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

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

(1) Naina Lebbe Niyar

(2)Idroos Mohamed Riyas

Accused-Appellants

C.A.Case No:-312/2007

H.C.Kurunegala Case No:-108/2002

V.

The Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

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

K.K.Wickremasinghe, J.

Counsel:-Indica Mallawarachchi for the Accused-Appellants

Dilan Ratnayake S.S.C for the Respondent

Argued On:-12.08.2015

Written Submissions:-22.09.2015

Decided On:-01.12.2015

H.N.J.Perera,J.

The accused-appellants were indicted in the High Court of Kurunegala for having committed the murder of one Suppan Sinige Selva Waduwel on 13.05.2000 an offence punishable under section 296 of the Penal code. After trial the accused-appellants were convicted and sentenced to death. Aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court.

According to the prosecution on the day of the incident the wife of the deceased witness Tennakoon Mudiyanselage Gunawathie and her husband the deceased had been seated on a short wall in their veranda engaged in a conversation. It was her evidence that the 2nd accused-appellant who was known to them had come up to them and abused the deceased at which point the witness had asked the 2nd accused-appellant to leave them alone and go. The 2nd accused-appellant had been there for about 20 minutes abusing her husband and she had testified that the deceased did not make any utterance in retaliation. It was the evidence of the said sole eye witness that thereafter the 2nd accused-appellant had jumped over the short wall and left their compound and that she had not seen where he had gone.

The said witness has further testified that when she had gone inside the house to get a shirt for the deceased and was coming out she had seen the deceased being stabbed by the 2nd accused-appellant and the two of them grappling with each other.

It was her position that when the 2nd accused-appellant first came to their house, he had gone to the house of the 1st accused-appellant which was about 40 feet away in the same compound and she had seen the 1st

accused-appellant handing over a knife to the 2nd accused-appellant. It was her position that the 1st accused-appellant never came to their house or to the place where the incident took place whilst the 2nd accused-appellant abused and attacked the deceased, the 1st accused-appellant was in his veranda watching the scene and scolding them.

When this matter was taken up for argument before this court the learned Counsel for the accused-appellants stated to court that she is unable to find compelling grounds of appeal in respect of the 2nd accused-appellant. The learned Counsel therefore limited her submissions in this case to the conviction and sentence of the 1st accused-appellant by the learned trial Judge of Kurunegala.

Learned Counsel for the accused-appellants urged two grounds of appeal as militating against the maintenance of the conviction of the 1st accused-appellant.

(1)The learned trial Judge has seriously misdirected himself on very crucial issues of fact causing serious prejudice to the 1st accused-appellant.

(2) Conviction against the 1st accused-appellant on the basis of common intention is factually and legally flawed.

It was contended by the Counsel for the accused-appellants that the learned trial Judge had come to a finding that when the deceased and the witness Gunawathie were talking seated on the short wall, the 2nd accused-appellant had come and abused them and gone to the house of the 1st accused-appellant at which point the 1st accused-appellant had given the knife to the 2nd accused-appellant who returned and stabbed the deceased. The evidence of witness Gunawathie was that when the 2nd accused-appellant first came to their house he was armed with the knife which was given to him by the 1st accused-appellant inside the

latter's house. On perusal of the evidence given by the said witness Gunawathie it is clearly seen that she had stated that the 2nd accused-appellant went into the house of the 1st accused-appellant before he came to the compound of the deceased. She has clearly stated that the 2nd accused-appellant went into the house of the 1st accused-appellant before coming to their compound.

It was further contended by the Counsel for the accused-appellants that the learned trial Judge has further misdirected himself by concluding that the said witness Gunawathie had seen the 2nd accused-appellant grappling with the deceased and the 1st accused-appellant had brought and handed over the knife to the 2nd accused-appellant. On perusal of the evidence of the said witness Gunawathie it is clearly seen that it was her position that the 1st accused-appellant never came to their compound and prior to the 2nd accused-appellant coming to their compound, he has gone to the house of the 1st accused-appellant at which point the latter had given a knife to the 2nd accused-appellant inside his house.

It is very clear that the learned trial Judge has further misdirected himself when he stated that Gunawathie's evidence established that both accused-appellants had come to the house of the deceased and engaged in a fight. The witness Gunawathie has categorically stated that whilst the 2nd accused-appellant was abusing them and attacking the deceased in their compound, the 1st accused-appellant was watching the incident from the veranda of his house which was about 40 feet away from the place of the incident and that he never came to the crime scene.

It is further the contention of the Counsel for the accused-appellants that the learned trial Judge has misdirected himself with regard to the issue of common intention. It had to be established by the prosecution that the two accused-appellants were acting with a common intention. The

evidence against the 1st accused-appellant was that he gave a knife to the 2nd accused-appellant when he first came to his house and that he was watching and scolding them from his veranda of his house which was about 40 feet away from the scene of the crime. The said witness Gunawathie was not able to say as to exact words the 1st accused-appellant uttered at that time. Apart from this there is no other evidence to support the proposition that the 1st accused-appellant entertained and acted with the common murderous intention to cause the death of the deceased.

It is the contention of the Counsel for the accused-appellants 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 2nd accused-appellant did and therefore the 1st accused-appellant 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 the accused-appellants, that they at the time the criminal act was committed were acting in furtherance of the common intention. 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 pre-arrangement or some other evidence of common intention.

Section 32 of the Penal Code provides that:-

"When 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."

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-appellants 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.

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. 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. 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 King V. Asappu (1948) 50 N.L.R 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.

The question then, in regard to the 1st accused-appellant, is whether his giving a knife to the 2nd accused-appellant immediately prior to the incident and watching the incident from his veranda of his house which was about 40 feet away from the scene of the crime was a participatory

presence in the sense that he was there as sharing a common intention with the 2nd accused-appellant to cause the death of the deceased. There is no evidence whatsoever as to under what circumstances the said knife was given to the 2nd accused-appellant by the 1st accused-appellant.

The learned Counsel for the accused-appellants submitted that the charge against the 1st accused-appellant cannot be maintained as the evidence is insufficient.

In Queen V. Vincent Fernando 65 N.L.R 265 Basnayake, J. 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 case of Ariyaratne V.Attorney General S.C 31/92 SCM 15.11.93, G.P.S.de Silva ,J. 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 1st accused-appellant handing over a knife immediately prior to the incident to the 2nd accused scolding and watching the incident from the veranda of his house which was about 40 feet from the place of the incident. There is no evidence whatsoever as to under what circumstances the said knife was given to the 2nd accused-appellant by the 1st accused-appellant.

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

On perusal and consideration of the learned trial Judge's judgment and the totality of the evidence led in this case we are of the considered view that the learned trial Judge has come to a right decision in finding the 2nd accused-appellant guilty of the charge. In my opinion the prosecution has proved the case against the 2nd accused-appellant beyond reasonable doubt. For these reasons, I affirm the conviction and sentence of the 2nd accused-appellant and dismiss his appeal. I allow the appeal of the 1st accused-appellant and acquit him.

Appeal of the 1st accused-appellant allowed. 1st accused-appellant acquitted.

Appeal of the 2nd accused-appellant dismissed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL