

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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/0192/2023
High Court of Homagama
Case No: HC/122/2018

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Bamunusinghe Arachchige
Dayananda
2. Kariyawasam Katuwana
Vithanalage Ajantha Kariyawasam

ACCUSED

AND NOW BETWEEN

Kariyawasam Katuwana Vithanalage
Ajantha Kariyawasam

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Keheliya Alahakoon for the appellant.**
Shanil, Kularatne, PC, ASG for the
Respondent.

ARGUED ON : **11/02/2026**

DECIDED ON : **08/05/2026**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) with the 2nd Accused were indicted in the High Court of Homagama on the following charges:

1. On or before 21st June 2000 the Accused committed attempted murder by shooting Ladduwage Yoshin Yasodara De Silva an offence punishable under Section 44A of the Firearms (Amended) Act No. 22 of 1996 read with Section 300 of the Penal Code.
2. In the course of the same transaction, the accused armed with a gun attempted to commit robbery by trying to snatch a gold chain worn by Sali Fernando an offence punishable under Section 44A of the Firearms (Amended) Act No.22 of 1996 read with Section 490 and 380 of the Penal Code.

As the 1st Accused absconded the court in this case, after an inquiry, his case was fixed in absentia of him under Section 241(1) of the Code of Criminal Procedure Act No. 15 of 1979.

The prosecution had called PW5, PW6, PW7, PW10 and marked the deposition of PW1 and PW3 under Section 33 of the Evidence Ordinance and closed their case. After the conclusion of the prosecution's case, the Learned High Court Judge had called for the defence, and the 2nd Appellant had made a dock statement denying the charges. After considering the evidence presented by both parties, the Learned High Court Judge had convicted the Appellant and the 1st Accused as charged, and sentenced them as follows:

For both the 1st and 2nd counts, the Appellant and the 1st Accused were sentenced to life imprisonment. Further, the Appellant and the 1st Accused were separately ordered to pay a compensation of Rs.100,000/- with a default sentence of 01-year imprisonment each. An open warrant had been issued against the 1st Accused.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court. The Learned Counsel for the Appellant

informed this court that the Appellant has given consent to argue this matter in his absence. Also, at the time of the argument the Appellant was connected via the Zoom platform from prison.

Background of the Case.

In this case when the High Court trial started, PW1 had gone abroad and PW3 was dead. Acting under Section 33 of the Evidence Ordinance, the evidence given at the non-summary was adopted through the Mudaliar of the Court.

According to PW1, Yasodara Silva, who was only 14 years of age, when they were watching television, two persons had entered the house and tried to rob the gold chain worn by PW4. At that time the Appellant and the 1st Accused who had possessed guns, had held PW3 and PW4 at gunpoint and threatened them. Due to fear, when PW1 tried to run from the scene, one of the persons had opened fire which had struck his buttock. As such he was hospitalised and he had received treatment. According to PW1, the 1st Accused was known to him before this incident. This witness had identified the Appellant and the 1st Accused at the identification parade.

PW3, Sandya Jayalath who too had been deceased before the commencement of the trial, had corroborated the evidence of PW1 and had identified the Appellant and the 1st Accused at the identification parade. At the trial the defence had admitted the identification parade notes under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

PW5, Jayalath Fernando who was sleeping in the house at the time of the incident, had only awakened upon hearing the cries of PW3. By that time, PW1 had sustained a gunshot injury. As soon as he had awakened, he had locked the door first and had remained in the house for about five minutes. Thereafter, with the help of PW6 Ratnapala he had taken PW1 to the hospital.

According to PW7 Dr. Gabadage, who had examined PW1, it was identified that the injury sustained by PW1 is a firearm injury.

At the hearing of this appeal the Counsel for the Appellant had raised the following grounds of appeal.

