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

In the matter of an Appeal in terms of 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 Case No:
CA HCC 231-235-15

High Court of Colombo Case No: 2393/2005

Democratic Socialist Republic of Sri Lanka

Complainant

1. Athagamage Laxman Rohitha Silva
2. Hewa Ranasinghalage Shantha Viraj
3. Ihagama Abagaswela Gedara Weerakkody alias Rohan
4. Atalugamage Priyantha Wijayakumara Silva
5. Nahala Devage Sarath Kumara
6. Thuwan Abdul Rahuman Azaam

Accused

AND NOW BETWEEN

1. Athagamage Laxman Rohitha Silva
2. Hewa Ranasinghalage Shantha Viraj

4. Atalugamage Priyantha Wijayakumara Silva

5. Nahala Devage Sarath Kumara

6. Thuwan Abdul Rahuman Azeem

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant- Respondent

Before : **Menaka Wijesundera, J**

B. Sasi Mahendran, J

Counsel : Rasika Samarawickrama for the 1st Accused-Appellant
Gayan Perera with Prabha Perera and P. Ekanayake for the 2nd, 4th and 6th Accused-Appellants.
Dr. Ranjith Fernando with Maleesha Meera for the 05th Accused Appellant.
Shanil Kularathne, SDSG for the Respondent

Written Submissions On : 07.03.2022 (by the 2nd, 4th and 6th Accused-Appellants)
07.03.2022 (by the Respondent)

Argued On : 28.03.2023

Decided On: 22.06.2023

B. Sasi Mahendran, J

The 1st, 2nd, 4th, 5th, and 6th Accused-Appellants (here in after referred to as Accused) along with one Ihagama Ambagaswela Gedara Weerakkody alias Rohan, deceased by the time the trial had commenced) were indicted as described in the indictment before the High Court of Colombo on the following three counts,

1. 1.That the Accused persons were members of an unlawful assembly with the common object of which was to cause hurt to Roshan Lasantha Gomas alias Shan, and thereby committing an offence punishable under Section 140 of the Penal Code,

2. At the same place, time and in the course of same transaction, being one or more members of the said unlawful assembly, in prosecution of the said common object, caused the death of said Shan and thereby committed the offence of murder punishable in terms of Section 296 read with Section 146 of the Penal Code.

3. At the same place, time and in the course of same transaction, the accused persons, caused the death of said Shan, thereby committed an offence punishable in terms of Section 296 read with Section 32 of the Penal Code.

It should be noted that the abovesaid indictment only be levelled against the above Accused named as only persons who were only participated, whereas the said indictment had not been presented with the phrase "with those unknown to the prosecution".

The trial commenced before the High Court Judge of Colombo on 18th May 2007 where all Accused opted for a trial without jury. The prosecution led evidence of four witnesses including the judicial medical officer. After the conclusion of the prosecution case, for the defense, 1st, 2nd 3rd and 6th Accused made statements from the dock whilst the 5th Accused gave evidence from the witness box. Upon considering the evidence elicited during the course of the trial, the learned High Court Judge by her judgment dated 30th April 2015 convicted all Accused for all charges in the indictment. It was the contention of the learned counsel who appeared for the Accused that their clients had been falsely implicated and that the story of the prosecution cannot be relied upon due

to several inconsistencies and overall lack of credibility, therefore following grounds of appeal was urged by them.

Grounds of appeal

1. Conviction is wholly unsafe in view of the uncorroborated and unsatisfactory nature of the evidence of the sore eye witness.
2. The learned trial judge has failed to apply the principles governing the evaluation of evidence.
3. The learned Trial Judge when writing his judgement has seriously misdirected himself on very critical issues of the facts causing serious prejudice to the appellant.
4. The prosecution has not been able to prove murderous intention of the 4th, 6th Accused Appellants.
5. The accused persons were indicted for being members of an unlawful assembly in the prosecution of common object of which to commit murder of the deceased and thereby committing an offence under section 146 of the Penal Code, but this has not been proved by the prosecution.
6. The evidence available in the present case is not sufficient to convict the Accused Appellants under Section 32 of the Penal Code.

When the matter came for argument on 28.03.2023, the learned Senior Deputy Solicitor General, indicated to this court that the learned Trial Judge did not properly direct herself with regard to the unlawful assembly, very correctly and in the best of spirits demonstrated the role of the Hon. Attorney General not to support the conviction of 2nd, 5th and 6th Accused. As such, 2nd, 5th and 6th Accused were acquitted and the sentences against them were set aside on the same day.

The factual background, in brief, as deduced from the evidence is as follows. According to the eye witness PW1 namely Abeysingha Weerakoon Hettige Roshani Nilanthi Gomas, the sister of the deceased, there was anonymity between the deceased and the neighbors with regard to a pigeon cage belonging to the deceased, which was stolen by unknown persons. It was suspected to be stolen by people who came to buy drugs from the property on which the pigeon cage was located. As a measure of retaliation, the deceased purportedly started attacking people who came to the said property to buy drugs, disrupting the foregoing business activity, which tipped off the neighbors. (It should be noted that except for PW5 all were neighbors.) On the fatal day, PW1 heard the 3rd and

4th Accused call out to the deceased, while they were sleeping. Deceased went out the house from the kitchen door and went to the front as the witness and the family followed him. She could identify the persons at the gate from the street light, as they were neighbors. At the gate, there was an exchange of words between the deceased and the both Accused. She overheard the third Accused saying; (On page 122 of Brief)

"පොලිස් නිලධාරින්ට නතර කරන්න බැරි උන එක කොහොමද නතර කරන්නෙ..."

This piece of evidence had established in this case that 3rd and 4th Accused were indeed neighbors, therefore there arises a motive for the said Accused to attack the deceased. PW1 in her evidence claims there was a three-wheeler stopped at the gate, which she recognized to have belonged to the 5th Accused, who she claims was sitting in the driver's seat. The deceased, then got into a three-wheeler on his own and they proceeded from the house. In the meantime, the third and the fourth Accused persons took steel rods from a nearby land belonging to them and followed the three-wheeler.

Seeing this, she and the rest of the family of the deceased has also run after the two Accused. The three-wheeler stopped about 25 yards from the house, and the deceased got off from the three-wheeler. According to PW1, by this time all six Accused were there. When the deceased got off, the 1st Accused chased him off to the middle of the road and hit his leg with a rod. The deceased fell down, at which point the fourth Accused hit the deceased with a steel rod three times, yelling; (On page 133 of Brief) "උඹ පාරේ නේද".

PW1 claims that the fourth Accused hit the deceased on the head, followed by the first Accused.

(On page 133 of the Brief)

උ - මල්ලි වැටුනට පස්සෙ ප්‍රියන්ත , 4 වැනි විත්තිකරු යකඩ පොල්ලකින් මල්ලිගේ ඔලුවට ගැහුව.

ප්‍ර - ඔලුවට ගැහුවෙ කවුද?

උ - රෝහිත හා ප්‍රියන්ත පමණයි ඔලුවට ගැහුවේ.

As the fourth Accused was hitting the deceased, PW1 has yelled "මල්ලිට ගහන්න එපා", and hanged on to the rod causing him to drop it. Then only the assault was stopped and the deceased by this point had been laying on the road, bloody and groaning. She has identified the 2nd Accused at the scene, but she has not disclosed the degree to which (if any), the 2nd Accused participated in the assault. When the assault stopped, the 6th

Accused gathered the weapons and put them in the three-wheeler and thereafter all six of them have left. It's in PW1 evidence that they struggled to find a three-wheeler to take the deceased to the hospital right away as the neighbors feared to help them in lieu of the events that had just occurred. According to PW1 she identified all the Accused persons as they were neighbors except for PW5.

When we pursue her evidence, we don't see any major contradictions in PW1's evidence, as she's consistent throughout. Minor contradictions in evidence are usually found in witness testimony, especially when the witness has to recollect their memory years after the events. We're mindful towards the observations made by Justice Thakkar with regard to contradiction in Bharwada Bhoginbhai Hirjibhai vs State of Gujarat 1983 AIR HC 753;

> *"… (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another. (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder. (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person…"*

The main argument put forward by the defence is that PW1 is the sole eye witness to the incident, therefore the court could not act upon her sole testimony. With regard to credibility of sole eye witnesses, our courts have followed the dictums pronounced in the following cases.

Anil Phukan v. State of Assam AIR 1993 SC II 1462, A. S. Anand J. along with N. P. Singh J.,

"A conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction."

Wijepala v. The Attorney-General, 2001 (1) SLR 45, Ismail J. held;

"Senaratne who was the sole eyewitness has thus been cross-examined on vital aspects relating to the incident and doubts have been raised in regard to his presence at the scene. Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact, thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial. In this instance, the prosecution has not led any other evidence, which even barely supported Senaratne in regard to the infliction of the injury by the appellant."

We're mindful that the PW1 is the sister of the deceased, which renders her an interested witness. Accordingly, this court has to consider whether there is an independent corroboration available before accepting the evidence of this witness. As per the expert evidence of PW6, Ayanthie Saliya Gunasekara, Judicial Medical Officer who conducted the post mortem, injury No. 1 is identified as a fracture on the head of the deceased and a fatal wound, likely caused by a heavy, blunt object.

At this juncture we will reproduce the relevant portions from an extensive evaluation by the learned Trial Judge of the PW6 evidence for the purpose of clarity.

(on page 427 of the Brief);

තවද මරණකරුගේ ඇගේ ඇති සිරීම් තුවාල සම්බන්ධයෙන් ප්‍රශ්න කිරීමේදී ඔහුගේ ශරීරයේ පිටුපස සිරීම් හා ධරිත තුවාල ඇති අතර ඒවාට උදාහරණයක් ලෙස තුවාල ලැබූ තැනැත්තාගේ පිටුපස තුවාලයක් ඇති වී ඇති වී ඇති අතර අංක 7 තුවාලය ඇති වූ අවස්ථාවේදී සිටගෙන සිටියා යයි සිතිය හැකි බවය. එනම් පපුව පිටුපසට වූ තුවාල නිසා. තවද මරණකරුගේ අත්වල තුවාල පහරදීමකින් සිදුවිය හැකි බවය. උදාහරණයක් ලෙස පොල්ලකින් ගහපු වෙලාවේදී එය වැලක්වීමට ඇත එසවීම නිසා එම තුවාල සිදුවිය හැකි බවය.

(on page 428)

මේ අනුව පැහැදිලි වන්නේ තුවාල අංක 1 මරණය ගෙනදිය හැකි බරපතල තුවාලයක් බවත්, එය මරණකරු බිම වැටී සිටියදී ඔහු ඉන් බේරීමට අත් ඔසවා ඇති බවත්, ඔලුව වලනය නොවීම නිසා ඔලුවට වැරෙන් දෙන පහර වැදීමෙන් මෙම මරණය සිදුවී ඇති බව මම නිගමනය කරමි.

(on page 429)

තුවාල අංක 13, 14, 15 පොල්ලකින් සිදු කළැ තුවාලය ඒ අනුව තු ශරීරයේ තුවාල බාධක හා ධාරිත තුවාල ආයුධ එකකට වැඩි ගනනක් හෝ කිහිපයකින් සිදුවිය හැකි බවය. මොට ආයුධ බවත් එහි බර ගැන කීමට නොහැකි බවත්, ඒ අනෙකුත් තුවාල සිදුකර ඇත්තේ යකඩ පොල්ලකින්ද, ලී පොලුවලින්ද යන්න වෛද්‍යවරියට කිව හැකි නොහැකි බවට සාක්ෂි දී ඇත.

The trial Judge has evaluated PW1 evidence in corroboration with the PW6's expert medical opinion and concluded PW1 to be a trustworthy witness. Therefore, we are of the view that learned High Court Judge correctly accepted the evidence of PW1 as the witness No. 1 is consistent in her evidence and have been corroborated by the expert medical opinion.

The learned counsel for the Accused in his argument, has brought up that the prosecution failed to prove the common intention beyond reasonable doubt. The court has to consider whether 1st, 3rd (now deceased) and 4th Accused shared the common murderous intention to cause death to the deceased. What is common intention is specified in under Section 32 of the Penal Code.

"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"

Before we analyze the evidence, it is pertinent to consider how our courts have interpreted "common intention" and its applicability.

The Queen v. Vincent Fernando 65 NLR 265, Basnayake CJ. held;

"Now where a series of criminal acts is done by several persons, each act would be done either jointly or severally. But whether the criminal acts in the series of criminal acts are done jointly or severally if each criminal act is done in furtherance of the common intention of all each of the persons sharing the common intention and doing any act in the series of criminal acts is not only liable for his own act but is also liable for the acts of the others in the same manner as if it were done by him alone.

The King v. Assappu 50 NLR 324, Dias J. held;

"We are of 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 any one 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 (7) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles.

Wimalasena v. Inspector of Police, Hambanthota 74 NLR 176, Siva Supramaniam, J. held;

"The prosecution apparently relied on S. 32 of the Penal Code to bring home the offences against the 2nd and 3rd accused. It has been repeatedly held by this Court that the mere presence of an accused is not sufficient to establish common intention."

Anthony v. The Queen 55 NLR 35, Gunasekara, J. held;

"A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed. In the present case the jury may well have been satisfied that at the time of the provocation the appellants were already so united by a common bond of relationship to each other and hostility to Mack on the score of his attitude to the third accused, that as soon as he laid hands on the third accused, they readily came to a tacit agreement to inflict grievous injuries on him. In our opinion there is no inconsistency in the verdict."

Raju and Others v. Attorney General 2003 (3) SLR 116, Edirisuriya J. held;

"The learned trial judge has failed to consider the case of each accused separately. He has failed to consider as to whether all the accused were actuated by common murderous intention. There is nothing in the judgement to suggest whether the learned trial Judge looked for evidence of pre arrangement or pre-plan from which the inferences of common intention could be inferred as a necessary and inescapable inference."

The abovesaid judgement was followed **in Kotawila Vithanage Chandradasa and Other v. Attorney General 113-114/2016**, Decided On 26.09.2018,by his Lordship Achala Wengappuli J.

With the above cited judicial decisions, we now consider whether the evidence led by the prosecution regarding common intention is sufficient to prove murderous common intention without any doubt. PW1 in his evidence stated that the 3rd and 4th accused came to their home, thereafter they have followed him with clubs and iron rods. When deceased got down from the three-wheeler 1st Accused started attacking him with the iron rod, as well as the 3rd and 4th Accused. The 4th Accused has hit the deceased's head while others were also hitting with clubs. Learned High Court Judge has reproduced the above evidence in his judgement and decided that 1st and 3rd Accused shared the common murderous intention with 4th Accused. The repeated blows on the body by all three with significant force has established clear murderous intention. Therefore, we hold that 1st, 3rd (now deceased) and the 4th Accused shared the common murderous intention to kill, one Roshan Lasantha Gomas alias Shan.

Unlawful Assembly

The 1st and 4th Accused were also convicted for the first count and second count, that is based on unlawful assembly. Since the 2nd, 5th and 6th Accused were acquitted for all counts including unlawful assembly, and also without the phrase in the indictment that is "with those unknown to the prosecution", whether this court affirms the conviction only against the 1st, 4th along with the 3rd (deceased) for unlawful assembly. This court is mindful that to form unlawful assembly, there should be five or more persons according to Section 138 of the Penal Code. This concept was articulated in the following cases.

The Queen v. Appuhamy 62 NLR 484, Sansoni, J held;

"A common object is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, then their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves. If these elements are established, the prosecution has then proved the existence of an unlawful assembly with that particular common object: see Sukha v. Stale of Rajasthan."

In the light of the authority mentioned above, we hold that persecution has failed to establish with 1st and the 4th Accused were members of unlawful assembly. Therefore, we acquit both 1st and 4th Accused from charges of first and second counts.

We hold that the learned High Court Judge correctly applied the relevant legal principle, in coming to his findings in regard to the third count. Therefore, we affirm the conviction and sentence imposed on the 1st and 4th Accused by the High Court of Colombo.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL