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

In the matter of an appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka

CA/HCC/247/2012

Complainant

HC of Polonnaruwa
Case No. 252/2006

Vs.

W.M.B.G. Sooriyarathne Banda

Accused

And Now Between

W.M.B.G. Sooriyarathne Banda

Accused -Appellant

Vs.

The Attorney General of the
Democratic Socialist Republic of Sri Lanka
Attorney General's Department,
Colombo 12.

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : J. Tenny Fernando with Prashani Mathurage for The accused-appellant

Shanel Kularathne, SDSG for the respondent

ARGUED ON : 08.10.2021

DECIDED ON : 23.11.2021

R. Gurusinghe, J.

The accused-appellant (appellant) was indited along with the first accused for having committed the offence of murder of a person by the name of Abeymanike, attempted to murder Warnakulasuriya Piyal, and hurt Warnakulasuriya Sudharma, offences punishable under sections 296, 300, and 315 of the Penal Code respectively.

The prosecution has called PW2, 3, 8, 9, 11, 12, 13, 18, and produced items P1 to P10. The appellant made the dock statement and closed the defense case.

The prosecution version of the case is that the appellant came to the deceased Abeymanike's house together with the first accused in the night. The first accused slashed the deceased and PW2 with a sword, while the appellant attacked PW2 and PW3 with a club.

PW3, Sudharma, testified that on the 17th of December 2007, around 8.30 and 9.00 in the night, PW3, her brother Piyal, PW2, and her mother

(the deceased) were at home. The deceased was about to sleep. The first accused Sunil came and called out to the deceased. They identified the voice as Sunil's, and the deceased opened the door. The first accused entered the house armed with a sword. There was a bottle lamp burning inside the house. The first accused assaulted the deceased with the sword. The deceased fell on the ground. Then the appellant came with the club and dealt a blow on PW2 upon which he fell unconscious. PW3 ran away.

As per the evidence of PW2 the first accused called out to his mother, the deceased. Then the deceased opened the door and was assaulted by the first accused with the sword. When PW2 approached the deceased to help her, the appellant dealt a blow on PW2. PW2 cannot recollect anything that took place thereafter.

The first accused and the appellant had not come to the deceased’s house together. There was a time gap between their arrivals. PW3 admitted that the first accused had completed his assault by the time the appellant arrived at the scene.

On page 82 of the brief, PW3 has answered as follows:

ප්‍රː මම තමුන්ට විත්තියෙන් අවසාන වශයෙන් යෝජනා කරනවා මේ අද දින කූඩුවේ ඉන්න විත්තිකරු තමුන්ලාගේ ගෙදරට එනකොට තමුන්ලාට සුනිල් ජයතුංග කියන තැනැත්තා තුවාල කරලයි තිබ්බේ.

උː ඒ කියන්නේ එද්දිත් තුවාල කරලා.

ප්‍රː අද මේකූඩුවේ ඉන්න සූරියරත්න බණ්ඩා කියන විත්තිකරු තමුන්ලාගේ ගෙදරට එනකොට සුනිල් ජයතුංග කියන තැනැත්තා තමුන්ලාට තුවාල කරලා ඉවරවෙලා තිබ්බේ කියලා මෙම විත්තියෙන් කියනවා.

උː ඔව්

There is no evidence to show that the appellant had dealt any blows on the deceased. In all probability, the fatal injuries to the deceased was caused by the first accused with the sword.

The liability of the appellant for the murder would depend on whether the appellant was acting with the first accused in furtherance of a common murderous intention. There is no evidence of a pre-arranged plan.

PW8, Premaratna, has testified that the first accused had told him that he had assaulted Abeymanike (the deceased) and Ranmahattaya (PW2). However, the first accused had not mentioned to PW8 regarding the presence or involvement of the appellant in the incident.

This piece of evidence shows that the first accused and the appellant were not acting together and that they did not have a pre-arranged plan between them. Accordingly, it also creates a doubt as to whether the appellant had a common intention with the first accused.

In the case of *King vs.Assappu* 15 NLR 324, the Court of Criminal Appeal stated the points that should be taken into consideration in regard to common intention as follows;

"We are of the opinion that in all cases where the question of common intention arises the Judge should tell the Jury that, in order to bring the rule in section 32 into operation, it is the duty of the prosecution to satisfy them beyond all reasonable doubt that a criminal act has been done or committed; that such act was done or committed by several persons; that such persons at the time the criminal act was done or 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 Judge should also tell the Jury that in applying the rule of common intention there are certain vital and fundamental

principles which they must keep prominently in mind - namely *(a)* the case of each prisoner must be considered separately; *(b)* that the Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed; *(c)* they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned - *47 N. L. R. at p. 375; (d)* the Jury must be warned to be careful not to confuse "Some or similar intention entertained independently of each other" with "Common intention"; *(e)* that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case -*A. I. R. 1945 P. C. 118; (f)* the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, 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, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other - *47 N. L. R. at p. 375, 48 N. L. R. 295; (g)* the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against anyone other than the actual doer of the criminal act. - *44 N. L. R. 370, 46 N. L. R. 135, 473, 475; (h)* in such a case such co-accused would be liable only for such criminal acts which they themselves committed; (*i*) the Jury should also be directed that the mere fact that the co-accused were present when the doer did the criminal act does not *per se* constitute common intention, unless there is other evidence which justifies them in so holding - *45 N. L. R.*

510; and (j) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles."

In *Wilson Silva vs. the Queen* 76 NLR 414, Weeramantri J stated the following:

"It was necessary to warn the Jury that even if there was a simultaneous attack in pursuance of similar intentions this would not satisfy the test of common intention unless there was a sharing of the intention. The Jury had, however, been placed on their guard not against such simultaneous and similar attacks but against separate attacks which they may no doubt have thought were attacks separate in point of time. Separate attacks would perhaps have been distinguished by them from an attack in pursuance of common intention even without this direction but the crucial distinction they should have had in mind was that even if this was a simultaneous attack (rather than a series of separate attacks) such attack should have been in consequence of a sharing of intentions rather than in consequence of similar intentions individually entertained by the assailants. The importance of this distinction being clearly brought home to the Jury has, as is in the case of the other matters I have mentioned, been repeatedly stressed by this Court."

In *King vs. Ranasinghe* 47 NLR 373, it was held that common intention within the meaning of section 32 of the Penal Code is different from the 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.

In this case, there is no evidence of a pre-arranged plan or any other evidence of common intention to kill the deceased, which could be attributable to the appellant.

The Learned Senior Additional Solicitor General for the respondent argues that as the appellant has done nothing to prevent the first accused from inflicting the injuries and the appellant dealing a blow on PW2, facilitated the first accused to kill the deceased. Therefore, this shows that the appellant had the common intention to kill the deceased.

At the same time, the Learned Additional Solicitor General concedes the fact that the appellant had not inflicted any injury to the deceased. Further, PW3 has also admitted that the first accused had completed the assault on the deceased when the appellant arrived.

This creates a ground of possibility for other inferences to be drawn from the above facts, such as the inference that the appellant did not participate in a pre-arranged plan with the first accused to murder the deceased. Also, when looking at the admission of PW3, along with the aforementioned evidence of PW8, it shows that there was a time gap between the assault on PW2 and PW3 and the murder of the deceased. This creates further doubt as to whether a pre-arranged plan existed between the first accused and the appellant or whether the first accused was acting by himself. Consequently, a common intention cannot be attributed on the appellant.

In the circumstances, the evidence is insufficient to prove that the appellant shared a common intention to kill the deceased. Therefore, the appellant is acquitted of count one, and the sentence of death is set aside.

However, there is no complaint or argument regarding the conviction of count two and count three. Both PW2 and PW3 stated that the appellant dealt a blow on them. PW2 fell on the ground unconscious having received the blow from the appellant. PW2 had eight injuries. One of the injuries was sufficient in the ordinary course of nature to cause death. There were five grievous injuries. PW3 was also hurt by the appellant

with a club. The medical evidence also corroborates the nature of the injuries. Therefore there is sufficient evidence to support the conviction for counts two and three.

Thus, the conviction and sentence of counts two and three are affirmed. It is further ordered that the sentence be effective from the date of conviction, namely 09/08/2012.

The appeal against the conviction on count one is allowed. The appeal against the conviction of counts two and three is dismissed.

Appeal partly allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal