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

Court of Appeal Case No:

HCC – 0433 – 2019

High Court of Colombo Case No:

HC / 3264 / 2006

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Uduwarage Anurudda Saman Silva
2. Degiri Susantha Priyadarshana Silva

Accused

AND NOW BETWEEN

Degiri Susantha Priyadarshana Silva

2nd Accused – Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondent

Before	:	Menaka Wijesundera J.
		B. Sasi Mahendran J.
Counsel	:	Shanaka Ranasinghe P.C. with Niroshan Mihindukulasooriya for the Accused – Appellant.
		Sudarshana De Silva D.S.G. for the State.
Argued on	:	18.07.2023
Decided on	:	05.09.2023

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 28.11.2019 of the High Court of Colombo.

The accused appellant (hereinafter referred to as the appellant) has been indicted along with the 1st accused who had been acquitted by the trial judge, under section 296 of the Penal Code on the basis of common intention.

The grounds of appeal of the appellant were that,

(1) The trial judge failed to consider the improbability of the prosecution version,

(2) The trial judge could not have convicted the appellant after acquitting the 1st accused on the evidence placed before Court,

(3) The trial judge failed to consider the confusion with regard to the recoveries made on the statements of the accused.

The version of the prosecution is that on the day of the incident in the evening the appellant and the 1st accused had arrived at the scene to clear the land adjacent to where the deceased had been living on the request of the deceased and had left manna knives under the chair of the deceased. Thereafter after a while they had arrived again and had called his son the pw1 to bring a crow bar and soon afterwards they had seen the 1st accused assaulting the deceased and the wife of the deceased and his other two children who had been inside the house had come running to the scene and they had seen the 1st accused brandishing the manna knife in his hand, and then afterwards both the appellant and the 1st accused had left the scene together.

The witnesses had identified the appellant using the manna knife marked as P1 and there had been another manna knife marked as P2. Both manna knives had been recovered from the custody of the appellant and the accused. On the statement the manna knife marked as P1 had been recovered on the statement of the appellant and

the manna knife which had been marked as P2 had been recovered on the statement of the 1st accused appellant.

The doctor who conducted the post mortem had observed 7 injuries on the deceased and the manna marked as P1 has had a blunt edged whereas the manna knife marked as P2 has had a curved edge. The doctor had said that injuries on the deceased could have been caused by both knives.

At the conclusion of the prosecution the accused had made dock statements stating that at the time of the incident they had been in the house adjacent to the deceased and they have over heard the noise and this position has not been put to the prosecution witnesses at the time of cross examination. As such we see this as a belated defense.

Hence on the evidence of the prosecution it has been established that the appellant and the accused had come together to the scene and while the 1st accused held a manna knife in hand the appellant had assaulted the deceased and both had fled together. But the manna which had been identified as being used by the appellant had been recovered on the statement of the appellant and furthermore the doctor had identified injuries on the deceased which could have been caused by both the knives marked by the prosecution.

But we observe that the learned trial judge had acquitted the 1st accused and had convicted the appellant. We fail to understand the merit behind this, because we observe that both the accused had come together to the scene of crime and have been armed with manna knives and after the appellant had committed the act both have left together.

The attorney general had indicted the accused on the basis of common intension which is classified under **section 32 of the Penal Code** which read as follows;

"When a criminal act is done by several persons in furtherance of 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."

The above had been discussed in the case of **The Queen vs. Vincent Fernando 65 NLR 265 by Basnayake J,**

"a mental sharing of the common intention is not sufficient the sharing must be evidenced by a criminal act, or illegal omission manifestation the sharing the state of mind ".

As such in the instant matter we find that both accused have come to the scene armed with manna knives before the alleged incident and had left the knives under the chair of the deceased and had come back again together and had been together while the act was committed and there after they have left together. Therefore, we see that they have shared the common intention of causing hurt to the deceased and had acted together in furtherance of the common intention. The injuries identified on the deceased had caused the deceased to succumb to his death due to shock and hemorrhage due to the cut injuries.

The appellant had committed the act although contradicted and the 1st accused had been brandishing a manna knife according to some witnesses and according to others, he had assaulted the deceased in passing.

But none of these had been considered by the trial judge. The trial judge had considered the culpability of the 1st accused and had concluded that it was mere presence although he was armed with a manna knife and there is evidence to say that he had been brandishing the knife while the act of assault was taking place.

Hence, we are unable to agree with the findings of the trial judge of acquitting the 1st accused and convicting the appellant.

We also note that the weapon identified in the hands of the appellant had been recovered on the statement of the 1st accused. The other weapon marked as P4 had been recovered on the statement of the appellant. This discrepancy had not been considered by the trial judge and the culpability of each accused also had not been considered by the trial judge.

Therefore we see that the trial judge had failed to consider the evidence of the prosecution in the correct perspective and thereby has failed to appreciate the ingredients of common intention meaningfully.

At this point we draw our attention to a judgment cited by the Counsel for the respondents and observe that the sentiments expressed in the said judgment had not been followed by the trial judge. It is as follows,

Rodrigi J in James Silva v Republic of Sri Lanka 1980 2 SLR 167 had said,

> ***"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defense in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty. See the Privy Council Judgment in Jayasena vs. Queen 72 NLR 313."***

As such we are compelled to set aside the conviction and the sentence against the appellant and allow the instant appeal but as the incident had taken place in 2003 which is 20 years ago, we do not think it is fair to send the matter for a retrial.

As such the instant appeal is allowed and the sentence and the conviction of the appellant is here by set aside.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL