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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal No:
CA/HCC/0192/2018**

Athige Don Preeman Melat Silva

ACCUSED-APPELLANT

**High Court of Colombo
Case No: HC/8774/1997**

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

**BEFORE : Sampath B. Abayakoon, J.
P. Kumararatnam, J,**

**COUNSEL : Anil Silva, P.C. with Isuru Jayawardena
For the Appellant.
Dileepa Peiris, DSG for the Respondent.**

ARGUED ON : 20/05/2022

DECIDED ON : 20/06/2022

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted with another person unknown to the prosecution in the High Court of Colombo on the following counts:

1. On or about 05.05.1992 at Maligawatta within the jurisdiction of this court the Appellant with another person unknown to the prosecution committed the murder of Sujeewa Samarawickrama and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. At the same time, place and in the course of the same transaction the Appellant with another person unknown to the prosecution committed robbery of a gold chain worth Rs.7,000.00/- in the possession of Samson Samarawickrama and at the time of committing robbery you used deadly weapons to wit a Pistol and bombs and thereby committed an offence punishable under Section 383 read with Sections 380 and 32 of the Penal Code.
3. At the same time, place and in the course of the same transaction the Appellant with another person unknown to the prosecution committed robbery of a gold chain worth Rs.10,000.00/- in the

possession of Sudath Prasanna Samarawickrama and at the time of committing robbery the Appellant had used deadly weapons to wit a Pistol and bombs and thereby committed an offence punishable under Section 383 read with Sections 380 and 32 of the Penal Code.

4. At the same time, place and in the course of the same transaction the Appellant with another person unknown to the prosecution committed robbery of a gold chain worth Rs.7,500.00/- in the possession of Sunanda Samarawickrama and at the time of committing robbery the Appellant had used deadly weapons to wit a Pistol and bombs and thereby committed an offence punishable under Section 383 read with Sections 380 and 32 of the Penal Code.
5. At the same time, place and in the course of the same transaction the Appellant with another person unknown to the prosecution committed robbery of a gold chain worth Rs.10,000.00/- in the possession of Madani Samarawickrama and at the time of committing robbery the Appellant had used deadly weapons to wit a Pistol and bombs and thereby committed an offence punishable under Section 383 read with Sections 380 and 32 of the Penal Code.
6. At the same time, place and in the course of the same transaction the Appellant with another person unknown to the prosecution committed robbery of a gold chain worth Rs.7,500.00/- in the possession of Lilian Samarawickrama and at the time of committing robbery the Appellant had used deadly weapons to wit a Pistol and bombs and thereby committed an offence punishable under Section 383 read with Sections 380 and 32 of the Penal Code.
7. At the same time, place and in the course of the same transaction the Appellant being in possession of an offensive weapon to wit a bomb

committed an offence punishable under Section 2(1)(b) of the Offensive Weapons Act No. 18 of 1966.

The trial commenced before the High Court Judge as the Appellant had opted for a non-jury trial. The prosecution had called 08 witnesses, marked the deposition of a deceased witness under Section 33 of Evidence Ordinance, marked the productions P1-P15 and closed the case. As the prosecution's case warranted a case to answer, the learned High Court Judge had called for the defence and the Appellant had made a dock statement. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant on charges 1,3,4,5 and 6 and acquitted the Appellant on charges 2 and 7. For count number 1 the Appellant was sentenced to death under Section 296 of the Penal Code on 14/05/2018. For the counts 3,4,5 and 6 the Appellant was sentenced to 10 years rigorous imprisonments for each count which are to run concurrently. In addition, the learned High Court Judge had imposed a fine of Rs.10,000/- for each count with a default sentence of 02 years rigorous imprisonment.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in their absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom platform from prison.

The Learned President's Counsel appearing for the Appellant has advanced a singular ground of appeal that is, that the Learned Trial Judge had not analysed the principles of Common Intention accurately and the prosecution has therefore failed to prove the case beyond reasonable doubt.

Background of the Case albeit briefly is as follows:

In this case the prosecution had called 04 lay witnesses and marked the deposition of PW1 under section 33 of the Evidence Ordinance.

In the evidence of PW1 it revealed that he had managed a small temple in which to perform rituals intended to ward off demons and evil spirits from an individual or a location. As usual after attending to his clients he had closed his temple for the public and had been making his way to his house which is also situated on the same premises when two persons had approached him with the intention of getting a king coconut blessed. The time was between 11.30-12.00 mid night on 05/05/1992. Both have had helmets in their possession. Suddenly, the Appellant accusing PW1 of being a bogus ritual performer, pushed the witness in to a small boutique and demanded his gold chain which he usually wore. At that time however, PW1 has not been wearing the chain as he had removed it after work. Due to the commotion that ensued, his sons, daughter and his sister had rushed to the scene immediately. The Appellant had then threatened the witness with an object resembling a bomb and the other person had been armed with a pistol. The other person too had demanded gold jewellery from the witness. The Appellant was standing close to the boutique while the others had stood few steps away from the witness. Then the Appellant had demanded PW1's sister's gold chain and had proceeded to remove it. At that time when this witness had tried to restrain the Appellant, the deceased had come out from his house to save him. Suddenly the other person who had possessed a gun opened fire on the deceased and he had fallen to the ground. As the place of incident was properly lit up with bright lights, he had been able to witness the sequence of events very clearly. When the Appellant along with other person tried to escape after the shooting, the people in the area had apprehended the Appellant and had proceeded to hand him over to the police with the motor bike and the two helmets that had been in the possession of the two perpetrators.

During cross examination this witness had said that when he grabbed the Appellant the other person had threatened him to release the Appellant.

PW2 is the brother of the deceased who too had rushed towards the commotion that day. When he reached the place, he had seen the Appellant keep a small round object on the table and heard him shout out that he was from the STF (Special Task Force) and would destroy everything. At that time the other person who possessed a pistol had told him to rob the house while he was on guard. At that time the Appellant had removed his gold chain and PW3's chain forcefully. Then his father PW1 had scuffled with the Appellant and at that moment the deceased had rushed to the place whereupon the other person had shot at him.

According to PW3, the sister of the deceased, when she went there, she had seen the Appellant and the other person who had then proceeded to brandish a pistol. Immediately thereafter, she had heard the sound of a gun. At the same time the other person who was carrying the pistol had snatched her chain and run away. The people could only apprehend the Appellant at that time. She too had travelled to the hospital along with the deceased as she also has had injuries on one of her hands.

PW5, sister of PW1, in her evidence had stated that she rushed to the place on hearing a mention about the STF. At the scene, she had seen a person standing there who was brandishing a pistol. He had threatened the witness with the gun and ordered her to remove her gold chain and had it over to the Appellant. Out of fear, she had complied with his command. After hearing the gunfire, she had lost consciousness. She too confirmed that the Appellant held an object similar to a ball in his hand.

PW16, the investigating officer had reached the place of incident around 00.15 hours on 06/05/1992. He had arrested the Appellant who was injured. He had observed the place of incident and recovered a motor bike bearing No.118-8550, one spent and one live cartridge, two live hand bombs of which one was of local make, a helmet, a pair of spectacles and a wrist watch. The Appellant had been apprehended by the people of the area at the crime scene and they had proceeded to hand him over to the police.

As mentioned above, the learned President's Counsel has advanced in his argument that the learned Trial Judge has failed to analyse the principles of Common Intention accurately and thereby the prosecution had failed to prove the case beyond reasonable doubt.

The concept of Common Intention and its applicability has been discussed in depth in several important judgments by local courts. Hence, I consider, it is important to discuss this concept before resolving the grievance of the Appellant.

Common Intention is depicted under Section 32 of the Penal Code of Sri Lanka. It reads:

“When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

Common Intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common Intention comes into being prior to the commission of the act, but a long gap in time need not be present. To bring this section into effect a pre-concert is not necessary to be proved, but it may well develop on the spot as between a number of persons and could be inferred from the facts and circumstances of each case.

In **The Queen v. Mahatun** 61 NLR 540 the court held that:

“Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such as if it were done by him alone.

To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-

arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment”.

In **Wimalasena v. IP Hambantota** 74 NLR 176 the court held that:

“Mere presence of an accused person is not sufficient to establish common intention within the meaning of section 32 of the Penal Code”.

In **S. Fernando v. H. De Silva** 68 NLR 166 the court held that:

“In order to sustain the charge based on common intention it is essential that both the accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence”.

Although the accused did not commit any physical act, yet liability could be imposed on him on the basis that his presence was a participatory presence. All these are generally established through circumstantial evidence.

In **King v. Assappu** 50 NLR 324 the court held that:

“In a case where the question of common intention arises the Jury must be directed that-

(i) the case of each accused must be considered separately.

(ii) the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed,

(iii) common intention must not be confused with same or similar intention entertained independently of each other,

(iv) there must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention,

(v) the mere fact of the presence of the accused at the time of the offensive is not necessarily evidence of common intention.

It may also be added that for a charge of murder, it is imperative that the accused entertained a murderous intention along with the perpetrator of the offending act.

With the guidance of the above cited judicial decisions, now I consider the singular ground of appeal advanced in this case by the Appellant.

PW1 in his evidence stated that when he was confronted by the Appellant and the other person, the Appellant threatening him with an object resembling a hand bomb, had demanded his gold chain that he usually wears daily. At that time the other person who possessed a gun had also inquired the witness where his gold jewellerys were. When the deceased rushed to the place the unknown person had opened fire at the deceased. PW1 also stated that both the Appellant and the other person had come in a motor bike and the helmets were on the table. When PW1 grappled with the Appellant, the other person had threatened him to let the Appellant go.

According to PW2, when he too had rushed to the scene upon hearing the commotion, the Appellant had threatened him with an object resembling a hand bomb and had removed his gold chain. At that time the other person who possessed a gun told the Appellant to 'clean' the house while he stands guard there. When his father managed to come out from the boutique, he had seen the other person shooting at the deceased.

When PW3 arrived at the scene, she had seen the Appellant and another person, and the latter had been in possession of a gun. At that time the other person had opened fire and run away after snatching her gold chain.

PW5 in her evidence stated that when she arrived at the scene, the person who possessed the gun held her on gun point and demanded her gold chain. At that time the Appellant had forcibly removed her gold chain. During cross examination she had said that the person who was standing outside the

boutique had ordered her to give the gold chain to the person who was inside the boutique. However, according to PW1, PW2 and PW3 at that time the appellant was the person who was inside the boutique threatening PW1 with an object like a hand bomb.

Analysing the sequence of events described by the lay witnesses, the Appellant and the other person had come together to the temple, threatened the witnesses with dangerous weapons, robbed gold jewellery from witnesses and shot at the deceased in furtherance of common intention. The weapons they possessed and the way that both had behaved clearly indicate that they had common intention in committing the crime. Further, carrying deadly weapons and using them to frighten the witnesses and killing the deceased clearly established their common murderous intention at the time of committing the offence.

Learned President's Counsel for the Appellant citing the judgment of **Somarathna v. Attorney General** [1986] 1 SLR 217 submitted that the Learned High Court Judge has not considered common intention in his judgment. In this judgment the court held that:

“The conviction of the appellant on the basis of his having entertained a common intention along with the other accused cannot stand as the Judge had failed to discuss this rule and apply it to the facts of the case. The prosecution must prove the essentials ingredients of common intention namely a sharing of a common intention and participation in the commission of the offences”.

“Where the prosecution relies on circumstantial evidence for common intention then the principle is that the inference of common intention should not be reached unless it is a necessary inference, an only inference, an inference from which there is no escape. Failure to apply these tests will make the conviction on

the inference that the appellant had acted in furtherance of a common intention unsustainable”.

The Learned High Court Judge, in his judgment has accurately analysed the evidence presented by both parties and arrived at the conclusion that the Appellant with another person unknown to the prosecution had jointly committed the offence as charged in the indictment.

In this case the prosecution had led incriminating evidence of both direct and circumstantial in nature against the Appellant and the circumstances established were consistent with the Appellant’s guilt. Hence, I proceed to dismiss his appeal.

Appeal is dismissed.

The Registrar is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL