidence the deceased is alleged to have sustained 51 injuries. Most of them were cut injuries. Of them only 3 have been described as grievous. That is,

(1) Injury No. 2 — a cut injury on the nose

(2) Injury No. 5 cut injury on the eyeball

(3) Injury No. 29, cut injury 5½" long on the right leg.

The cause of death has been given as shock and haemorrhage as a result of multiple cut injuries of the body.

The accused when called for their defence, did not give evidence, but the 1st accused made a statement from the dock. In his statement he stated that on the day in question he went to meet one Kiribanda to his house and when he was talking to Kiribanda the deceased came in a bicycle and crashed on to him. Then he fell. Thereafter, the deceased pulled out a knife and stabbed him several times and he held his hand out in defence. Seneviratne, the 2nd accused who was there grappled with the deceased and snatched the knife from the deceased. Thereafter he has dealt several blows on the deceased, in the exercise of the right of private defence. This incident took place on the bund of the Ela. As he feared further attacks from the deceased he pushed the deceased into the Ela. Having thrown away the knife he and Seneviratne, the 2nd accused, went to the Giribawa Police Station. According to him, at the time of the incident, Kiribanda and 2nd accused, Seneviratne, were the only persons there. Police

had given them a ticket to enter the hospital. They had gone and admitted themselves to the hospital. In fact this part of the story is corroborated by the Police who have arrested the 2nd accused at the hospital that same night. The version given by the 1st accused is further corroborated by evidence given by Dr. C. Illangakone who has produced the medical legal report and spoken to 5 injuries sustained by the accused. None of them were self inflicted. Injury No. 1 is a cut injury on the wrist joint and according to her it has been inflicted by a sharp cutting instrument. According to the doctor injury No. 1 is a defence injury which had been inflicted whilst avoiding a blow by a sharp cutting weapon. Injury No. 3 could have been caused if he fell on a rough surface whilst struggling with another person. According to the history given by the accused these injuries have been caused on 21.8.78 by an assault by a known person. This doctor has also given evidence about the injuries sustained by the 7th accused Jayakody. He had 8 injuries of which 3 were cut injuries, the others were abrasions. He has also given a history of assault but not given the name of the assailant. He had been examined on 28.8.78. The manner in which the 1st and 7th accused have sustained the injuries has not been explained by any of the prosecution witnesses. Furthermore, the first information regarding this incident had been given to the police by the 1st accused. Therefore, it lends support to the contention made by the Counsel for the appellants, that the injuries on the deceased were caused in a sudden fight, and that the prosecution witnesses have not come out with the full story, as to the manner in which the deceased came by his death.

The Counsel for the accused appellants, and also the State Counsel conceded that the only credible evidence in this case is that of Nandasena. On the evidence of Nandasena it is clear that he has come to the scene after the incident has started. Therefore he would not have known how the incident started. The bicycle also has been produced as a production in this case. Therefore, it appears that the incident would have started in the manner the 1st accused has described, and it is reasonable to

assume that the injuries would have been caused in a sudden fight. This is consistent with the evidence given by Nandasena.

As pointed out earlier the jury also has acted only on the evidence of Nandasena. However, the jury has failed to appreciate that even if Nandasena is believed fully, that it does not prove beyond reasonable doubt that the 2nd, 5th and 6th accused took part in the attack nor were they near the scene of the attack. They were 25 feet away from the place of the attack and offered no encouragement or help. As pointed out by Howard C.J. in *Police Sergeant Kulatunga vs. Mudalihamy* (1) to bring home a charge of unlawful assembly under section 140, "So far as each individual accused was concerned it had to be proved that he was a member of the unlawful assembly which he intentionally joined. Also that he knew of the common object of the assembly." In our view the evidence available falls short of such proof. The evidence of Nandasena does not show that the 2nd, 5th and 6th accused shared the common object of causing hurt to Jayasinghe Bandara or that they intentionally joined the unlawful assembly. Therefore we are of the view that 2nd, 5th and 6th accused should be acquitted on both counts 1 and 2. The resulting position would be, that the charge of unlawful assembly would fail in respect of the 1st, 3rd and 7th accused and they would also be entitled to an acquittal on count 1 and 2. Then the only count that will be left against 1st, 3rd and 7th accused would be count 4, viz. of being guilty of murder, of Jayasinghe Bandara on the basis of common intention.

In the light of the view that we have taken in regard to the manner in which this incident seems to have taken place, namely, that the injuries on the deceased and the accused would have been caused in a sudden fight, the 1st, 3rd and 7th accused would then be guilty of culpable homicide not amounting to murder on the basis of a sudden fight. Accordingly the verdict of the jury convicting them for murder, and the sentence of death imposed on them is set aside, and instead a verdict of culpable homicide on the basis of sudden fight is substituted thereon, in respect of 1st, 3rd and 7th accused, and each of them is sentenced to 10 years R. I.

There is one other matter on which this Court is impelled to comment, namely, that the confusion that arose in regard to the verdict may not have arisen in this case if the Trial Judge related the facts of this case to the law that would be applicable to the possible verdicts that could be brought against the accused in this case. The Trial Judge has referred to the case *Lionel vs. Republic of Sri Lanka* (2) where the following quotation from the judgment of the Court of Appeal of United Kingdom was cited with approval.

> "In the judgment of this court, if the trial Judge had not commented in strong terms on the appellant's absence from the witness box, he would have been failing in his duty. The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the Judge in his notebook. The Judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence and when an accused person elects not to give evidence, in most cases but not all, the judge should explain to the jury what the consequence of his absence from the witness box are and if, in his discretion he thinks that he should do so more than once, he may; but he must keep in mind always his duty to be fair."

Although the Trial Judge quoted this quotation with approval to the jury he has unfortunately not given full expression to the principles enunciated there, for we see that in the summing-up the learned Trial Judge has compartmentalised his summing-up to two sections, namely, the first part dealing with the law and thereafter the second part where he has given a summary of the evidence of each witness. Instead, the Trial Judge should have related the facts of the case to the relevant law, which would help the jury to arrive at a legally tenable verdict. It is our view, that this failure resulted in the confusion that arose in this case, which occasioned the jury to bring in two verdicts, which were

not tenable in law. Therefore, in our view it is the duty of the Trial Judge to relate the facts of the case to the legally tenable verdicts that could be brought in a particular case. This will greatly help in the discharge of the functions of the jury and facilitate the due administration of justice.

RAMANATHAN J. — I agree

W. N. D. PERERA J. — I agree.

Verdict of murder set aside. Verdict of culpable homicide not amounting to murder substituted against 1, 3, and 7 accused and accused sentenced to 10 years RI each. Other accused acquitted.