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 and in terms of High Court of Provinces (Special Provisions) Section 19 of 1990.

Court of Appeal Case No:

CA-HCC-105-106/20

HC of Kaluthara Case No:

HC 615/06

Democratic Socialist Republic of Sri Lanka

Plaintiff

v.

1. Thudugalage Don Lasantha Niroshan
2. Thudugalage Don Lakshman Priyankara
3. Thudugalage Don Ajith Priyantha
4. Kaluarachchige Somasiri
5. Thudugalage Don Piyasena
6. Mallawaarachchige Leelawathi
7. Kurundukarage Manjula
8. Dodangoda Hewage Jayawathi

Accused

AND NOW BETWEEN

2.Thudugalage Don Lakshman Priyankara

4. Kaluarachchige Somasiri

Accused-Appellants

v.

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

Plaintiff-Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Neranjan Jayasinghe for the 2nd Accused-Appellant
Nalaka Samarakoon with Vimukthi Weragama for the 04th Accused-Appellant
Dileepa Pieris, SDSG for the State

Written Submissions: 13.07.2021, (by the 1st Accused-Appellant)
04.08.2021 (by the 4th Accused-Appellant)
On 11.01.2022 (by the Respondent)

Argued On: 30.11.2023

Decided On: 14.12.2023

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Sasi Mahendran, J.

The 2nd Accused Appellant (hereinafter referred to as the 2nd Accused) and the 4th Accused Appellant (hereinafter referred to as the 4th Accused) along with six other Accused were indicted before the High Court of Kaluthara for the following counts,

1. On or about 11 March 1998 at Iddagoda, the Accused committed an offence in terms of section140 of the Penal code by being members of an unlawful assembly with the common object of causing injuries to Thudugalage Don Chandrasena and Thundugalage Don Nishani Shashikala.

2. In the course of the same transaction, the Accused committed an offence in terms of section 146 read with section 296 of the Penal Code by committing the offence of murder of Thudugalage Don Chandrasena.

3. In the course of the same transaction, the Accused committed an offence in terms of section 146 read with section 296 of the Penal Code by committing the offence of murder Thudugalage Don Nishani Shashikala.

4. In the course of the same transaction, the Accused committed an offence in terms of section 296 read with section 32 of the Penal code by committing the offence of Murder Thudugalage Don Chandrasena

5. In the course of the same transaction, the Accused committed an offence in terms of section 296 read with section 32 of the Penal Code by committing the offence of Murder Thundugalage Don Nishani Shashikala.

When the indictment was served on 09.06.2006 except for the 3rd Accused all the Accused were present. The 3rd accused had been tried in his absentia. Before the trial commenced since the 1st Accused was dead, steps were taken to amend the indictment.

The Prosecution led evidence of two lay witnesses and seven official witnesses and marked documents and productions P1 to P8. After the conclusion of the Prosecution case, the 4th Accused remained silent while the 2nd,5th,6th,7th, and 8th Accused made dock statements.

After the conclusion of the trial, the Learned High Court Judge delivered the judgment on 10.06.2020 and found the 1st, 2nd, 3rd, and 4th Accused guilty of the 4th and 5th Count in the indictment and was imposed death sentence and acquitted on 1st,2nd, and 3rd count. Further, he acquitted the 5th, 6th, 7th and 8th Accused from all counts.

Being aggrieved by the said conviction the 2nd and 4th Accused have appealed to this court.

The following are the grounds for Appeal,

1. The Learned High Court Judge had erroneously arrived at a conclusion that both Accused Appellants had participated in the crime with the 1st Accused and 3rd Accused in the indictment with a common murderous intention.

2. The Learned High Court Judge had rejected the dock statement of the 2nd Accused Appellant on unreasonable grounds.

Following are the facts and circumstances of this case;

PW01 Duwage Piyaseeli Hemalatha, is an eyewitness to this incident. PW01 who is the wife of the deceased Thudugalage Don Chandrasena (1st deceased) and mother of Thundugalage Don Nishani Shashikala (2nd Deceased).

According to PW01, her husband the first deceased has 9 brothers. Two of the brothers; Piyasena (5th Accused), Amarasena and the deceased were living with their family in the same undivided land of ½ Acres. PW01 family lived in a small house. There was no electricity to the said house hence they used to light 3 oil lamps at night.

PW01 states that there has been a long-standing animosity between the deceased and his brothers about the land they were residing, before this incident about 20-25 days earlier Amarasena had thrown acid at the said deceased and was under medication for 11-15 days.

As per the witness, Amarasena had two sons and a daughter. Lasantha Niroshan 1st Accused is the eldest of the three. Piyasena (5th Accused) was married to Leelawathie (6th Accused) and had three sons namely Lakshman Priyankara (2nd Accused), Ajith (3rd Accused), and Baby Hamu.

On 11.03.1998 the day of the said incident, the PW01 was preparing dinner while her husband(the 1st deceased) was in the living room and their daughter playing near the front door. Around 7:30 pm 1st and the 3rd Accused arrived at their house requested rice for dinner. At this hour the three oil lamps were lit inside the house. Despite this being an unusual behavior, with the permission of her husband (1st deceased), Pw01 had served rice to both the 1st and 3rd Accused. Thereafter they took the plate to a rock near the kitchen and called out for Somasiri (the 4th Accused). The 3rd Accused had brought a Kassippu in a can with him and had forcefully taken a glass from PW01 to drink it.

The 1st Accused after eating rice, called her husband to come out to convey a message. When the deceased came out there, the 1st Accused had taken a sword from his backside and attacked the deceased. While the 1st Accused was attacking the 3rd Accused had shouted saying " Kapann Kapann". PW01 states that due to the stabbing, the deceased head fell off to the ground.

In the meantime, the 4th Accused came from the back door to attack her. When she tried to escape through the front door 2nd Accused blocked her from going out. Thereafter she somehow managed to flee from the back door and hid herself beside a shrub near her house until the police came.

Then the 5th,6th,7th, and 8th Accused whom PW01 has recognized from their voices have come in search of the PW01 uttering the word that if they leave her alive, they would have to face a trial hence she should be cut into 100 pieces.

When we consider this evidence, we observe that there are no major contradictions marked by the defense. Also, we noticed she was consistent and learned High Court Judge had correctly considered her evidence as truthful evidence. There is no reason for us to disbelieve her evidence.

According to the JMO (PW08), he has observed 3 stab injuries that are deep in the body which could cause instant death. He has also done the post-mortem of the 2nd deceased who also received the cut injuries.

When we consider the evidence placed before the high court judge there is sufficient evidence to establish that the 1st and 3rd Accused are guilty of the murder of the 1st deceased namely, Thudugalage Don Chandrasena. About the murder of the 2nd deceased, there is no iota of evidence placed before the high court judge to prove the murder. But the learned high court judge has convicted the 1st -4th Accused for the 5th count. We hold that said conviction could not stand.

The question before us is whether the 2nd and 4th Accused had a common intention to commit the offence of murder with the 1st and 3rd Accused.

There is only one eyewitness available in this case namely Duwage Piyaseeli Hemalatha (PW01).

According to her, the 1st and 3rd Accused came together and the 1st Accused stabbed the deceased while the 3rd Accused said "Kapapan kapapan". According to PW01 2nd and 4th Accused were not present at the time of the stabbing. According to her, they have come later to attack her. Therefore, they were not present at the time of the incident. There is no evidence to establish that they shared a common intention with the 1st and the 3rd Accused to murder the Thudugalage Don Chandrasena.

According to her evidence

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ප්‍ර : ලසන්ත ස්වාමී පුරුෂයාට පහර දෙන විට සෝමසිරි කොහෙද හිටියේ?

උ : බිත්තිය මුල්ලට වන්නට කවර් වෙලා හිටියේ.

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ප්‍ර : ලසන්තට කොච්චර දුරකින්ද හිටියේ?

උ : අජිත් ඉස්සරහින් හිටියා. ස්වාමී පුරුෂයා ඉන්න තැන හිටියේ.

ප්‍ර : ලසන්තට කොච්චර දුරකින්ද සෝමසිරි හිටියේ?

උ : ලසන්තට සහ අජිත්ට පිටුපස්සෙන් හිටියේ.

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ප : ලසන්ත ස්වාමී පුරුෂයාට පහර දෙන විට ලක්ෂ්මන් කොහෙද හිටියේ?

උ : ඉස්සරහා. මම කලබලයෙන් ඉස්සරා ලක්ෂ්මන් හිටියා.

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ප්‍ර ; ඔබ කොහෙටද දිව්වේ?

උ : මම පිටුපස්ස දොරෙන් දුවන වෙලාවේ අල්ලාගෙන පිහියෙන් අනින්න හදනකොට සෝමසිරි තල්ලු කළා. දිව්වා පස්ස නොබලා.

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අධිකරණයෙන්,

ප්‍ර : ඔබ ඉදිරියේදී දැක්ක අය කව්ද?

උ : ලක්ෂ්මන් ප්‍රියන්ත.

ප්‍ර : තව කව්ද?

උ : එව්වරයි. මා වට කර ගන්න දිව්වා. සෝමසිරි මාව අල්ලා ගත්තා. ඒ පුද්ගලයා කඩුවෙන් ගැහුවට පස්සේ මගේ මහත්තයා මැරුණා කියලා මා කෑ ගැහුවා.

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ප්‍ර : ඒ වෙලාව වනවිට එතන හිටියේ අද දින නැති අජිත් ප්‍රියන්ත, ලසන්ත නිරෝෂණ විතරයි?

උ : එහෙමයි.

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උ : ලසන්ත නිරෝෂන් කඩුවෙන් කොටලා එයාගේ ගෙදර පැත්තට දිව්වා. කලබලයට පත්වෙලා පිටිපස දොරින් එන්න හදනකොට ආපහු හැරුනා. හැරෙනකොට කුස්සියේ දොරින් ඇතුල් වුනා සෝමසිරි. ඇතුල් වෙනකොට දරුවාගේ තොටිල්ලට වැටුනා. ඒ පාර තමයි කව්ද ගාගෙන දිව්වේ. ඔක්කොම බලන්න ආපු කට්ටිය මෙයාලා.

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අධිකරණයෙන්

ප්‍ර : කව්ද ආවේ?

උ : මෙයාල පිටුපස පැත්තෙන් කලබලයට පත්වෙලා ඉස්සරහ දොරින් එලියට එන්න ආවා. සාලෙන් දුවගෙන ආව එලියට එන්න. ඒ එන්න එනකොට ලක්ෂ්මන් ඉස්සරහ දොරකඩ. ඊටපස්සේ මම කලබලයට පත්වෙලා දුවන කොට කුස්සියෙන් ඇතුළු වුනා සෝමසිරි. බෙල්ලෙන් අල්ලා ගත්තා. බබාගේ තොටිල්ලට තල්ලු කරලා මම පැනලා දිව්වා. ඒ දුවලා කැලේ සැගවුනාට පස්සේ මම පසුවදා තමයි එලියට ගෙනාවේ.

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උ : කලබලයට පත් වෙලා ලක්ෂ්මන් පිටුපසට පනිනකොට සෝමසිරි ඇතුල් වුනා මතක තියෙන විදියට.

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ප්‍ර : සාක්ෂිකාරිය කියන විදියට තමාගේ ස්වාමී පුරුෂයාට ලසන්ත නිරෝෂන් කඩුවෙන් පහර දීල ඒ වැටිලා ඉවර උනාට පස්සේ කෑ ගහගෙන තමාගේ නිවස ඉදිරියට දුවනකොට තමයි දැක්කේ ලක්ෂ්මන් නිවසේ ඉදිරිපස පැත්තෙන් එනවා,

උ : එහෙමයි

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ප්‍ර: ඉස්සරහ දොරකඩ ලඟදි ලක්ෂ්මන් දකින්න කලින් ඊට පෙර අවස්තාවක ඔහු දැක්කද?

උ : නැහැ. මම දැක්කේ නැහැ කුස්සියේදී වායාව තමයි දැක්කේ ඒ වෙලාවේ තමයි දැක්කේ ඊට කලින් දැක්කේ නැහැ.

ප්‍ර: සෝමසිරි කොයි වේලාවේද ආවේ?

උ : සෝමසිරි සිද්ධිය වුනාට පස්සේ කුස්සි දොරෙන් පැන්නා.

ප්‍ර : පැන්නා කියන්නේ?

උ : දුවගෙන ආවා මාව අල්ලගන්න, අල්ල ගත්තා කුස්සියේ දොරකඩත් එක්ක කාමරය ඔහොම කිට්ටුව මම පිහිය මෙහෙම කරනකොට කෑ ගැහුවා.

section 32 of the Penal Code read as follows.

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

Section 294 of the Penal Code states that "except in the cases hereinafter excepted, culpable homicide is murder…..Thirdly - If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. "

I would like to quote the words uttered by **Alles J in The Richard's case reported in 1956,AC 576**

"If two persons took part in the assault on the deceased in furtherance of the common criminal purpose of causing the death of the deceased and one of them struck the fatal blow, even if it was not the Accused, the then Accused will be guilty of murder"

The above-mentioned dictum was referred to by Eric Basnayake J in **Werrappulige Upasena and eight others Vs. Attorney General CA6-8/2003 decided on 22.08.2006.**

Sir Madhavan Nair in Mahubub shab v Emperor A.I.R (32) 1945 Privy Council 118 on page 120 held that;

"In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word: persons" and before the word "each", so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say " an intention common to all". Under the section, the essence of that liability is to be found in existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention, in invoke the aid of S.34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act

were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case.

The above proposition was followed by **Soertsz A C. J. in the case of the King v, Ranasinghe . 1947 NLR On p. 375 held that;**

"As pointed out by their Lordships of the Privy Council in the recent case of *Marbub Shan V. Emperor* "Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin; nevertheless the distinction is real and substantial and if overlooked will result in miscarriage of justice. In their Lordships' opinion, the inference of common intention within the meaning of the term in section 34 (i.e., sect on 32 Ceylon) should never be reached unless it is necessary inference and it appears to us that, in the circumstances of the case before us too, it would be safer not to draw the inference of a common intention .There is no evidence at all of any prearrangement or even of any declaration or of any other significant fact at the time of the assault to enable one to say more than that the assailants had the same or similar intentions entertained independently by each of them."

In King v. Piyadasa 48 NLR page 295 Howard CJ has considered the ditum of Mahbub Shah v. Emperor and held that;

"In the present case there is really no evidence of a pre-arranged plan. There is no evidence of any connection between the first accused and the three others prior to the assault. It is not clear what the second, third and fourth accused were doing and where they had been prior to their arrival on the scene. Nor during the assault did the four accused say anything to indicate that they, were acting in furtherance of a pre-arranged plan. It is true that they all seem to have been armed with the same type of weapon. Moreover the second, third and fourth accused joined in the attack on the deceased very soon after he had been hit on the head by the first accused. This circumstantial evidence does not in our opinion place beyond all reasonable doubt the question as to whether they all shared a common intention to commit the offence of murder."

Basnayake, CJ in The Queen v. Vincent Fernando 65 NLR 265 held that,

A person who does a criminal act by himself is liable for that act if it offends any provision of the penal law. The above section does not deal with the liability of a person for the criminal act he himself does but with his liability for the criminal acts of others. What are the prerequisites of such liability? Several persons must have a common intention to do a criminal act, they must all do that act in furtherance of the common intention of all. In such a case each person becomes liable for that act in the same manner as if it were done by him alone. By virtue of the definition of " act " in section 31 of the Penal Code, the application of the section also extends to a series of criminal acts done by several persons in furtherance of the common intention of all. There are more cases which fall within the extended application than within the unextended. Now where a series of criminal acts is done by several persons, each act would be done either jointly or severally. But whether the criminal acts in the series of criminal acts are done jointly or severally if each criminal act is done in furtherance of the common intention of all each of the persons sharing the common intention and doing any act in the series of criminal acts is not only liable for his own act but is also liable for the acts of the others in the same manner as if it were done by him alone. For instance, if a man is done to death by several blows struck by several persons in furtherance of the common intention of all, each person is liable not only for the blow dealt by him but he is also liable for each of the blows dealt by the others in the same manner as if all the blows were dealt by him alone, and where death results from the blow of one of them and it appears that the common intention of all was to cause death, each of those who did criminal acts in furtherance of the common intention of all is liable for the at of the person whose blow resulted in the death of the deceased. It is not necessary to prove who struck the fatal blow. A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. **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. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind**. In the Penal Code words which refer to acts done extend also to illegal omissions (s. 30). What has been stated above in regard to criminal acts therefore apply to illegal omissions as well. (emphasis added)

Punchibanda v. The Queen 74 NLR 494, Sirimane, J in held that:.

"The evidence, in our view, falls short of establishing a common-murderous intention shared by the appellants.

Learned Crown Counsel submitted that if the 2nd and the 3rd Accused appellants had formed a common intention with the 1st Accused-appellant to merely assault the deceased, and if the 1st Accused-appellant stabbed him to death, then, even if the 2nd and the 3rd Accused-appellants had no knowledge that the 1st Accused-appellant was armed, or that he would use the knife to kill the deceased, still, they (the 2nd and the 3rd Accused-appellants) would be guilty of murder. In other words, that under section 32 of the Penal Code a person can be found guilty of murder on the basis of common intention, even if that person did not share a murderous intention with the person who actually committed the act, if the act was done in furtherance of a common intention to commit some other offence. No authority was cited to us for this proposition. On the contrary, our Courts have always held **that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32. (see e.g. King v. Assappu)**

In our view, before a person can be held vicariously responsible for the criminal act of another under section 32, the prosecution must prove that such a person shared a common intention to commit that particular act. (emphasis added)

In Banda and Others v. Attorney General, 1999 (3) SLR 168 Jayasuriya J. held that;

"It is manifest that learned trial Judge has used the term common intention only in one solitary passage in his judgment at page 181, He has culpably failed to consider the acts of participation on the part of each one of those Accused separately, to analyse these acts and relate them to the principles of law relating to common intention and having regard to their respective acts to determine whether they were actuated by a common intention. Justice Dias in King v. Asappu (1) laid down the principles that it is the bounden duty of the trial Judge to indulge in this process and that the same duty prevails even when the Accused is tried without a Jury. **Further, the trial Judge has not given his mind in regard to counts six and seven and considered whether the Accused were actuated by a common murderous intention to commit the offence set out in counts six and seven.** Justice Sirimane in Punchi Banda v. Queen(2) set aside the conviction in a situation where the trial Judge had not distinguished between the required common murderous intention and any other common intention entertained by the Accused. This is an error made by the

instant Judge when he failed to consider whether the Accused were actuated by a common murderous intention. These non-directions and mis-directions are in regard to vital aspects of the prosecution case and related to the ingredients of the offence and therefore the findings, convictions and sentences pronounced cannot be sustained."(emphasis added)

In Mapalagama Acharige Ariyaratne v. The Attorney General, SC 31/92, Decided on 05.11.1993,(1993 BLR Vol. V. Part 01, Page 01,). G.P.S. De Silva. CJ held that;

"It is well-settled law that the interference of a common intention " must be not merely a possible inference but a necessary inference, that is to say, an inference from which there is no escape."

Fernando and Others v. The Queen, 54 NLR 255 at 260. At the most, the prosecution is left only with the presence of the appellant at the scene, and that too not at the time of the attack upon the deceased. **It is a strict rule that presence alone cannot suffice to establish a " common intention."**

The appellant could have been convicted of murder only on the basis that he shared a common murderous intention with. There is no acceptable evidence to support such a finding. The verdict of the Jury is clearly unreasonable, having regard to the evidence. The appeal is accordingly allowed., the conviction and sentence of the appellant are set aside and the appellant is acquitted." (emphasis added)

Considering the above facts and the judgment about the common intention there is no evidence that the 2nd and 4th Accused were present when the said incident took place. The prosecution has failed to prove that they (the 2nd and 4th Accused) shared a murderous intention with the 1st and 3rd Accused who caused the murder of the deceased.

The issue before us is whether the 2nd and 4th Accused have shared the common intention, there is no evidence to show that they came together. Also, there is no evidence to show that there was a pre-arranged plan or they were there at the time of the incident.

We also note that there is no iota of evidence to prove the 2nd and 4th Accused shared murder intention with the 1st and the 3rd Accused.

Since there is no acceptable evidence to support such a finding, the conviction is unreasonable. Therefore we set aside the conviction and sentence of the appellant. Both the 2nd and 4th Accused Appellants are acquitted.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL