

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

In the matter of an Application made
under section 331 of the Code of Criminal
Procedure Act No. 15 of 1979 being an
Appeal against an Order/Judgment of the
High Court of Hambantota.

The State

COMPLAINANT

Vs

1. J.P. Wilson
2. J.P. Jayantha

ACCUSED

Case No. CA 159/2008

HC (Hambantota) Case No. HC 48/1997

AND NOW BETWEEN

1. J.P. Wilson
2. J.P. Jayantha

ACCUSED – APPELLANTS

Vs

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

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: Achala Wengappuli J.

COUNSEL

: Tirantha Walaliyadde P.C. for the

1st Accused – Appellant

Upul Kumarapperuma for the

2nd Accused – Appellant

S. Naranpanawa S.C. for the

Respondent

ARGUED ON

: 27th May, 2019

DECIDED ON

: 06th June, 2019

Deepali Wijesundera J.

The appellants along with six others were indicted in the High Court of Hambantota for offences punishable under section 140, 296 and 410 of the Penal Code. After trial the appellants were found guilty on the fourth charge for murder and sentenced to death.

The evidence of the prosecution was that on the day of the incident the first and fourth accused had gone to the house of the deceased in the

morning and had an argument which developed into a fight with the two sons of the deceased and another friend who was in the house. Both parties had sustained minor injuries and the first and fourth accused had left the scene. The two sons of the deceased and the friend have gone to the hospitals to get the wounds attended to. Witness number three Kumudini had remained at home with another person. The deceased who had gone out earlier had returned home and was told about the incident. Around noon the first and fourth accused along with some others have gone to the deceased's house and dragged her out of the house and the first accused is alleged to have shot the deceased according to prosecution witness number three's evidence.

The learned counsel for the appellants argued that there was no evidence to say exactly where the first appellant was when the shooting took place. On perusal of the evidence we find that prosecution witness number three first says she was shot inside the house and in another place she has said she was dragged out and shot and she does not clearly say when and how she was shot. The counsel for the first appellant argued that the evidence does not reveal specifically where the first appellant was positioned when the shooting took place. On perusal of the evidence of prosecution witness number three and two it is not clear where the first appellant was when the shooting took place. The appellant's counsel argued that the learned High Court Judge misdirected

himself when he stated that the evidence of prosecution witness number three was corroborated by prosecution witness number two and prosecution witness number seven and prosecution witness number eleven (p. 518). On perusal of evidence we find that prosecution witness number three while giving evidence had contradicted her own evidence. Prosecution witness number three and two have identified the people who came into their house (p. 100 to 109) and (p.188-189) but have contradicted each other on the evidence.

The learned High Court Judge has acquitted the third accused based on the evidence of the third witness for the prosecution and on the same breath has convicted the appellant on the evidence of the same witness. First, sixth, seventh and eighth accused have been acquitted without calling for their defence under section 200 of the Criminal Procedure Code.

The appellants have cited the judgments in **Siriwardene and another vs AG and Q vs Vellasamy** where it has been decided that the testimony of a witness can not be believed to convict one accused and disbelieved to acquit another accused.

On the charge of common intention the appellant's counsel submitted mere presence is not sufficient to convict an accused. In **Piyathilaka and others vs Republic of Sri Lanka (1996) 2 SLR 141, Raju and others vs AG 2003 3 SLR 116** it has been held that common murderous intention must be shared before a person can be convicted for murder under section 32. In the instant case the learned High Court Judge has failed to consider the acts of participation on the part of each one of the accused, and thereby misdirected himself.

When convicting accused on common intention the trial Judge should consider the evidence against each accused separately and see whether they have been acting with common murderous intention when the offence was committed. In the instant case when he acquitted some of the accused the common intention failed and he has erroneously convicted the appellants on common intention. The trial Judge failed to evaluate the evidence of each appellant separately before coming to the conclusion that they committed the murder with common murderous intention. Both appellants have cited a number of judgments on common intention which we have considered. The respondent's counsel did not make any oral or written submission in support of the respondent.

For the afore stated reasons we decide to set aside the judgment
dated 29/05/2008 and acquit the accused appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL