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

In the matter of an Appeal made in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Alankara Dewage Prasanna Dissanayake
2. Alankara Dewage Roshan Dissanayake
3. Konara Mudiyanselage Hemantha Dammika Kumara alias Ravi
4. Ranasinghe Arachchige Chaminda Pushpakumara alias Patta

Presently at Welikada Prison

Accused

C.A. Case No: **HCC-24 – 27/2014**

(CA 24-27/2014)

H.C. Monaragala Case No: **495/2008**

AND NOW BETWEEN

1. Alankara Dewage Prasanna Dissanayake
2. Alankara Dewage Roshan Dissanayake

3. Konara Mudiyanselage Hemantha Dammika Kumara alias Ravi
4. Ranasinghe Arachchige Chaminda Pushpakumara alias Patta

Presently at Welikada Prison

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Anil Silva, PC with AAL Isuru Jayawardena for the 1st and 2nd Accused-Appellants AAL M. Sharon Seresinhe for the 3rd and 4th Accused- Appellants R. Bary, SSC for the Complainant-Respondent
ARGUED ON	:	03.07.2019
WRITTEN SUBMISSIONS	:	The 1st and 2nd Accused-Appellants – On 17.01.2018 The 3rd and 4th Accused-Appellants – On 17.01.2018 The Complainant-Respondent– On 15.10.2018

DECIDED ON : 31.10.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellants filed these appeals seeking to set aside the judgment of the Learned High Court Judge of Monaragala dated 20.12.2013 in case No. 495/2008.

Facts of the case:

The accused-appellants (hereinafter referred to as the 'appellant and/or accused') were indicted in the High Court of Monaragala for following counts;

- **Charge No. 01** – Against all appellants, for committing the Murder of Jordige Jayasiri on or about 14.06.2002, an offence punishable under section 296 read with section 32 of the Penal Code.
- **Charge No. 02, 03, 04, 05** – Against all four appellants for committing attempted murder on Rathnayake Mudiyanselage Priyanka Rathnayake, Leslie Kumara Hettiarachchi, Rajapaksha Withanage Samarasinghe and Madduma Liyanage Piyadasa and thereby committed offences punishable under section 300 read with section 32 of the Penal Code.

The prosecution led 19 witnesses and marked 'P 01 to P 20' and closed the prosecution case. When the defence was called, all four appellants made dock statements. All appellants were convicted for charge 01 and charge 02 to 05 separately.

The appellants were sentenced to death in respect of the charge 01. Further, each appellant was imposed with a term of 10 years rigorous imprisonment for each charge from 02 to 05.

Being aggrieved by the said convictions and the sentences, the appellants preferred four appeals. All four appeals were taken up together and I will address all four appeals together in this judgment.

Following grounds of appeal were submitted in written submissions of the appellants;

- **For the 1st and 2nd appellants (numbered as extracted from written submissions):**
    1. The prosecution has not proved beyond reasonable doubt as to who threw the offensive weapon or whether an offensive weapon was actually thrown by anyone.
    2. The conviction of the appellants based on common intention cannot be sustained.
- **For the 3rd appellant:**
    1. The Learned High Court judge has convicted the 3rd appellant when he did not share a common intention with other appellants who caused the murder and attempted murder.
- **For the 4th appellant:**
    1. When the identity of the 4th appellant cannot be established beyond reasonable doubt, the Learned High Court Judge has convicted him for murder and attempted murder.
    2. When there was no common intention to commit murder or attempted murder, the Learned High Court Judge has convicted him on the basis of common intention to commit murder and attempted murder.

Incident relevant to the case is summarized as follows;

Priyantha Rathnayake, (hereinafter referred to as the 'PW 01'), who was the officer in charge of the Badalkumbura Police, got information over the phone, on or about

08.15pm on 14.06.2002, that a boutique of one Dananjaya Mudalali had been robbed and a gold chain had been taken. It was further informed that the robbers were heading to Badalkumbura from Butthala in a three wheeler. PW 01 convened a team of police officers and proceeded towards Weragoda. The said Police Officers and a police driver went in a jeep to the scene and the said three wheeler was spotted close to the post office. The Police officers had blocked the said three wheeler from further proceeding, by crossing its path in the jeep. When the officers surrounded the said three wheeler, one of the accused had tried to run away. At this point one of the officers (Dharmasiri – PW 06) was ordered to prevent the said accused from escaping. The said accused was later identified as the 04th accused. As per the evidence, the 1st accused was seen throwing the hand bomb, while the 2nd accused was apprehended by the Police at which point, the 2nd accused escaped. The driver of the three wheeler who was injured in the incident was identified as the 3rd accused. One of the injured officers died as a result of this explosion and four others were injured. One of the said injured officers had his leg amputated as a result. The 1st, 2nd and 4th accused escaped the scene and PW 20 had arrested the 1st and 2nd accused after two days from the incident i.e. on 16.06.2002. The 4th accused was later arrested in May, 2005 at Weyangoda by PW 24.

The 1st and 2nd accused persons were identified in an identification parade on 24.04.2003 and the 4th accused was identified in an identification parade held on 25.05.2005 by the above witness.

Now I wish to consider the 1st ground of appeal urged on behalf of the 1st and 2nd appellants that the prosecution has not proved beyond reasonable doubt as to who threw the offensive weapon or whether an offensive weapon was actually thrown by anyone.

I observe that the 1st to 3rd appellants did not dispute the fact that they were present at the time the explosion took place. In the dock statement, all three of them stated that they were at the scene of crime when they heard an explosion.

The PW 01 and PW 04, testified that they identify the 1st accused as the person who threw a bomb. PW 02 in the identification parade held on 24.04.2003 said that it was the 1st accused who threw the bomb, but in the trial, PW 02 testified that it was the 2nd accused who threw the bomb. PW 03 identified the 1st and 2nd accused were in the scene of crime but he testified that he could not identify who threw the bomb. PW 07 who was the driver of the Police jeep testified that he heard an explosion as he was seated in the jeep. PW 07 further testified that they did not take any bomb with them but only a T56 gun. PW 06 testified that he was chasing the 4th accused that was escaping and then heard an explosion. Therefore, he had stopped following the 4th accused and had come back (Page 450 of the brief). Considering above evidence, it is apparent that there was no possibility of 3rd and 4th appellants to throw the bomb.

The Learned SSC for the complainant-respondent (hereinafter referred to as the 'respondent') submitted that the Medical evidence is consistent with the testimonies of the Police officers who testified at the trial. The medical officer who conducted the post mortem examination of the deceased (PW 15) had identified extensive injuries on the body of the deceased, caused due to an explosion. The two Judicial Medical officers (PW 14 & PW 18) who examined the injured police officers had identified serious injuries on the injured as well which were consistent with injuries, caused as a result of an explosion.

Further, the Government Analyst's Report and the identification parade notes were admitted by the defence, subject to the objections made at the parade.

It is noteworthy that the Learned High Court Judge made observations (during the trial and in the judgment) to the fact that the 1st and 2nd appellants were lookalike.

Considering above, I am of the view that the Learned High Court Judge was correct in coming to the conclusion that evidence of PW 01 and PW 04 about the 1st accused was consistent. Therefore, I am of the view that the fact that the 1st accused threw the bomb was in fact established.

I wish to consider the 2nd ground of appeal on behalf of the 1st and 2nd appellants and the only ground of appeal urged on behalf of the 3rd appellant together. Both these grounds alleged that the conviction of the appellants based on common intention cannot be sustained.

The Learned President's Counsel for the 1st and 2nd appellants contended that there was no pre arrangement nor was there evidence of a pre-arranged plan. The mere fact that an offensive weapon was there (assuming without conceding) in the vehicle, does not mean that the others were aware or had reason to believe that one of them had an offensive weapon. It was further argued that the common intention of the persons would have been to rob the boutique of Dananjaya Mudalali and the said Dananjaya Mudalali was not called to testify. Thus even this matter was not proved by the prosecution.

The Learned Counsel for the 3rd appellant contended that there is no evidence that it was a pre-arranged plan to hire the three wheeler for the robbery and therefore, it cannot be inferred that the 3rd appellant had knowledge of the robbery. It was further argued that there was no participatory presence of the 3rd appellant and it was only a mere presence.

In **General Principles of Criminal Liability in Sri Lanka**[1], the principles on the 'common intention' are described as follows;

> *"...Establishment of a guilty intention common to all the accused persons is a condition precedent of the application of section 32 which, accordingly, does not make necessary any departure from the principle that an accused person may be punished only for his own mens rea, as expressed by a physical act. Section 32, therefore, enables punishment of one particeps criminis for the act of another, but never for the intention or knowledge of another...*
>
> *The two essential prerequisites for invocation of section 32 have reference, respectively, to a mental and a physical element:*
>
> *(I) the sharing of a common criminal intention between or among the accused persons, and (II) the doing of a criminal act by each of the accused persons in furtherance of the common intention of all. These requirements warrant separate investigation..."*

In the case of **The Queen V. P.G. Arasa & another [70 NLR 403],** it was held that,

> *"...This Court has held on numerous occasions that mere presence is not a sufficient circumstance to justify an inference of common intention..."*

In the case of **King V. Jan Singho [41 NLR 573]**, it was held that,

> *"...It does not seem to us that these facts lead one irresistibly to the inference that such a common intention existed on the part of the second and third appellants. Their actions are capable of innocent explanations even though no such explanation was given by either of them..."*

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[1] G.L. Peiris, *General Principles of Criminal Liability in Sri Lanka; A Comparative Analysis*, Stamford Lake Publishers, 2012, P. 416 & 417

In the case of **Mapalagama Acharige Ariyarathne V. Attorney General (1993) BLJR Vol V. Part 1 Pg. 1 (SC No. 31/92),** it was held that,

> *"(a) the inference of a common intention must be not merely a possible inference but a necessary inference.*
>
> *(b) It is a strict rule that the presence of an accused at the scene alone cannot suffice to establish a common intention."*

In the case of **King V. Assappu [50 NLR 324]**, it was held that,

> *"...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..."*

In light of above, it is understood that it is essential for the prosecution to prove that the accused-appellants shared a common intention, beyond reasonable doubt. Even though mere presence of an accused at the scene of crime is not sufficient to establish sharing of a common intention, it is settled law that the common intention would have been arrived at the very instance or just prior to the criminal act was committed.

I observe that the Learned High Court Judge has considered these aspects of common murderous intention in the following manner;

> *"මෙවැනි නඩුවකදී 2,3,4 වුදිතයන් පළවන වුදිතත් සමඟ මිනීමැරීමේ පොදු චේතනාව බෙදා ගනිමින් කටයුතු කළ බවට සාක්ෂි පැමිණිල්ල විසින් ඉදිරිපත් කළ*

යුතු වේ. මෙම ත්‍රීරෝද රථයේ විත්තිකරුවන් එකට පැමිණීමත්, පොලිසිය විසින් ඔවුන් වට කරන ලද අවස්ථාවේ 4වන විත්තිකරු මුලින්ද, 1,2 විත්තිකරුවන් ඉන් පසුවද පැන යාමෙන් ගම්‍ය වන්නේ ඔවුන් එකට පොදු චේතනාවකින් යුතුව කටයුතු කළ බවය. එනම් මෙවැනි පිපිරීමක් සිදු වූ අවස්ථාවක එම අවට සිටි අය යම් කම්පනයකට පත් වී ඒ ආකාරයෙන්ම සිටීම බලාපොරොත්තු විය යුතු නමුත් 1,2,4, විත්තිකරුවන් පිපිරීම සිදුවනවාත් සමඟ එම ස්ථානයෙන් ක්ෂණිකව පැන යාමට හැකි මානසිකත්වයකින් සිට ඇති අතර, එමඟින් ගම්‍ය වන්නේ මෙම විත්තිකරුවන් අත් බෝම්බයක් තිබීම සම්බන්ධයෙන් ඔවුන් අතර පෙර දැනුමක් තිබී ඇති අතර, එම අත් බෝම්බය මෙවැනි අවස්ථාවකදී භාවිතා කරනු ඇතැයි විත්තිකරුවන් දැන සිටි බවය. 3 වෙනි විත්තිකරුද ත්‍රීරෝද රථයෙන් එළියට බැස ඇති නමුත් තුවාල වීම හේතුවෙන් ඔහුට පැන යාමට හැකි වී නැත" (Page 568 of the brief)

It was revealed that the 3rd appellant was wounded by the said bomb-blast and fallen on the ground. PW 08 testified that he took steps to take the 3rd appellant to a hospital with injured police officers and later a statement was recorded from the 3rd appellant.

I observe that it was the position of the prosecution that the team of police officers left the Police Station with the aim of apprehending the perpetrators escaping in a three wheeler. Therefore, the conduct of the appellants demonstrate that they were trying to escape from the Police officers even by inflicting such bodily injury which was likely to cause death. I am of the view that the Learned High Court Judge has arrived at a correct conclusion, after evaluating the evidence before him. All the evidence draws an irresistible inference that the accused persons acted on a common murderous intention which was shared among them.

Therefore, the 2nd ground of appeal on behalf of the 1st and 2nd appellants and the only ground of appeal urged on behalf of the 3rd appellant should necessarily fail.

The Learned Counsel for the 4th appellant contended that the identity of the 4th appellant cannot be established beyond reasonable doubt. It was argued that the Learned High Court Judge has convicted him on the basis that he was identified by 2 witnesses and he has no other connection to this incident. Further, the Learned Counsel for the 4th accused contended that the 4th appellant was arrested and identified nearly after 3 years and therefore, his identity is not proved beyond reasonable doubt and when there is a delay in identification, witnesses could make mistakes.

It is observed that the 4th appellant was arrested in May, 2005 and was produced in an identification parade on 25.05.2005, which was nearly after 2 and half years after the incident in question. The 4th appellant was identified by PW 01 and PW 04 in the said parade. I observe that it was PW 06 who ran after the 4th accused when he escaped from the scene, but he did not participate in the said identification parade. As I have already mentioned in the beginning of this judgment, the bomb was exploded when the PW 06 was running after the 4th accused. Therefore, I am of the view that the witnesses did not have much time to memorize the 4th appellant's face since he fled from the scene from the very first instance and there is a serious danger of mistaken identification.

In the case of **Sri Ram V. State Of Uttar Pradesh [1992 Cri. LJ 2570]**, it was held that,

> *"This delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the appellant..."*

In the case of **Regina V. Turnbull [1976] 3 All ER 549**, it was held that,

> *"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification..."*

In the case of **H.M. Pushpa Kumara alias 'Pushpe' and another V. The Attorney General (2017-2) ACJ 129**, it was held that,

> *"Although the parade notes have been admitted by the appellants in the High Court they have challenged holding of the said parade, on the basis that they were taken out on several occasion whilst they were being held in the Matale Police Station. The prosecution has not given a reasonable explanation as to why the parade was held two months after the appellants were arrested.*
>
> *It was held in Roshan vs AG 2011 1 SLR 364 that; "The identification parade, if it is to be of value, must be held at the earliest opportunity, so that the impression of the witness remains fresh in his mind and he does not have the chance of comparing notes with others."..."*

In light of above, it is understood that the identity of an accused must be proved beyond reasonable doubt and if there is a doubt as to the identity, he should be acquitted. Considering above, especially the delay in holding the identification parade, I am of the view that the identity of the 4th appellant was not proved beyond reasonable doubt and therefore, it is unsafe to convict him for the charges leveled against him. Since the 4th appellant is entitled to an acquittal solely on the

1st ground of appeal, I do not wish to consider the 2nd ground of appeal urged on behalf of him.

Considering above, I affirm the convictions and the sentences imposed on the 1st, 2nd and 3rd accused-appellants and acquit the 4th appellant from all charges leveled against him.

The appeal of the 4th appellant is allowed.

The appeals of the 1st, 2nd and 3rd appellants are dismissed.

This judgment is applicable to all four appeals in HCC-0024-0027/2014.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. The Queen V. P.G. Arasa & another [70 NLR 403]
2. King V. Jan Singho [41 NLR 573]
3. Mapalagama Acharige Ariyarathne V. Attorney General (1993) BLJR Vol. V. Part 1 Pg. 1, (SC No. 31/92)
4. King V. Assappu [50 NLR 324]
5. Sri Ram V. State Of Uttar Pradesh [1992 Cri. LJ 2570]
6. Regina V. Turnbull [1976] 3 All ER 549
7. H.M. Pushpa Kumara alias 'Pushpe' and another V. The Attorney General (2017-2) ACJ 129