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/0333/2019
High Court of Gampaha
Case No: HC/114/2013

1. Hapuarachchige Weerarathna
2. Hapuarachchige Lakmal Nadees Sagara

ACCUSED-APPELLANTS

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 Amaan Bandara and Shaluka Neranga for the Appellants.**
Riyaz Bary, DSG for the Respondent.

ARGUED ON : **23/11/2022**

DECIDED ON : **31/01/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) with 3rd accused were indicted jointly in the High Court of Gampaha for committing attempted murder on Hapuarachchige Roshan Pradeep punishable under Section 300 of Penal Code and voluntarily causing grievous hurt to Hapuarachchige Premadasa punishable under Section 315 of Penal Code. The date of offence was 17th February 2010.

The trial commenced before the High Court Judge of Gampaha as the Appellants had opted for a non-jury trial. The prosecution had called 08 witnesses and marked productions P1-P4. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellants and the 3rd accused had given evidence under oath and closed their case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants for 1st, 2nd counts and acquitted the 3rd accused from the case.

The Appellants were sentenced as follows on 08/11/2019:

- For the 1st Count each sentenced to 12 years rigorous imprisonment with a fine of Rs.5000/-. In default 06 months simple imprisonment.

- For the 2nd Count each sentenced to 01 years rigorous imprisonment with a fine of Rs.2500/-. In default 03 months simple imprisonment.
- In addition, the Learned High Court Judge had directed the Appellants to pay a compensation of Rs.500000/- each to PW1 with a default sentence of 2 years rigorous imprisonment.
- The Court further ordered that the sentences imposed on 1st and 2nd counts to run concurrently and the default sentences to run consecutively.

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

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

Background of the Case.

The 1st Appellant is the father of 2nd Appellant. The 3rd accused who was acquitted is the wife of 1st Appellant and the mother of 2nd Appellant. The injured Premadasa, PW2 is the brother of 1st Appellant and seriously injured Roshan Pradeep, PW1 is the son of PW2.Therefore, it is very clear that the alleged incident had taken place between close relations.

In this case due to the serious nature of the injury sustained on his head at the time of the incident, PW1 could not give evidence in the trial. Further PW17, had been treated as adverse witness as he has given unfavourable evidence for the prosecution. Therefore, the prosecution case is solely rest on the evidence of PW2, who is supposed to be the purported eye witness to the incident.

On the day of the incident, PW2 had gone a nearby land where the 1st Appellant had been residing. Claiming that the land is belonging to him, PW2

had entered the land to harvest bananas and to collect coconuts. At that time, the 1st Appellant, armed with a pole had assaulted PW2 on his back. Further PW2 had heard 3rd accused shouting and asking 2nd Appellant to bring a pole. Immediately, the 2nd Appellant had come to the scene armed with a pole and had assaulted PW2 who was lying fallen on the ground. At that time PW1 had come to the scene and tried to calm down the parties, the 2nd Appellant had chased after him and dealt a blow on his head.

According to PW14, the JMO who examined PW1, stated that a sharp blow to the head had caused brain swelling as well as the cells of the brain to lose its regenerative ability and as a result the function of that part of the brain has ceased. This led the PW1's ability of comprehension and speech and motor functions are retarded as a result of this attack. Also observed that there was bleeding around the eyes. The JMO has also stated that the severity of the injuries are consistent with that of what would be the result of injuries caused by a heavy and blunt weapon.

According to PW15, the doctor who examined PW2 stated that non-fatal wounds were observed on PW2 such as scrapes and bruises which could have been caused as a result of the use of a blunt weapon and the scrapes could have been caused by the edge of the said weapon.

PW6, IP/Wickramsinghe had visited the scene of crime and observed that there was a path of grass and bananas along the way which was flattened. A motor bike was seen fallen on the road.

The 1st Appellant giving evidence from witness box stated that hearing the noise like cutting trees when came out from his house had seen the PW2 armed with a pole and PW1 armed with a knife cutting banana from his land. When he confronted PW2 had assaulted him with the pole he carried and as a result he had fallen on the ground. At that time PW1, did not got involved but tried to stop the fight. At that time 2nd Appellant also rushed to the scene had tried to stop the fight. Then PW2 had assaulted them with the pole to

which they ducked and the blow dealt by PW2 landed on the head of PW1 causing injury to him.

The 2nd Appellant had corroborated the evidence given by his father the 1st Appellant.

The Learned President's Counsel for the Appellants had raised three grounds of appeal which are set out below:

1. Has the prosecution proved the case against the Appellants beyond reasonable doubts.
2. Has the learned Trial Judge failed to consider lesser culpability in this case.
3. Has the learned High Court Judge properly evaluated the evidence pertains to Common Intention.

As the grounds of appeal raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

This case, as claimed by the learned President' Counsel entirely rests on evidence given by PW2.Although PW2 claimed that the land in which the incident had happened is owned by him, this had not been proved by the prosecution as the Appellants were living on the land at the time of the incident.PW2 admitted that the incident happened when he was cutting bananas. This was the sole reason for the incident.

The 2nd Appellant only reached to the place of incident when called by 3rd accused who is the mother of the 2nd Appellant. This had been confirmed by PW2 in his evidence. The 2nd Appellant who had come to the place of incident had assaulted by PW1 and PW2. Hence it is quite clear that the 2nd Appellant only came to the place incident upon calling by the 3rd accused who had been acquitted by the learned High Court Judge from this case. No communication whatsoever had taken place between 1st and 2nd Appellants.

The principle of the 'Common Intention' is that if two or more people who possess the same intention get together for the purpose of achieving their common target and they act in furtherance of the common intention of all, in such an instance all persons who have participated in the commission of the act would be become jointly liable to face criminal charges.

In this case no evidence transpired that the Appellants had actuated common intention at the time of committing the offence. They had only similar intention without knowing each other had the same intention to achieve the particular consequences. As long as they entertain such intention separately, they will be individually held responsible for their actions.

In **King v. Ranasinghe *et al* 47 NLR 373** the court held that:

> *"Common intention within the meaning of section 32 of the penal Code is different from 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, the reasons elaborated above, common intention cannot be attributed between 1st and 2nd Appellants. But the learned High Court Judge had misdirected himself by attributing common intention between 1st and 2nd Appellants. Therefore, I quash the conviction and sentence passed on 1st Appellant on the first count and acquit him from 1st count.

In this case witness PW17, who had been called by the prosecution was treated as adverse witness by the prosecution. Hence his evidence had been entirely rejected by the learned High Court Judge. The prosecution had tried to corroborate the evidence of PW2 through the evidence given by PW17, but ultimately left the court to believe and consider only evidence of PW2 who said to be the eye witness to the incident.

In this case the incident happened in the land where the Appellants were residing at the time of the incident.PW2 had admitted this fact in his evidence. According to the defence evidence the Appellants became entitled to the said land after a District Court Judgment. Hence when PW2 went into

the said land to cut bananas and to pluck coconuts a fight erupted with involvement of PW1 and the Appellants including 3rd accused who was acquitted after the trial.

In this case, initially the fight has started between PW2 and 1st Appellant.PW1 and 2nd Appellant had involved in the fight after seen their respective fathers' involvement in the fight. Sudden fight with provocative action of the parties led to this unfortunate incident. The parties involved in the incident are very close relations.

Considering all the circumstances immerged, I conclude this is an appropriate case to consider the 1st charge under Section 301 of the Penal Code against the 2nd Appellant. Hence, I set aside the conviction and sentence imposed on 2nd Appellant in respect of 1st count by the Learned High Court Judge.

Section 301 of the Penal Code states:

Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, -or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

In **Regina V. Periyasamy 58 NLR 433** the court held that:

"A person charged with murder can, if the evidence warrants it, be convicted of attempt to commit murder or of attempt to commit culpable homicide not amounting to murder within the meaning of section 300 or section 301 respectively of the Penal Code although he was not charged with such offences".

Considering above mentioned reasons, I convict the 2nd Appellant under Section 301 of the Penal Code and sentence him to 7 years rigorous imprisonment with a fine of Rs.5000/-. In default 06 months simple

imprisonment imposed. Further I order a compensation of Rs.750,000/- payable to PW2.In default 2 years rigorous imprisonment imposed.

The sentence imposed in respect of 2nd count against the Appellants are to remain same. Further I order the sentence imposed on the 2nd Appellant in respect of 1st and 2nd counts to run concurrent to each other.

Considering further, I order the sentences imposed against the Appellants deem to have commenced from the date of conviction, namely from 08/11/2019.

Subject to above variation, the appeal is partially allowed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL