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

In the matter of an Appeal under Section 331 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.

The Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No. CA/HCC/0417/2017

Complainant

High Court of Colombo Case No. HC/4492/2008

V.

Nishshanka Dinesh Kumara Silva

Accused

AND NOW BETWEEN

Nishshanka Dinesh Kumara Silva

Accused–Appellant

V.

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

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**
WICKUM A. KALUARACHCHI, J.

COUNSEL : Senarath Jayasundara with Aruny Gamage and Chathurangi Wedage for the Accused – Appellant.

Azard Navavi, Deputy Solicitor General for the Respondent.

ARGUED ON : 30.05.2022

WRITTEN SUBMISSIONS
FILED ON : 11.07.2018 by the Accused – Appellant.

31.08.2018 by the Respondent.

JUDGMENT ON : 25.07.2022

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as the appellant) was indicted in the High Court of *Colombo* on the following 3 counts.

    I. That he was a member of an unlawful assembly with the common object to cause injuries to *Ganga Neranjan Gamage* with others unknown to the prosecution, an offence punishable in terms on section 146 Penal Code.

    II. While being a member of the said unlawful assembly, committed the murder of *Ganga Neranjan Gamage*, an offence punishable in

terms of section 296 to be read with section 146 of the Penal Code.

III. That he committed the murder of the said *Ganga Neranjan Gamage* with others unknown to the prosecution, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

2. After trial, the learned High Court Judge acquitted the appellant on counts no. 1 and 2 and convicted him for count no. 3. Accordingly, he was sentenced to death. Being aggrieved by the above conviction and the sentence, the appellant preferred the instant appeal. In his written submissions the learned Counsel for the appellant urged the following grounds of appeal.

I. The learned High Court Judge failed to analyze properly the evidence for the prosecution case.

II. The learned High Court Judge did not consider the fact that the appellant was not identified and came to a wrong conclusion.

III. The learned High Court Judge did not consider the legal aspect of the doctrine of common intention, properly at his conclusion.

3. The main eye witness to the incident who testified at the trial was the sister of the deceased *Visaka Rathnaseeli Gamage* (PW1). On the day of the incident, she has travelled to *Mount Lavinia* Magistrate Court by bus along with her brother, the deceased and one *Nilanga*. According to her evidence, when the bus halted at the bus stop near the Magistrate Court at about 9.30 a.m. *Nilanga* has got down from the bus first, and behind

Nilanga, her deceased brother has followed. All of a sudden she has seen *Nilanga* running towards the Court as he got down from the bus. When she was getting down from the bus, she has seen a person holding the deceased brother. Then another person who has been hiding behind a lottery hut near the bus stop has come and clutched the brother. More people who had been hiding behind the lottery hut have come and started stabbing the brother. Altogether she has seen five assailants. She has cried out for help. She has identified the four persons who have come out of the hiding from behind the hut as persons she has seen before in courts. One person by the name of *Chaminda Kumara* alias *'Kodiya'* has been known to her. She has seen two persons holding knives. When she cried out, she realized that she was also stabbed. According to her, along with the people who held knives and stabbed the deceased the others have also assaulted him before they took to their heels. Thereafter, she has taken the deceased brother to the hospital. She was also treated for the stab injury that she had sustained on the back of her shoulder.

4. It was evident that her brother was a suspect in a case in the *Mount Lavinia* Magistrate Court where he was charged for attempting to kill the said '*Kodiya*' by shooting. When she went to the police station from the hospital to make the complaint, she has seen the appellant under arrest. She has also seen the knife that was recovered from the appellant by the police at the police station.

5. According to the evidence of PW4 Police officer *Jayantha Bandara*, he has been the OIC of the crimes branch attached to the *Mount Lavinia* police station. When he was travelling to *Mount Lavinia* Courts by the police jeep, he has seen some people

holding knives running away from the Court premises. He has got down from the vehicle and managed to arrest one person who is the appellant. The appellant has been running from the Court premises towards the direction of *Moratuwa*. At that point in time, a woman has informed him that her brother was stabbed. When he arrested the appellant, he has had a knife in his possession which was taken as a production.

6. It has been evident that the PW1 has not attended court to participate in the identification parade as a witness to identify the suspects who were produced before the Magistrate Court. Further, PW1 has not attended the Magistrate Court for the non-summary proceedings. Her evidence was that she has been in hiding, due to the fear of death threats that she has received.

7. The learned Counsel for the appellant contended that, the appellant has not been properly identified by the witnesses at the trial as a person who was involved in the murder of the deceased. The learned Counsel further submitted that, the PW1 has failed to attend the identification parade and therefore, identification of the appellant from the dock at the trial cannot be considered as proper identification of the appellant, to safely convict him. It is the contention of the learned Deputy Solicitor General for the respondent that the appellant has been properly identified as one of the assailants, as the appellant was arrested by the police officer immediately after the incident, when the appellant was running away with the other assailants.

8. The eye witness to the incident PW1, has failed to appear in the Magistrate Court for the identification parade where the appellant was produced as a suspect. The explanation she has

given is that, she went into hiding due to the death threats made by the assailants. She has not even given evidence at the non-summary inquiry. The identification of an accused for the first time in the dock is an undesirable practice. (***R. v. Cartwright*, 10 Cr.Ap.R. 219,CCA**). It is settled law that little or no weight should be given for dock identification as a witness may tend to identify the accused already in the dock assuming that he may have been the person who committed the crime. A trial Judge may permit dock identification if the Court finds that the failure to conduct an identification parade was a result of the suspects conduct or default. However, it is important that the Judge directs himself of the danger of dock identification, reliability of the witness and also whether the accused had a fair trial.

9. In case of ***Holland v. HM Advocate ([2005] UKPC D 1; The Times, 1 June 2005),*** it was held that permitting a dock identification was not per se incompatible with the right to a fair trial. Factors to weigh in the equation of whether an accused had had a fair trial would include whether he was legally represented, what directions the Judge has given about identification evidence and the significance of the contested evidence in the context of the case as a whole. (*Archbold Criminal Pleading Evidence and Practice 2019 at page 1854*).

10. In case of ***Terrell Nailly v. The Queen [2012] UK PC 12***, the Privy Council stated,

> *"When considering the admissibility, and the strength, of identification evidence, it is often necessary to consider separately the circumstances in which the witness saw the accused and* ***the circumstances in which he later identified him****... .The decision whether to admit dock*

identification evidence is one for the trial Judge, to be exercised in the light of all the circumstances. Ultimately the question is one of fairness. …"

11. In the instant case, PW1 testified that the appellant was one of the persons who stabbed the deceased. On the same day, a few hours after taking the deceased to the hospital, she has gone to the police station to lodge a complaint where she has seen the appellant under arrest. PW1 has been cross-examined at length by the Counsel for the appellant. Her evidence has been consistent. She was cross-examined with regard to her seeing the appellant at the police station. However, her evidence that she saw the appellant stabbing the deceased has never been challenged by the defence in cross-examination. Further, her evidence that she saw the appellant at the police station under arrest has also not been challenged by the defence in cross-examination.

12. Police Officer PW4 has testified that, he arrested the appellant while he was running away from the crime scene towards the direction of *Moratuwa*. Although the Counsel for the appellant has cross-examined the PW4 at length, his evidence that the appellant was arrested with the knife while he was running away from the direction of the crime was never challenged.

13. In the above premise, I find that the prosecution has established beyond reasonable doubt, the fact that the appellant was one of the assailants who stabbed the deceased. Hence, the second ground of appeal based on the identity of the appellant should necessarily fail.

14. The learned Counsel for the appellant submitted that the learned trial Judge has found the

appellant guilty on individual liability and not on the basis of common intention under section 32 of the Penal Code. It is the contention of the learned Counsel for the appellant that, there is no direct evidence that the appellant inflicted the fatal injury on the deceased, and therefore the appellant could not have been convicted based on individual liability. The learned Deputy Solicitor General for the respondent submitted that the learned trial Judge has found the appellant guilty on count no. 3 based on acting in furtherance of common intention with others unknown to the prosecution. In that, the learned Deputy Solicitor General further submitted that the rest of the persons accused of the murder in the Magistrate Court were acquitted in the non-summary inquiry.

15. On perusing the judgment of the learned trial Judge, it is abundantly clear that the appellant has been found guilty for count no. 3, not based on individual liability but for acting in furtherance of the common intention with several other persons unknown to the prosecution. At pages 29, 30 and 31 of his judgment (pages 295, 296, 297 of the brief) the learned trial Judge has clearly analyzed the evidence and found the appellant guilty on count no. 3 based on common intention. The learned trial Judge has elaborated further that it is not necessary for the prosecution to prove that the appellant inflicted the fatal injury on the deceased, and that it is sufficient to prove that the appellants act has contributed significantly to the death of the deceased.

16. PW1 has given clear evidence that the appellant was also one of the persons who stabbed the deceased. Further, the appellant was arrested by the police officer PW4, immediately after the incident whilst running away from the crime scene with a knife.

17. In case of ***Dangallage Lionel Peiris and others v. Attorney 111-114/99 (36 2005)*** the court observed,

> *"Murderous intention is something which has to be inferred from the evidence of the case. Sir Mahavan Nair in Mahbub Sha Vs Emperor (supra) observed that "it is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case". Murderous intention has to be inferred from various factors such as the weapon used; gravity and nature of the injuries; place of injuries; and the force used by the assailant to inflict the injury. …"*

18. There is clear evidence that the appellant has acted in furtherance of the common intention to kill the deceased, when they came out of the hiding and flocked around the deceased, stabbed and assaulted him as the appellant got down from the bus. The Medical Officer who conducted the autopsy has observed 29 injuries on the body of the deceased, including thirteen stabs and cut injuries. The learned High Court Judge in his judgment has clearly and properly discussed and analyzed the evidence led by the prosecution as well as the defence (dock statement made by the accused) when concluding that the prosecution has proved the charge in count no. 3 beyond reasonable doubt.

19. Therefore, the learned trial Judge has rightly concluded that the appellant has caused the death of the deceased acting in furtherance of the

common intention of other persons unknown to the prosecution. Hence, the ground of appeal no. 1 and 3 are devoid of merit. Therefore, I affirm the conviction and the sentence imposed on the appellant by the learned High Court Judge.

Appeal is dismissed.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL