250/2012

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

In matter the of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 0f 1979 as amended.

Ratnasinghe Wattage Piyasena

Accused-Appellant

C.A.Case No:-250/2012

H.C.Tangalle Case No:-03/2003

V.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

Before:-H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-Anil Silva P.C with Nalaka Jayasuriya for the Accused-Appellant

S.Wijesinghe D.S.G for the Respondent

Argued On:-19.03.2015

Written Submissions:-12.06.2015

Decided On:-20.07.2015

H.N.J.Perera, J.

The 1st accused-appellant with three others in this case were indicted in the High Court of Tangalle for having committed the murder of one Ratnasinghe Wattage Chamil Pradeep on 27.06.2000 an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code. Therefore the case for the prosecution was presented on the footing that all four accused-appellants were actuated by a common murderous intention at the time the deceased Chamil Pradeep was killed. After trial the 1st accused-appellant was convicted and sentenced to death. This appeal is from the said conviction and the sentence.

The salient facts established by the evidence were as follows:-According to the evidence of Kusumalatha the mother of the deceased when she was at home she heard someone calling out for the deceased. She cannot exactly say who it was. A short time later she heard the other witnesss Anil Pradeep shouting "mother elder aiya is stabbed". She rushed out of the house and saw the witness Anil Pradeep bringing the deceased home. The witness Anil Pradeep further said that "Alli mama stabbed".(the deceased 4th accused). The deceased also is alleged to have said "mother save me, Alli mama stabbed me."

The witness Kusumalatha , the mother of the deceased further stated that she saw the 1st, 2nd and the 3rd accused and that the 1st accused-appellant was seen close to the house with a gun in his hand. She had categorically stated that there was no animosity among the parties and they were in good terms.

The witness Anil Pradeep said on 27.06.2000 at about 5.30-6.00 p.m he was returning from the house of his grandmother, he saw the deceased struggling with the 4th accused. The 2nd accused was trying to prevent the struggle. Suddenly the deceased fell down and he rushed and tried to carry the deceased. Then he noticed blood on his hands and saw the 4th accused having a blood stained knife in his hands. When he carried the deceased he saw the 1st and 3rd accused a short distance away and the 1st accused-appellant had a gun and threatened to shoot his brother. The witness had categorically stated that the 1st accused-appellant was standing with a gun near the entrance gate to his house and that he had to pass the 1st accused-appellant and go to his house. This witness had further stated that he then told the accused-appellant not to shoot the deceased his brother but to shoot him instead. By that time the deceased had been stabbed by the deceased 4th accused and as he was carrying the deceased home and the deceased fell near the first accused. He shouted and the mother came running towards them and the 1st accused-appellant just stood near the house without doing anything.

It is clear from the evidence led in this case that the fatal blow was dealt by the 4th accused. The evidence given by the witness Anil Pradeep very clearly establish the fact that the 1st accused-appellant was standing near the house of the deceased some distance away from the place of the incident. In this case both witnesses state that the 1st accused-appellant was standing a short distance away from the scene of offence. It will be seen that there was literary no evidence to justify a conclusion that the 1st accused-appellant too assaulted the deceased person.

It had to be established by the prosecution that the two accused (the 4th and the 1st accused) were acting with a common intention. The evidence against the 1st accused-appellant was that he was merely near the house of the deceased with a gun in hand and had threatened to shoot the deceased after the deceased had received the fatal blow from the 4th

accused. Apart from this there is no other evidence of a common intention between the 1st and the 4th accused.

It is the contention of the Counsel for the accused-appellant that taking into consideration all the items of evidence, the inference of common intention cannot be drawn in this case and the 1st accused-appellant should not be held responsible for what the 4th accused did and therefore he should be acquitted.

It is the duty of the prosecution to satisfy beyond reasonable doubt that a criminal act has been committed , that such act was committed by several persons , that such persons at the time the criminal act was committed were acting in the furtherance of the common intention of all. And that such intention is an ingredient of the offence charged, or of some minor offence. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. There should be evidence direct or circumstantial, of prearrangement or some other evidence of common intention.

In the case of common intention liability is imposed on the offender on the basis that both actus reus and mens rea has been committed by him. A common meeting of minds has been identified as an essential pre-requisite for the imposition of criminal liability on the basis that the accused shared a common intention. The agreement or the common design required for the imposition of liability may have been arrived at immediately before the offensive act was committed. 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. (King V. Assappu 50 N.L.R 324, Piyathilaka and 2 others V.Republic of Sri Lanka [1996]2 Sri.L.R 141).Though the accused did not commit any physical act, yet liability could be imposed on him on the basis that his presence was

participatory presence. In a murder case it is imperative that the accused entertain a murderous intention with the perpetrator of the offending act. In the instant case according to the main eye witness Anil Pradeep only the 2nd and the 4th accused had been near the deceased at the time of the incident. The 2nd accused had tried to prevent the struggle. According to this witness he had seen the 1st accused-appellant and the 3rd accused standing at a distance away from the place of the incident. The 1st accused-appellant had done nothing. He was standing near the gate of the deceased house holding a gun. The 1st accused-appellant had done nothing or said anything to indicate that he entertained the same intention of the 4th accused. There is no evidence to indicate that the accused-appellant was actuated by a common intention with the doer of the act namely the 4th accused at the time the offence was committed. According to the said witness it was only after the 4th accused had stabbed the deceased that the 1st accused-appellant had uttered the words that he will shoot the deceased.

The question then, in regard to the 1st accused-appellant, is whether his presence near the scene of the incident was a participatory presence in the sense that he was there as sharing a common intention with the 4th accused to cause the death of the deceased.

The learned President's Counsel for the accused-appellant submitted that the charge against the 1st accused-appellant cannot be maintained as the evidence is insufficient. The Counsel submitted that to maintain a charge on the basis of common intention the mere presence is not sufficient. The prosecution must prove an overt act manifesting his intention.

In Queen V. Vincent Fernando65 N.L.R 265Basnayake, J. has stated as follows:-

"A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. 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. In the Penal Code the words which refer to acts done extend also to illegal omissions."

In the case of Ariyaratne V. Attorney-General S.C. 31/92 SCM 15.11.93, G.P.S.de Silva has reiterated that the inference of common intention must be not merely a possible inference, but an inference from which there is no escape. The facts revealed that, the principal witness speaks only of the presence of the 1st accused-appellant standing near the house of the witness with a gun in hand, little away from the scene of the incident. The 1st accused-appellant had uttered the words "I will shoot him". This utterance was made after the 4th accused had stabbed the deceased person.

Having considered the evidence against the 1st accused-appellant I am of the view that evidence is insufficient to sustain the conviction. Therefore I am of the view that the 1st accused-appellant should be acquitted.

Appeal allowed. 1st accused-appellant acquitted.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL