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

1. Garumuni Manoj Sri Devananda Mendis
2. Garumuni Abaya Sri Leelananda Mendis

ACCUSED-APPELLANTS

C.A 183/2008 **A-B**

H.C. Balapitiya HCB 783/2005

Vs.

Hon. Attorney General
Attorney General's Department,
Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: N.A. Chandana Sri Nissanka for the 1st Accused-Appellant

Neranjan Jayasinghe for the 2nd Accused-Appellant

Haripriya Jayasundera D.S.G. for the Complainant-Respondent

ARGUED ON: 07.07.2014 & 08.07.2014

DECIDED ON: 01.09.2014

GOONERANTE J.

Originally four Accused were indicted in the High Court of Balapitiya. The 1st and 2nd Accused-Appellants were charged for the murder of one Garumuni Sanjaya Meththananda. The 3rd & 4th Accused were charged for mischief, under Section 410 of the Penal Code, but after trial 3rd & 4th Accused were warned and discharged. The incident was on or about 20.5.2002. The prosecution case briefly is as follows:

On the day of the incident the main witness, the wife of the deceased came home with the daughter after work. She was a Proctor's Clerk according to the evidence led in court. At that time her deceased husband and the younger daughter was in the house. The deceased had been attending to or repairing a torch in a room. The daughter was taking a wash and the witness had been watching television at about 7.30 p.m. At that time she heard a noise

and she went up to the fount door opened it and saw the porch light had fallen or had burst and the broken pieces on the ground. Thereafter she with the help of her husband replaced it with another bulb, and each of them went back into the house and she watched television. Then for the second time she heard a noise and when she went near the front door saw the 1st Accused coming towards her armed with a club or iron pole. When she asked the 1st Accused-Appellant as to why he is charging inside the house he had dealt a blow with the iron pole/club which struck her hand. At that moment itself the deceased had come near her and the 1st Accused had dealt several blows to the deceased which struck the head of the deceased and pushed the deceased to the wall and attacked him with a club. The witness went out of the house and shouted and called for help. At that moment itself the 2nd Accused-Appellant arrived at the scene of the crime and according to the evidence the 2nd Accused-Appellant also attacked the deceased with a club.

Evidence had transpired at the trial which suggest motive of a long standing land dispute between the parties. The deceased was the brother of the 1st & 2nd Accused-Appellants. 3rd and 4th Accused are the children of the 1st & 2nd Accused-Appellants.

I will now refer of the submissions of learned counsel for the 1st and 2nd Accused-Appellants. Learned counsel for the 1st Accused-Appellant sought to explain that the main prosecution witness is not a credible witness, by referring to some past acts of the deceased where he had been interdicted from the Postal Department and pending cases against the deceased. The witness had rejected the question put to her but admitted a case of possession of a gun by the deceased. He also submitted that his client had been falsely implicated and emphasized that the witness had no injuries on her hand. Learned counsel also suggested that the dock statement of the 1st Accused-Appellant had not been properly analysed by the learned High Court Judge. He then categorically referred to an omission and the trial Judge's refusal to admit that part as an omission, which is a misdirection of the trial Judge.

The learned counsel for the 2nd Accused-Appellant made it very clear that the 2nd Accused did not at any stage entertain a common murderous intention, and the conviction of the 2nd Accused is bad in law. Learned counsel also submitted as above about the credibility of the main eye witness and invited this court not to place any reliance on her version, since no proper acceptable description of an attack on the deceased by the 2nd Accused had surfaced in evidence. It was emphasized that the witness had in answer to a

specific question of attack by the 2nd Accused, the answer was that the witness cannot remember. It was the contention of learned counsel for the 2nd Accused-Appellant that it is highly unsafe to rely on the evidence of the main prosecution witness. There was some emphasis placed on the daughter's failure to give evidence when her father was attacked and it offends Section 114(F) of the Evidence Ordinance. It was suggested that there is also an absence of pre-plan or a pre-arrangement between the 1st & 2nd Accused.

The learned Deputy Solicitor General inter alia submitted that the police observations corroborate the version of the main eye witness. There was evidence, transpired that the deceased at a certain point had been kept against the wall and attacked. Police evidence show blood stains and brain matter on the wall. She also submitted that the omission referred to by the counsel for the 1st Accused-Appellant would not be so relevant to the case in hand. As such no prejudice would be caused to the case of the Accused. However it was the position of the learned Deputy Solicitor General that both Accused-Appellants entertained the common murderous intention. 1st Accused came forward at the very outset of the incident and attacked the deceased and was followed by the 2nd Accused-Appellant. Although the witness for the prosecution was not able to give a description of specific place of attack by the

2nd Accuseds on the deceased, it was also her argument that the learned High Court Judge has correctly analysed the case of each party.

This is a case of direct evidence. The main prosecution witness had no difficulty in identifying the perpetrators of the crime since all of them were relatives and living in close proximity. There is also some evidence of malice over a land dispute. A fairly clear description of the assault/attack on the deceased by the 1st Accused had been narrated by the main witness. As observed by the learned Deputy Solicitor General her evidence is no doubt corroborated by the version of the police. Blood stains on the wall and floor with brain matter on the wall, is considered with each others' evidence. In law it is necessary for the trial Judge to consider the case of each Accused separately and arrive at a conclusion of guilt or innocence. The iron pole used to attack the deceased had without difficulty been identified by the witness. Perusal of the evidence led in the case, the defence had not been able to create a doubt in the prosecution case as far as the 1st Accused-Appellant is concerned. As such this court need not interfere with the conviction of the 1st Accused-Appellant. Medical evidence support the main witness's version of attack on the head. High Court Judge's contention on same is in order. The question is the decision taken on the culpability of the 2nd Accused –Appellant.

Did he entertain the required murderous intention along with the 1st Accused-Appellant?

The two Accused did not approach the scene of the crime together. Evidence merely to beat the deceased by both with weapons even after the attack by the 1st Accused-Appellant would not be sufficient to share the required common murderous intention. There is no evidence of pre-arrangement or any other declaration or a significant fact at the time of assault or before to enable court to infer the required common intention. In

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Four accused were charged with murder. The evidence was that after the deceased had been hit on the head with an iron rod by the first accused and had fallen down the other three accused came and hit him with iron clubs. There was no evidence as to where thee blows alighted. The first accused also joined in the assault on the deceased when he lay fallen. The medical evidence revealed two fatal injuries on the head and other injuries which were not serious – Held, that the evidence did not justify the inference that there had been a pre-arranged plan by all the accused for commit murder. In the circumstances, therefore, the second, third and fourth accused were convicted under section 317 of the Penal Code.

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Common intention within the meaning of section 32 of the Penal Code is different from same or similar intention. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.

A clear description of attack by the 2nd Accused-Appellant seems to be lacking. When capital punishment is involved a court of law would and should consider the case of each accused separately to ascertain the depth of crime committed by each. The evidence led does not give a clue as to how and when the 2nd Accused dealt blows on the deceased. There is a statement by the witness, that at one point both attacked the deceased. Then at pg. 88 the witness states she did not see the 2nd Accused-Appellant attacking the deceased. How and when the blows were dealt should not be imagined in the context of the case. As such this court observes that the learned High Court Judge erred to that extent to decide on the common murderous intention as far as the 2nd Accused-Appellant is concerned. I would draw some support to express this view also having perused the judgment of *Gunadasa Vs. Attorney General 1999 (1) SLR 253*, where common intention and similar intention, causation are discussed.

Held:

The 1st Accused caused two injuries to the head of the deceased with a katty and when the deceased fell the 2nd accused with a sword cut the leg of the deceased and inflicted on him a mortal wound on the rear of the chest saying he would finish off the deceased. The trial

judge trying the case without a jury did not address the question of common intention. The facts support the inference of only a similar intention.

The inference of common intention must be an irresistible and necessary inference from which there is no escape. a distinction must necessarily be drawn between the concepts of similar and same intention and the concept of common intention. Where, as here, the two accused acted in furtherance of a similar intention the liability of each accused would rest solely on the particular acts committed by him and one accused would not be constructively be liable for the acts and consequences traceable to the other accused.

In the post-mortem report enumerating the injuries the doctor reported that death was due to cardio-respiratory failure resulting from shock and hemorrhage due to the damage caused to the internal organs which led to profuse bleeding. The doctor had not stated that death was due to any injuries to the skull or brain nor was evidence elicited on this point.

There was very great antecedent probability as opposed to a mere likelihood of the injury to the rear of the chest causing the death of the injured if left to nature and there was no resort to medical treatment.

The 2nd accused had the clear intention to cause the death of the deceased and his case comes within the ambit of clause 1 to section 294 of the Penal Code. If at the time of death the wound inflicted by the 2nd accused is still an operating cause and a substantial cause then death can properly be said to be the result of that wound albeit some other cause of death is also operating. This is the principle of causation. Explanation 1 to section 293 of the Penal Code gives effect to this principle which is founded on sound reasoning and common sense. Thus when the second accused caused bodily injury to the injured in this

case who was labaouring under a disorder and bodily injury inflicted by the first accused and by that process he, thereby accelerated the death of the deceased, he shall be deemed in law to have caused the death of the injured and the requirement of causation is established beyond doubt.

At the time the deceased was still alive though possibly mortally inured if the accused inflicts an injury which at least short-terms the period of his life the law makes him guilty of murder.

The dying declaration of the deceased is corroborated by the evidence of a witness and consistent with the oral evidence. Hence, the judgment cannot be flawed for the trial judge's use of the dying declaration.

No evidence was elicited as to whether the injuries caused by the 1st accused to the head were sufficient in the ordinary course of nature to cause death,. The benefit of the doubt on this point has to be resolved in favour of the 1st accused. He is, therefore, guilty of attempted culpable homicide not amounting murder.

We accordingly affirm the conviction and sentence of the 1st Accused-Appellant. In the interest of justice the position of the prosecution and the Accused party need to be considered very carefully based on evidence. It is served best when the case of each other are considered separately. The presence of the 2nd Accused-Appellant was not also a mere presence. He had performed some act, sans the murderous intention, which ultimately ended in

a gruesome murder. There is no evidence to demonstrate that when the main witness made a distress call the 2nd Accused made an attempt to ease the situations of a gruesome attack. There had been previous enmity between the brothers of one family consisting of the deceased and the Accused party.

The case of the defence had been considered by the trial Judge. Both Accused-Appellants made dock statement and called the official witness from the Magistrate's Court and the High Court. Both witness being record keepers of the two courts to produce V12 and V13, and V14. Trial Judge no doubt has given his mind and held that the defence version has no relevance and given his reasons to reject the above documents. We will not interfere with those views of the trial Judge.

Upon a consideration of all the material we substitute for the conviction of murder a conviction under Section 317 of the Penal Code (voluntararily causing grievous hurt) and impose a sentence of three years Rigorous Imprisonment, on the 2nd Accused-Appellant.

Conviction and sentence of 1st Accused-Appellant affirmed. Sentence of 2nd Accused-Appellant varied.

Conviction and sentence altered as above to be implemented from the date of this judgment.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL