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

In the matter of an Appeal in terms of Section 331(3) of the Criminal Procedure Act No. 15 of 1979 read with Article 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/0073/2023

Democratic Socialist Republic of Sri Lanka.

Complainant

High Court of Homagama
Case No: HC/69/2018

Vs.

1. Koralage Jayalath
2. Koralage Indika Prasad Sanjeewa
3. Kasthuri Arachchige Lalinda Prasad
4. Korku Hannadige Lahiru Dilshan

Accused

AND NOW BETWEEN

Korku Hannadige Lahiru Dilshan

4th Accused – Appellant

Vs.

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

Complainant-Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Aruna Pathirana Arachchi for the Accused-Appellant.

Sudharshana de Silva, S.D.S.G. for the Respondent.

Argued on : 22.05.2024

Decided on : 25.06.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 20.03.2023 of the High Court of Homagama.

The accused appellant (here in after referred to as the appellant) has been indicted with three others for murder under the provisions of the Penal Code. The appellant and the other three accused had pleaded not guilty to the indictment and upon the conclusion of the trial the learned trial judge had convicted the appellant and the 1st accused for culpable homicide not amounting to murder on the basis of a sudden fight and has sentenced the appellant accordingly.

The main ground of appeal raised by the learned Counsel for the appellant was that the trial judge had misconstrued in applying section 32 of the Penal code.

The story of the prosecution has rested its case on two eye-witnesses that is PW16 and PW3, but I observe that the evidence of PW3 has been rejected by the trial judge on the basis of the witness being unreliable.

According to the said witnesses, there had been a funeral house in their respective village and both PW 16 and 3 had been present and very late in the night, there had been two groups of mourners playing cards and the deceased, the appellant along with the other three accused had been present.

At some point, both witnesses say that a person by the name of Bache had shuffled the cards and the appellant had objected and a tussle had ensued between them and the deceased had intervened who had been in return assaulted by the appellant and stabbed by the 1st accused. Both eye witnesses

say that it was Bache who started the fight.

There had been an Identification parade held and the notes of the parade had been admitted by both parties and it had been marked in evidence.

But the proceedings show that it had been suggested that the appellant and the other accused had been shown to the witnesses which I think is an objection which is taken up very commonly, and the trial judge also had considered the same and has adverted her mind to the fact that even on the previous day that there had been a fight at the same place. Hence the parties are not entire strangers to each other.

The doctor had observed a fatal stab injury on the deceased along with four other non-grievous injuries.

But this Court observes that although it is the corroborated testimony of both the witnesses of the prosecution that the entire incident was started by Bache the police has failed to investigate in to the presence of Bachi at the scene, but the trial judge had adverted her mind to the same.

But even if Bache had been at the scene and the failure on the part of the police does not wipe away the evidence of the eye-witnesses at the scene.

The Counsel for the appellant only addressed on the applicability of section 32 of the Penal Code which we think is without merit because the liability under section 32 can take place instantaneously and without any premeditation.

The Counsel for the appellant submitted that the appellant did not share a common intention with the other accused at the time of the offence and that there was no prearranged plan among the accused and the appellant, but according to the evidence of the eye-witnesses the person Bachi had been firstly challenged by the appellant and when the deceased had intervened the appellant had assaulted the deceased and has held the deceased while the 1st accused stabbed, which clearly shows although they had not come together, at the time of the incident that the appellant had shared a common intention with the 1st accused.

This has been very carefully gone in to by Basnayake J in the case of **The Queen vs Mahathun and another at 61 NLR 540** that **"when a criminal act is done by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were**

done by him alone. If each of several persons commit a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such act as if it were done by him alone.

To establish the existence of common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre - arranged plan. It can be formed on the spur of the moment".

In the instant matter, the appellant and the other accused has had no pre-arranged plan but it is obvious that the common intention had been shared by the appellant and the 1st accused at the time of the commission of the offence.

Hence, we see no merit in the submission of the learned Counsel for the appellant that the conviction of the appellant is bad in law because the trial judge had misapplied the principle of common intention when convicting the appellant.

The appellants statement from the dock had been rejected by the trial judge on the basis that it had not been put to the witnesses for the prosecution.

But, it is the opinion of this Court that the evidence reveal that the appellant has clearly participated in committing the act of assaulting the deceased.

The doctor had found five injuries on the deceased and one injury had been identified to be fatal and the trial judge had taken in to consideration the nature of the circumstances at the time of the incident and had found the appellant guilty for an offence punishable under section 297 of the Penal Code which I think is justified when considering the evidence of the eye-witness PW 16.

But, this Court fails to see how the trial judge had disregarded the evidence of PW3 who has clearly implicated the appellant, the 1st accused and the 2nd accused.

But, as the trial judge has the priceless opportunity of watching the demeanor and the deportment of the witnesses in the witness box, the trial judge's conclusion that PW3 has been a witness without credibility cannot be over ruled.

It has been held in the case of Sunil Jayaratne vs Attorney General 2011 2 Sri L.R 92 that " unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first hand evidence

put before her to which the judges of the Appellate Court would not have the ability to witness".

Hence, based on the material stated above it is the opinion of this Court that the submissions of the Counsel for the appellant holds no merit hence, we see no reason to set aside the conviction and the sentence imposed by the trial judge, as such, the instant appeal is dismissed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal