

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

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

Court of Appeal No:

Hon. Attorney General

CA/HCC/0057/16

Complainant

High Court of Kuliyaipitiya

Vs.

Case No: HC/178/2008

Yaapa Mudiyanseelage Nihal alias Edmond
Nihal

Accused

AND NOW

Yaapa Mudiyanseelage Nihal alias Edmond
Nihal

Accused – Appellant

Vs.

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

Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Tenny Fernando for the Accused-Appellant.
Lishan Ratnayake S.C for the Respondent.

Argued on : 25.06.2024

Decided on : 25.07.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 09-02-2016 of the High Court of Kuliyaipitiya.

The accused-appellant (hereinafter referred to as the appellant) has been indicted along with the dead Somapala, who was the husband of the deceased, for committing the death of the appellant's sister.

The appellant had pleaded not guilty and the prosecution had led the evidence of 3 lay witnesses, the doctor and the police officers. The appellant had made a Dock statement and had called one defence witness.

Upon the conclusion of the trial, the learned trial judge had convicted the appellant for murder and had sentenced accordingly. The appellant being aggrieved by the said judgement, has lodged the instant appeal.

The grounds of appeal raised by the learned counsel for the appellant are as below,

1. The trial judge has usurped the role of the prosecutor
2. The appellant has not shared a common murderous intention with the dead-accused, Somapala, at the time of the incident.
3. The trial judge has failed to consider the contradictions and omissions.

The main witness of the prosecution is witness No. 01, namely Nilmini. According to the testimony of Nilmini, her mother, had been living with her on the date of offence (03-06-2006) for medical reasons.

On this fateful day, the deceased had come to visit the mother. The deceased accused (Somapala), who is the husband of the deceased, had come to take the deceased away but she had refused. Thereafter, the deceased-accused had gone away. This had been around 6pm in the evening. Thereafter, the appellant had come to visit the mother with a bottle of drinks, but PW-01 and the deceased had not opened the door. Thereafter, the appellant had also gone away. At about 9.45 pm, Nilmini's in-laws had visited her and when the door was opened to receive the guests, the appellant had walked in, challenging witness Nilmini. Witness Nilmini has said in pg.105 that she and the appellant never got on as siblings but in fact, the appellant had obstructed her education, as well.

At this juncture, deceased-accused namely Somapala, had entered the house with a sword and had confronted the deceased. Thereafter, the deceased had tried to escape

but Somapala had taken the sword and had cut the deceased. At this point, the appellant had taken a knife from the back of his shirt and had told everybody not to move, but witness Nilmini had tried to flee and the appellant had given chase and Nilmini had fallen into an abandoned well. This witness had been thoroughly cross examined, but it appears to be that she had stood the test of cross examination quite satisfactorily. Thereafter, prosecution had lead PW-02, who had corroborated PW-01 and had said that the deceased-accused, namely Somapala, had cut the deceased while the appellant gave chase to witness Nilmini with a knife. In cross examination, this witness had admitted that Somapala and the appellant came to the scene of crime together.

Thereafter, the prosecution had led the evidence of PW-04, who is the daughter of the deceased, had said that at the time of the incident, she had been in a neighbouring house but she saw Somapala and the appellant, leaving the scene of the crime together.

All the lay witnesses and investigative officers had observed that there was sufficient illumination at the scene of the crime and the police had recovered a knife subsequent to the statement of the appellant.

At the closure of the prosecution case, the defence had been called and the appellant had made a statement from the Dock, according to which he had admitted going to the scene, giving chase to PW-01, but had denied sharing a common murderous intention with Somapala. His position is that, cutting of the deceased took place while he was giving chase to witness No.02.

Defence had called a witness and he had corroborated the story for the prosecutor.

In the light of the above mentioned evidence, the first ground of appeal raised by the learned counsel for the appellant is that the trial judge had usurped the role of the prosecution.

The learned counsel for the appellant drew the attention of the court to page 212 of the appeal brief, in which he alleges that the defence witness was led in the absence of a state counsel. But this court observes that the defence witness had been led at the request of the appellant and only the examination in chief had taken place and the cross examination had been postponed to another date. The trial judge has not asked a single question. The cross examination had in fact taken place after two months, therefore the Attorney General had plenty of time to study the examination in chief and cross examine the witness. Therefore, the absence of the state counsel has not caused any prejudice to either party, but we note that the Attorney general has also not objected to the proceedings in pg.212 on a subsequent date. The counsel for the appellant submitted a lengthy written submission on this and has quoted many Indian judgements.

But in the instant matter we observe that, for the reasons stated above that none of the prejudice cited in the judgments submitted by the appellant had taken place in the instant case. Therefore, we see no merit in the first ground of appeal.

The second ground of appeal raised by the counsel for the appellant was that the appellant did not share a common murderous intention with Somapala.

But upon perusing the above mentioned evidence, the appellant had walked into the scene of crime with a knife hidden inside his shirt and the deceased Somapala had followed soon afterwards. Prior to this, the appellant had come to the scene of crime to visit his mother and he had been drunk and turned back and sent by witness Nilmini and the deceased. The appellant has supposed to have said, brandishing his knife, for everybody to be in the places they were, which the defence had challenged with a contradiction which the trial judge had overruled. The appellant had left the scene with the dead Somapala and the appellant has always had a bad relationship with witness Nilmini.

All these items of evidence against the appellant had been considered thoroughly by the trial judge in his judgement. The appellant in his dock statement had tried to show that at the time Somapala was stabbing the deceased, he was giving chase to witness Nilmini. But this line of defence had not been taken up during the cross examination of the witnesses, therefore the trial judge had rejected the dock statement. The defence witness had also spoken in line with the prosecution witnesses. Therefore, in view of the above mentioned evidence, it cannot be held that the appellant did not share the common murderous intention with the deceased Somapala.

At this point the court draws its attention to the case of **The King v Asappu et al (1948) 50 NLR 324 at 329**, Justice Dias stated that, “there must be evidence, direct or circumstantial, either of a pre-arranged plan or a declaration showing common intention , or some other significant fact at the time of the commission of the offence to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other.”

In the case of **The Queen v J Mahatun (1959) 61 NLR 540 at 546**, former Chief Justice Basnayake stated that in order to prove the existence of common intention, it is not essential to prove that the criminal act was done pursuant to a pre-arranged plan. Common intention can come into existence at the spur of the moment.

Therefore, we see no merit in the second grounds as well.

The third ground of appeal is the allegation that the trial judge had not considered the contradiction in the evidence of the prosecution. But we observe that the trial judge has considered v1-v4 in the relevant portions of evidence in the prosecution very lucidly and clearly. Therefore, we are compelled to overrule the said ground of appeal as well.

As such, we see no merit in the submission of the learned counsel for the appellant and there is no worthy ground to set aside the conviction and the sentence entered by the trial judge against the appellant. Hence, the instant appeal is dismissed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal