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.

The Democratic Socialist
Republic of Sri Lanka

Complainant

C.A. Case No. HCC-55/20

High Court of Gampaha

Case No. 25/2009

Vs.

1. Punala Vidanalage Lakshitha Tharanga Manel.
2. Punala Vidanalage Lakshitha Thushara Manel.
3. Punala Vidanalage Iresha Manel.

Accused

AND BETWEEN

Punala Vidanalage Lakshitha
Thushara Manel.

2nd Accused –Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Sumith Senanayake, PC with Nisali Balachandra for the Accused-Appellant.
Dilan Rathnayake, SDSG for the Hon. Attorney General.

ARGUED ON : 05.02.2024

DECIDED ON : 04.03.2024

WICKUM A. KALUARACHCHI, J.

The 2nd accused-appellant together with another two accused were indicted in the High Court of Gampaha in terms of Section 296, 300, 317, and 314 of the Penal Code. The 1st accused died before the commencement of the trial. After trial, the 3rd accused was acquitted from the charges against him. The 2nd accused-appellant was convicted by the judgment dated 29.07.2020 for committing the murder of one Wasantha Ranjith Abeysinghe, an offence punishable under Section 296 of the Penal Code. This appeal has been preferred against the said conviction.

Prior to the hearing of the appeal, the learned President's Counsel for the 2nd accused-appellant and the learned Senior Deputy Solicitor General (SDSG) for the respondent filed written submissions. At the hearing, the learned President's Counsel for the appellant and the learned SDSG made oral submissions.

The learned President's Counsel for the appellant advanced his arguments on the following grounds of appeal:

i. The learned High Court Judge failed to evaluate the evidence regarding the identification of the 2nd accused-appellant.

ii. The learned High Court Judge failed to evaluate the evidence regarding the injuries sustained by the 2nd accused-appellant.
iii. The learned High Court Judge expected proof of the defence case.
iv. The learned High Court Judge failed to consider the dock statement properly.

This incident had taken place on 23.06.2006. The deceased 1st accused and the 2nd accused-appellant are twins. The eyewitnesses who gave evidence regarding the incident are PW-1, PW-3, and PW-4. PW-1 is the wife of the deceased. PW-3 is a neighbour of the deceased. PW-4 is the wife of the elder brother of the deceased.

As the aforesaid four grounds of appeal are interconnected, I expect to deal with all four grounds together. PW-1, the wife of the deceased stated in her evidence how the incident commenced. She stated that the appellant and his twin brother came together and assaulted her husband (the deceased) with an iron bar. She further stated that one of the twins assaulted her mother-in-law as well. When PW-1 came forward to settle the dispute she had also been hit with the iron bar and was injured. PW-1 had seen the incident up to a certain point and then, she rushed to the police station to make a complaint.

PW-4 has also seen the incident. She stated that the appellant and his brother came with an iron bar and a dagger, grabbed the deceased, and assaulted him. She could not distinctly identify who possessed the iron bar and who possessed the dagger, as they were twins. PW-1 has also stated that one of the twin brothers attacked with the iron bar but she could not identify whether it was the 1st accused or the appellant.

The learned President's Counsel stated at the beginning of his arguments that the appellant does not deny his presence at the scene. As the deceased 1st accused and the appellant are twins, the learned

President's Counsel mainly challenged the findings of the learned High Court Judge regarding the identification of the appellant. The contention of the learned President's Counsel was that it has not been established whether the first accused or the appellant caused the fatal injury to the deceased. The contention of the learned SDSG was that the first accused and the appellant were acting in furtherance of their common intention to kill the deceased and thus, even if the injuries that resulted in the death of the deceased were caused by the first accused, the appellant would be liable under Section 32 of the Penal Code for committing the offence of murder.

At this stage, it is pertinent to consider the doctrine of common intention. Following judicial authorities clearly demonstrate, on what occasions the doctrine of common intention could be applied. In ***Queen V. Vincent Fernando and two others*** – 65 NLR 265, it was held that "to be liable under Section 32, a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act." ***In Richard V. State*** – 76 NLR 534 at 546, it was held "that in the absence of explanation [from Premadasa], the jury were entitled to draw the reasonable inference from all the circumstances that his presence at the scene was a "participating presence" as distinct from a "mere presence" which would have entitled him to an acquittal." [Emphasis added] It is settled law that to convict a person for an offence under common intention, his presence at the scene must be a participatory presence, and mere presence of the accused at the scene is not sufficient.

It was also held in ***Sarath Kumara V. Attorney General*** – C.A. No. 207/2008, decided on 04.04.2014 that "… once a participatory presence in furtherance of a common intention is established at the commencement of an incident, there is no requirement that both perpetrators should be physically present at the culmination of the event unless it could be shown by some overt act that one perpetrator

deliberately withdraw from the situation to disengage and detach himself from vicarious liability."

It is also important to note that in the case of ***Queen V. Mahathun*** - 61 NLR 540, it was held that "to establish an existence of a common intention, it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the movement." In this judgment; it is clearly explained as follows how the criminal liability arises under Section 32 of the Penal Code: "Under Section 32 of the Penal Code, when a criminal act is committed 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 commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each such if it were done by him alone."

Considering the aforesaid decisions, it has to be determined whether the appellant has committed the offence of murder with a common intention with the first accused. Before addressing this main issue of common intention, I intend to consider the impact of rejecting the evidence of PW-3 by the learned trial Judge. The learned Judge stated in his Judgment that contradictions up to V-8 were marked between the evidence of PW-3 and her statement to the Police. In addition, contradictions between her evidence at the trial and evidence at the inquest were marked as V-10 to V-17. When marking many contradictions with her evidence in the inquest proceedings, PW-3 had stated that she did not make those statements when giving evidence at the Inquest. The learned Judge found that PW-3 had not signed her recorded evidence at the inquest proceedings. In the circumstances, the learned Judge took the view that it is not safe to consider those contradictions between her evidence and inquest proceedings as the inquest proceedings had not been signed by her and by other witnesses

who gave evidence in the inquest as well. That is why the learned trial Judge decided not to consider the evidence of PW-3 in determining this action.

The contention of the learned President's Counsel for the appellant was that failing to consider the contradictions marked in the evidence of PW-3 caused prejudice to the appellant because if those contradictions were considered, a reasonable doubt would have been created in the prosecution case. However, the learned President's Counsel did not explain how the non-consideration of PW-3's evidence affects the credibility of the prosecution case. I regret that I am unable to agree with that contention of the learned President's Counsel because failing to consider the evidence of PW-3, who testified as an eyewitness, would be a disadvantage for the prosecution and not for the accused-appellant because the prosecution had to prove the charges beyond a reasonable doubt with the testimony of other witnesses in the absence of the testimony of one of the eyewitnesses.

Now, I proceed to consider whether there was sufficient evidence to prove the common intention of the appellant. As stated previously in this judgment, one of the main contentions of the learned President's Counsel was that there was no proof that the fatal injury was caused by the appellant or there was no proof that the appellant had a common intention in committing the murder.

In evaluating the evidence, the learned trial Judge considered PW-1 and PW-4 as reliable witnesses and acted upon their evidence. The learned Judge has correctly observed that they had given evidence after 12 years of the incident and it is natural to occur discrepancies and omissions in their evidence. However, as there were no vital contradictions or omissions that affected the credibility of their testimony, the learned Judge acted upon their evidence. In the judgment of the Indian Supreme Court in ***Bhoginbhai Hirjibhai V.***

State of Gujarat -AIR 1983 SC 753 it was held as follows: "*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. … 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. … 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. … Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*" I agree with the learned trial Judge that the discrepancies that have arisen in the evidence of PW-1 and PW-4 are the discrepancies that can arise in the testimony of any human being when he testifies after twelve years. As there were no vital contradictions or omissions that affected the credibility of PW-1 or PW-4, the learned High Court Judge is correct in acting on their testimony.

According to PW-4, she had heard a loud voice saying "අයියේ වරෙන් ඉන්නවා" Then, she saw the appellant and the first accused coming armed with an iron bar and a dagger and grabbed the deceased. As they were twins, PW-4 could not identify who was armed with an iron bar and who was armed with a dagger. She also could not say who shouted. However, it is evident that the appellant or his brother, the first accused shouted. According to the appellant's dock statement, the first accused was his younger brother. That is why he has stated in his dock statement that when there was a fight between the deceased and his younger brother, he went to resolve it. Therefore, it must be the first accused who was appellant's younger brother who shouted "අයියේ වරෙන් ඉන්නවා". It is important to note that none of the aforementioned items of evidence were challenged in cross-examination. At least, it has not

been suggested to PW-4 on behalf of the appellant that her evidence of hearing such shouting is false or that her evidence that one of them came with an iron bar and the other person came with a dagger is false. In the case of ***Himachal Pradesh V. Thakur Dass*** (1983) 2 Cri. L.J. 1694 at 1701 V.D. Misra CJ held that "*whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.* Similarly, in ***Motilal V. State of Madhya Pradesh*** (1990) Criminal Law Journal NOC 125 MP it was held that "*Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact.*"

It was held in the previously stated judgment of ***Queen V. Mahatun***, that it is not essential to prove a pre-arranged plan to establish the existence of a common intention. However, in the case at hand, the pre-arrangement is clearly established because when the twin brothers reached the house of the deceased, the first accused had told, brother come, he is here (අයියේ වරෙන්, ඉන්නවා). Thereafter, both of them grabbed the deceased and assaulted him. It clearly reflects that the appellant came with his brother in search of the deceased. Their common intention with a pre-plan of causing a fatal injury to the deceased is also apparent as they came with an iron bar and a dagger.

The Assistant Judicial Medical Officer was of the opinion that the fatal head injury could have been caused by an iron bar. PW-1 stated that twin brothers came together, they assaulted the deceased and one of them struck the deceased with an iron bar. PW-4 has also stated in her evidence that the first accused and the appellant came together, they caught and held the deceased, and the deceased was beaten. She stated further that three of them wrestled there, then the deceased fell on the ground and after he fell, two of them continued to beat the deceased. Furthermore, PW-4 stated that the deceased had been dragged about fifty meters from home and even when the police officers came there, two of them were beating the deceased.

PW-12, the police officer who went there during the incident, corroborates the evidence of PW-4. He stated in his evidence that when he was going to the place of the incident with the other police officers after receiving a complaint from the wife of the deceased, they saw two people beating the deceased who had fallen, and when they saw the police officers, they ran away. Police officers chased the two persons and on two occasions they were caught. The appellant and the first accused were identified as the persons who ran away. So, from the evidence of the police officer, PW-12, who can be considered as an independent witness, it is established that the appellant, together with PW-1, were beating the deceased.

It is precisely clear from the aforesaid items of evidence that the appellant's presence at the scene is not "mere presence," but a "participatory presence." It is established from the evidence of PW-1, PW-4, and PW-12 that the first accused and the appellant came together armed with an iron bar and a dagger in search of the deceased, both of them caught the deceased, assaulted the deceased when fighting with him; even after the deceased fell on the ground, they continuously beat the deceased for some time; during this attack, one of them caused the fatal injury to the deceased by using the iron bar. After causing the fatal injury, when they saw police officers, both of them ran away.

Therefore, from the very inception of the incident until they ran away after causing the fatal injury to the deceased, the appellant was not only physically present at the crime scene but also actively engaged with the first accused in committing the crime with murderous intention. Hence, whoever of them inflicted the fatal blow to the deceased using the iron bar, sharing of common intention by the appellant with the first accused to commit the murder is well established by the manner in which the appellant acted. Even if the first accused had inflicted the fatal blow by using the iron bar, the appellant is liable under Section 32 of the Penal Code for committing the offence of murder, as it is

evident from the circumstances explained above that the appellant and the first accused were acting in furtherance of their common intention to kill the deceased.

The learned President's Counsel for the appellant advanced an argument that the learned trial Judge had not considered the injuries sustained by the appellant. It transpired from the evidence that during this incident, the appellant sustained injuries and was hospitalized. But no evidence was adduced with regard to his injuries. However, it is my view that failure to adduce evidence regarding the appellant's injuries has no effect in determining this action. The appellant and his brother, the first accused, had gone to the place where the deceased was residing; they caught the deceased, and then there was a fight among the deceased, the first accused, and the appellant.

However, it is apparent that the deceased did not caused injuries to the appellant first. PW-1 and PW-4 clearly explained that the appellant and the first accused came to the house of the deceased and they started assaulting the deceased. Even after the deceased was fallen on the ground, both of them were attacking the deceased. After inflicting the fatal injury on the deceased, PW-12, the police officer saw both of them running away. So, within the cause of that fight, the appellant may have sustained injuries. The fact that the appellant was injured during the assault on the deceased has no bearing on the conclusion that the appellant had participated in the crime with the common murderous intention in committing this murder.

Another ground of appeal urged by the learned President's Counsel is that the learned High Court Judge failed to consider the dock statement properly. The appellant, in his statement from the dock stated that "...යද්දිම අතේ තිබුණ මැරිච්ච කෙනාට කොටපු එකෙන් මට කෙටුවා." What he said was that I was attacked by the same thing that was used to attack the deceased. However, the appellant has not disclosed who attacked. Analyzing the dock statement, the learned High Court Judge stated in

his judgment that the only explanation that can be given to the said statement of the appellant is that his brother has assaulted him by something that was used to attack the deceased.

There is nothing wrong with that observation made by the learned Judge because it is apparent from the evidence that only the appellant, the first accused, and the deceased were there when this incident occurred. Therefore, the appellant's brother must have attacked the deceased with some weapon, as it was not possible for the deceased to attack himself. In the said circumstances, the only inference that could be drawn from the appellant's statement that "...යද්දිම අතේ තිබුණ මැරිච්ච කෙනාට කොටපු එකෙන් මට කෙටුවා." is that the appellant's brother has attacked the appellant by using the same thing that was used to attack the deceased.

In addition, the third ground raised by the learned President's Counsel was that the learned trial Judge expected proof of the defence case. The learned Trial Judge observed that the defence that was taken in the dock statement that he went to the place of the incident to settle the dispute had not been suggested to the prosecution witnesses and therefore, the unreliable dock statement does not cast a reasonable doubt on the prosecution case. The contention of the learned President's Counsel was that the said observation is erroneous because it amounts to proving of the defence case.

I regret that I am unable to agree with the said contention of the learned President's Counsel because if the appellant took up a certain position that was not taken up in cross-examining the prosecution witnesses, it is correct to conclude that it is an unacceptable afterthought. When PW-1 and PW-4 stated in their evidence that the appellant and the first accused came together armed with an iron bar and a dagger, it has not been even suggested to these witnesses that the appellant did not come with the first accused, and he came later to that place. In addition, it has not been suggested to the prosecution witnesses that the appellant

came to this place to settle the dispute that had arisen between the deceased and his brother, the 1st accused. So, these items of evidence are unchallenged.

The Indian judgment of ***Sarvan Singh V. State of Punjab*** (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of ***Ratnayake Mudiyanselage Premachandra V. The Hon. Attorney General*** C.A. Case No. 79/2011, decided on 04.04.2017 as follows: "*It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted*." Therefore, the evidence of the prosecution that the appellant came together with the first accused to the house of the deceased armed with an iron bar and a dagger is unchallenged. In the circumstances, the learned Trial Judge is correct in not accepting the entirely different story narrated by the appellant from the dock.

For the above reasons, I am of the view that none of the grounds of appeal urged by the learned President Counsel for the appellant warrants interference by this Court with the Judgment of the learned High Court Judge.

Accordingly, the Judgment dated 29.07.2020, the Conviction and the Sentence imposed on the 2nd accused-appellant are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL