IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal
Under sec.331 of the Code
Of Criminal Procedure Act
No.15 of 1979 as amended

CA.90/2005

H.C.Gampaha 57/98

Welipiti Gamaralalage Somasiri
Accused Appellant

Vs

Hon. Attorney General
Respondent

Before: **W.L.R Silva, J.&**
H.N.J.PERERA, J.

Counsel:m/s Indika Mallawaarchchi for the appellant

Sarath Jayamanne, DSG for the Respondent

Argued : 11.1.2012

W/Sub: 14.2.2012

Decided: 16.2012

H.N.J.Perera, J.

This is an appeal from the judgment of the High Court of Gampaha dated 29.06.2005. The Accused Appellant (here- in-after referred to as the Appellant) along with two others were indicted for committing the following offences:

(1) that on or about 13.11.1993 the 1st accused caused the death of one Nagasena Mudiyanselage Ranjith Rathnasiri alias Mahinda thereby committing an offence punishable under sec. 296 read with sec. 32 of the penal code.

(2) at the same time and place and in the course of the same transaction the 2nd accused namely Welipiti Maharalalage Aruna Nishantha caused hurt to one Welipiti Maharalalage Ariyawathie thereby committing an offence punishable under sec. 314 of the penal code.

(3) at the same time and place and in the same course of the same transaction the afore-mentioned 2nd accused caused hurt to one Welipita Maharalalage Milinona thereby committing an offence punishable under sec.314 of the penal code.

At the conclusion of the trial the Learned Trial Judge acquitted the 2nd and 3rd accused of all the charges framed against them and convicted the 1st accused on count one and sentenced him to death on 28.6.2005. Being aggrieved of the aforesaid conviction and the sentence, the appellant has preferred this appeal to this court.

The facts briefly are as follows.

The deceased is related to the three accused who are brothers of the same family. The accused are the sons of the sister of the father of deceased. According to the prosecution the 1st accused had a longstanding animosity with the deceased and they had been living in the same village. On the day in question the deceased proceeded to a boutique in the village to buy green gram. At the time the boutique was closed but the owner of the boutique, Ariyawathie was at the back of the boutique which was used as her house. Having learnt the request of the deceased the witness Ariyawathie came back to the boutique and gave 250 grams of green gram to the deceased. The witness brought a bottle lamp to make the sale. The witness when returning to the back of the boutique heard a sound from the front part of the boutique. When she rushed back she saw the deceased lying fallen on the ground and the 1st and the 2nd accused were attacking the deceased. Both the 1st and the 2nd accused continued to attack the deceased and when the

Witness attempted to prevent the deceased being attacked, she was also attacked on the hand. Thereafter 1st and the 2nd accused dragged the deceased away from the boutique. On hearing cries, the mother of the deceased, Milinona and the eleven year old daughter of the deceased, Nayana Iroshini rushed to the boutique of Ariyawathie. From Ariyawathie they learnt that the 1st and 2nd accused had dragged the deceased towards the house of the 1st accused. When they visited the house of the 1st accused they saw the deceased being attacked by the 1st and the 2nd accused. The deceased was fallen at the door step of the 1st accused. 2nd accused also hit Milinona and chased both of them away. However, the 3rd accused prevented Nayana Iroshini from being attacked. Soon thereafter Nayana Iroshini and Milinona went to the police station and lodged the first complaint.

IP Marsinghe came to the scene of the crime immediately with the two witnesses and observed patches of blood from the boutique up to the door step of the house of 1st accused where the body of the deceased was lying. He further observed strewn green gram in front of the boutique.

The defense version was that when the 1st accused went to the boutique, the deceased assaulted him with a club. When he tried to prevent the attack on him it caused an injury to him and later he applied Siddhalepa. 1st accused claims that he

(4) Learned Trial Judge has seriously flawed with regard to the principle relating to the concept of common intention.

(5) Learned Trial Judge failed to address his mind to the items of evidence favourable to the accused appellant thereby denying him of a fair trial.

Now I will proceed to deal with the several grounds of appeal urged on behalf of the accused appellant in order to determine whether there arises a substantial miscarriage of justice sufficient to vitiate the conviction. It is submitted on behalf of the appellant that witness Ariyawathie was not an eye witness with regard to the onset of the attack and that on her own admission she was in fact totally oblivious as to how the incident had commenced except the fact that upon hearing a loud noise she had proceeded in the direction from which the noise emanated and had seen the deceased lying fallen, being attacked by both accused. It was further submitted that the appellant has not denied his complicity in the attack but has given evidence on oath bringing himself within the ambit of a sudden fight and or private defence and the appellant giving evidence has testified that when the deceased accosted him, Ekmon Singho was present. It is the position of the appellant that the witness Ekmon Singho who is the husband of the main eye witness Ariyawathie was a listed and available witness at

the time of trial and that the said witness was a material witness for the prosecution who could have unfolded the

grabbed the club from the deceased and hit back at the deceased once due to which he fell in front of the boutique. The 1st accused claims that he dealt one blow to the deceased and that the deceased fell on the ground and he left the place.

After oral submissions, counsel on both sides filed written submissions. The following matters were raised as grounds of appeal on behalf of the appellant, which are briefly set out as follows:

(1) Sec. 114 (f) of the Evidence Ordinance operates against the prosecution as the prosecution failed to summon witness no. 4 namely Ratnayakelage Ekmon Singho who was a listed and available witness at the trial and who could have unfolded the narrative of events and provided the missing link in the prosecution case.

(2) Learned Trial Judge seriously misdirected himself in fact and in law by failing to consider the evidence of the appellant in its correct perspective, hence the rejection of the defense evidence is untenable.

(3) Learned Trial Judge acquitted the 2nd accused and convicted the 1st accused appellant on the same principle of law thereby causing serious prejudice to the appellant, subjecting him to unequal treatment, denying him of a fair trial and rendering the judgment perverse.

narrative of events and provided the vital link in the prosecution case.

In the case of The king v Chalo Singho 72 NLR269, it was held thus "Prosecuting counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting counsel to call such a witness or may call him as a witness of the court.

There is no misdirection by the Judge when he omits to refer to the presumption under section 114 (f) of the Evidence Ordinance in cases in which the crown does not call or tender for cross examination on the request of the prisoner's counsel a witness, whose name appears on the back of the indictment and whom the prisoner's counsel had himself an opportunity of calling."

In this case witness Ekmon Singho was an available and listed witness at the time of trial. The prosecution did not call him to give evidence on behalf of the prosecution. The appellant's counsel had all the opportunity to call Ekmon Singho to give evidence on behalf of the defense. On a perusal of the proceedings of this case it is apparent that counsel for the appellant had made no such application to court. Therefore this court cannot agree with the submission made by the counsel for the defense that there is a misdirection by the Judge .

Further when one peruse the evidence given by this particular witness Ekmon Singho at the Inquest and the Non Summery proceedings we find that this witness only corroborate the evidence given by his wife Ariyawathie and does not in any way corroborate the position taken by the accused appellant in this case. Therefore this court cannot agree with the submissions made by the counsel for the defense that the said witness Ekmon Singho was a material witness for the prosecution who could have unfolded the narrative of events and provided the vital missing link in the prosecution case. Therefore I see no merit in the argument put forward by the counsel for the appellant

It is the contention of the counsel for the appellant that the Learned Trial judge seriously misdirected himself in fact and in law by failing to consider the evidence of the accused appellant in its correct perspective. Hence the rejection of the defense evidence is untenable. It is submitted on behalf of the Respondent that there is no evidence to suggest that either deceased provoked or parties started a sudden fight. According to witness Ariyawathie the deceased had come to the boutique to buy green gram. This fact is corroborated by the evidence of the investigating officer who had seen strewn gram near the boutique. According to witness Ariyawathie she had heard a sound from the front part of the boutique, and when she rushed back she saw deceased lying fallen on the ground and

1st and the 2nd accused were attacking the deceased. According to her, several blows were inflicted on the deceased even after the deceased had fallen on the ground. There is no evidence to suggest that either the deceased provoked or that there was a sudden fight between the parties. According to 1st accused he had dealt only one blow to the deceased. It is submitted on behalf of the Respondent that the version of the 1st accused that he inflicted only one blow is totally demolished in the teeth of the medical evidence. The JMO had observed 14 injuries all over the body of the deceased. There were several lacerations and contusions on the ear, head, and shoulders. The most crucial injuries were the fractures of the skull which were responsible for causing the damage to the internal brain. There is no material before the court to suggest that the incident took place as a result of a sudden fight. The evidence led in this case clearly shows that the deceased did not carry a weapon or a club when he arrived at the boutique. Also there is no evidence to suggest that the deceased provoked the accused. Ariyawathie's evidence clearly establishes the fact that the deceased was unarmed when he arrived at the boutique and in fact leaving the place after he had purchased green gram from Ariyawathie.

According to witness Ariyawathie the 1st and 2nd accused continued to attack the deceased and when she attempted to prevent the deceased being attacked, she was also attacked on

her hand Thereafter the 1st and 2nd accused dragged the deceased away from the boutique Milinona and Nayana Iroshini who arrived at the scene on hearing cries learnt from the witness Atiyawathie that the 1st and 2nd accused had dragged the deceased towards the house of 1st accused and on arrival at the house of the 1st accused saw the deceased being attacked by 1st and 2nd accused.

The fact that the deceased was dragged from the boutique up to the house of the 1st accused is further corroborated by the evidence of IP Marasinghe who came to the crime scene immediately with the said two witnesses. IP Marasinghe has observed patches of blood from the boutique to the door step of the house of 1st accused where the deceased body was lying. The medical evidence corroborates that injuries on the deceased could have been caused by a blunt weapon. The evidence before the Learned Trial Judge revealed that there was no motive whatsoever for witness Ariwathie and Nayana Iroshini to falsely implicate any of the accused. It is also evident that soon after the incident witness Nayana Iroshini had rushed to the police and made a complaint to the police. Witness Artiyawathie and MiliNona were also injured in the incident. The acquittal of the 2nd accused on hurt charge was due to the non production of the MLR of the witness Ariyawathie. The reason for the acquittal of the 2nd accused on

the 3rd charge was due to the failure of the prosecution to lead the evidence of witness Mili Nona.

The Learned Trial Judge had examined the evidence led in the case in its totality and had come to the conclusion that the prosecution has proved its case beyond reasonable doubt.

The accused appellant had given evidence on oath raised the plea of private defense and/ or sudden fight. It is submitted by the counsel for the accused appellant that the appellant at the very first opportunity when the police arrived at his residence after the incident had handed over the club to the police officer indicating that it was in fact the club that the deceased had brought to attack him. IP Marasinghe had recovered on a section 27 statement a blood stained kitul club from the house of 1st accused and also another club from the garden of the house of the 1st accused. The Learned Trial Judge had observed the fact that though the accused appellant had testified that he came to Ariyawathie's boutique to purchase cigarettes it is only a mere statement and no other evidence has been led to establish that fact. We find that there is no material before this court to support the defense proposition that the incident took place as a result of sudden fight. We are of the opinion that the Learned trial Judge has rejected the evidence given by the 1st accused after due consideration.

It is further submitted by the counsel for the appellant that the Learned Trial Judge failed to consider certain items of evidence favorable to the appellant. i.e. absence of a motive on the part of the appellant. It has been stated that the existence of a motive is not wholly essential in the prosecution case. There is no requirement therefore for the prosecution to prove a motive in order to prove a charge. In Emperor v Balaram Das it was held that where there is clear evidence that a person has committed an offence it is immaterial that no motive is proved, or that the evidence of motive is unclear. In Shreekanthiah Ramayya v State of Bombay [AIR (1955) SC 287] it was held that a conviction is possible without any motive being disclosed. The lack of evidence of motive is not a reason for a court to disbelieve the prosecution version in a case.

Therefore I am of the view that no prejudice has been caused to the appellant in evaluating the evidence of the witnesses as there was evidence to suggest that there was animosity between the parties.

The police officer had testified that a kitul club marked p1 was recovered on a section 27 statement of the appellant. It is the position of the appellant that the said club was handed over to the police by the appellant stating that it was the club the deceased had brought to attack the appellant. The recovery of this kitul club on a statement made by the appellant to the

Police officer under section 27 of the Evidence Ordinance is not been challenged by the appellant. The JMO had stated in his evidence that a heavy blunt weapon like the club produced in the case may have caused the injuries to the deceased. This court cannot agree with the submissions made by the counsel for the appellant that the Learned Trial Judge had failed to consider these items of evidence in the correct perspective.

It was also the contention of the counsel for the appellant that the Learned Trial Judge has failed to properly analyse the evidence of the accused appellant. It was submitted on behalf of the 1st accused appellant that the appellant had testified that when the deceased tried to attack him on the head he had shielded himself from the blow, ultimately resulting in the blow alighting on his shoulder and injuring his finger. The 1st accused appellant had further testified that following his arrest he was produced before a medical officer and subsequently received treatment at the prison's hospital and that the prosecution failed to explain the injuries on the accused and failed to produce the medical report of the appellant at the trial thereby denying the appellant a fair trial. When one consider the judgment of the Learned Trial Judge it is apparent that he had considered and analysed the evidence given by the appellant and though no medical evidence was led to prove that the 1st accused appellant sustained injuries due to this incident we find that the Learned Trial judge had considered the nature of

the injuries to have been sustained according to the evidence given by the 1st accused and have rejected the same giving reasons. This court's attention was drawn to the document tendered by the appellant's counsel marked x3 with the written submissions. E.R.S.R.Coomaraswamy in 'The law of evidence ' vol.2 (book 2) at page 1194 it is stated thus:- " The Indian Supreme Court has stated that injuries on the person of the accused should be explained by the prosecution. Where the prosecution fails to do so, any of the following results may follow:-.....(3) That the omission to explain the injuries is innocent or of no effect at all where the injuries sustained are minor and superficial and the prosecution evidence is so clear and cogent, so independent and disinterested that it far outweighs the omission to explain the injuries. It is further stated that as a principle of appreciation of evidence, where serious injuries are found on the person of the accused; the prosecution must explain them so as to satisfy the court as to the circumstances under which the occurrence originated. But injuries must be very serious and severe and not merely superficial and must be shown to have been caused at the time of the occurrence in question." In this case we find that the Learned Trial Judge has considered the evidence of the appellant and even if one were to accept the evidence of the 1st accused, he had only sustained one minor injury on his finger. Therefore this court is of the view that no prejudice has been

caused to the appellant by the failure of the prosecution to produce the medical report of the appellant. We cannot agree with the submission made by the counsel for the appellant that the failure of the prosecution to produce the medical report of the appellant has resulted in a denial of a fair trial to the accused appellant.

It is further the contention of the counsel for the respondent that the Learned Trial judge has misdirected himself with regard to the issue of common intention. The Learned Trial Judge has concluded that there is evidence beyond reasonable doubt that it was only the 1st accused who had inflicted fatal blows on the deceased and has further concluded that though the evidence of witness Ariyawathie reveals that the 2nd accused attacked the deceased it is doubtful that he entertained a murderous intention or had a pre-arranged plan to attack the deceased. We find that very cogent evidence has been led in this case that both the 1st and the 2nd accused had attacked the deceased with clubs. Witness Ariyawathie has testified that the 1st and the 2nd accused assaulted the deceased, that the 1st accused dealt 4 blows and the 2nd dealt 2-3 blows on the head of the deceased. And when the witness Nayana Iroshini arrived at the house of the 1st accused she saw the deceased being attacked by 1st and 2nd accused. Section 32 of the Penal code provides that; "Where a criminal act is done by several persons in furtherance of the common intention of

all, each of such persons is liable for the act in the same manner as if it were done by him alone" Liability is imposed on the offender on the on the basis that both actus reus and mens rea has been committed by him. The agreement or the common design required for the imposition of liability may have been arrived at immediately before the offensive act was committed.(Anthony v the Queen 55 NLR 35,Wilson Silva v The Queen 76 NLR 414) It was further held in Wimalasena v I.P Hambantota 74 NLR 176 that mere presence of the accused at the scene is not sufficient to establish that he shared a common intention upon which liability could be imposed on him. In Piyathilaka and others v Republic of Sri Lanka [1996] 2 Sri L.R. 141 it was held that to maintain a charge on the basis of common intention the mere presence is not sufficient and the code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. The operation of the section preconceives a shared intention by all the accused but does not depart from the principle that each accused is punished based on his or her individual intention. The section also requires that a criminal act be carried out by each of the accused in furtherance of the common intention of all. In a case of murder against all the accused where the accused are sought to be liable on the basis of section 32, the common intention must necessarily be a murderous common intention. In Asappu

(1948) 50 NLR 324 it was held that in order to justify the inference of common intention there must be evidence, direct or circumstantial, either of pre-arrangement or a pre-arranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence. Witness Ariyawathie when she rushed back she saw deceased lying on the ground and 1st and 2nd accused attacking the deceased. Both 1st and the 2nd accused continued with the attack. When she attempted to prevent the deceased being attacked, she was also attacked on her hand. Thereafter 1st and 2nd accused dragged the deceased away from the boutique. When Nayana Iroshini accompanied by her grandmother arrived at the house of the 1st accused she too saw her father being attacked by 1st and 2nd accused. The JMO observed 14 injuries all over the body of the deceased. The most crucial injuries were the fractures of the skull at different places which were responsible for causing the damage to the internal brain and there was a strong probability that death may be caused due to the said injury. It is abundantly clear from the evidence that the accused joined in a shared intention to commit the murder of the deceased and the provisions of section 32 of the Penal Code are applicable in this case with regard to establishing the liability of the accused for the murder of the deceased. Therefore it is manifestly clear that the Learned Trial Judge was misconceived in law when he decided that the 2nd

accused did not entertain a common murderous intention and this court is of the view that the acquittal of the 2nd accused by the Learned Trial judge is no impediment to convict the 1st accused appellant of the charge of murder.

On a perusal of the judgment of the Learned Trial Judge it is very clear that the Learned Trial judge had considered all the material evidence that had been led before him at the trial by both parties. The evidence given by the 1st accused had been analysed and properly considered by the Learned Trial Judge in detail. It is abundantly clear that the Learned Trial Judge had chosen to believe the evidence led on behalf of the prosecution to that of the evidence led by the defense And further proceeded to give reasons for disbelieving the defense version of the case.

A Court Of Appeal will not lightly disturb the findings of a Trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong The Privy Council in Fraad v Brown & company Ltd.,20 NLR at page 283 held as follows:

"It is rare that a decision of a Judge so express ,so explicit upon a point of fact purely is over ruled by a Court Of Appeal, because the Courts Of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that

kind, as contrasted with any Judge of a Court Of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court Of Appeal will over-rule a judge of first instance"

In conclusion, for reasons stated above I hold that the accused appellant had failed to satisfy this court on any ground urged on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused appellant and affirm the conviction and the sentence dated 29.6.2005 of the Learned High Court Judge of Gampaha.

JUDGE OF ~~THE~~ COURT OF APPEAL

Ranjith Silva, J.

I agree.

JUDGE ~~OF~~ THE COURT OF APPEAL