1. The Learned High Court Judge has erred in law by convicting the Appellant for count number one in the indictment, disregarding the fact that common intention has not been established by the prosecution.
2. The Learned High Court Judge has erred in law by convicting the Appellant for both counts under Section 44A of the Firearms Act, whereas the prosecution has failed to prove that the alleged weapon falls under the legal definition of a gun.
3. The Learned High Court Judge has failed to analyze the glaring improbabilities and contradictions and omissions with regard to the incident and the alleged usage of guns.
4. The Learned High Court Judge has misdirected himself by disregarding the effects of infirmities and gaps of evidence in the prosecution's case.
5. The Learned High Court Judge has failed to correctly analyze the dock statement of the Appellant.

The identity of an accused is very important in a criminal trial. Wrong identity may cost irreparable damage to the accused. Hence, the prosecution has to prove the correct identity of an accused to secure a criminal conviction. If the identification evidence is challenged successfully, where there is no or limited other evidence, the outcome will be an acquittal of the accused.

This was highlighted in the case of **Attorney General v. Joseph Aloysius and Others** (1992) 2 Sri L.R. 264 as follows:

“The identity of the accused, as a person who committed the offence is a fact in issue at a criminal trial and evidence as to identification of the accused by a witness, is relevant and admissible”.

In the case of **Jayatissa v. Attorney General** (S.C. (Spl) L.A. No. 229/2009, decided on 09.02.2010) it was noted that:

“If the alibi evidence is neither believed nor disbelieved, but would create a reasonable doubt as to the prosecution case on identity, the Accused is entitled to get the benefit of the doubt.”

In this case identity is not an issue as the Appellant had admitted the identification parade notes under Section 420 of the Penal Code. At the time of holding the identification the Appellant raised concerns that he was shown to the witnesses at the police station.

In the 1st ground of appeal, the Learned Counsel for the Appellant contended that the Learned High Court Judge has erred in law by convicting the Appellant for count number one in the indictment, disregarding the fact that common intention has not been established by the prosecution.

In this case the evidence given by PW1 and PW3 very clearly mentioned that the Appellant and the 1st Accused had entered their house and held PW3 and PW4 on gunpoint and tried to rob the chain of PW3. This position was not contradicted by the defense. Further, when the 1st Accused shot at PW1, the Appellant, who was also in possession of a gun, had tried to snatch the chain of PW4.

The concept of Common Intention and its applicability have been discussed in depth in several important judgments by local courts. Hence, I consider, it is important to discuss this concept before resolving the grievance of the Appellant.

Common Intention is depicted under Section 32 of the Penal Code of Sri Lanka. It reads:

“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.”

Common Intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common Intention comes into being prior to the commission of the act, but a long gap in time need not be present. To bring this section into effect a pre-concert is not necessary to be proved, but it may well develop on the spot between a number of persons and could be inferred from the facts and circumstances of each case.

In **The Queen v. Mahatun** 61 NLR 540 the court held that:

“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 as if it were done by him alone. To establish the 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 prearrangement. It can be formed on the spur of the moment”.

In **Wimalasena v. IP Hambantota** 74 NLR 176 the court held that:

“Mere presence of an accused person is not sufficient to establish common intention within the meaning of section 32 of the Penal Code”.

In **S. Fernando v. H. De Silva** 68 NLR 166 the court held that:

“In order to sustain the charge based on common intention it is essential that both the accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence”. Although the accused did not commit any physical act, yet liability could be imposed on him on the basis that his presence was a participatory presence. All these are generally established through circumstantial evidence.

In **King v. Assappu** 50 NLR 324 the court held that:

“In a case where the question of common intention arises the Jury must be directed that-

- (i) the case of each accused must be considered separately.
- (ii) the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed,
- (iii) common intention must not be confused with same or similar intention entertained independently of each other,
- (iv) there must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention,
- (v) the mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

It may also be added that for a charge of murder, it is imperative that the accused entertained a murderous intention along with the perpetrator of the offending act. With the guidance of the above cited judicial decisions, now I consider the singular ground of appeal advanced in this case by the Appellant.

Analysing the sequence of events described by the lay witnesses, the Appellant and the 1st Accused had come together to the house of PW1, threatened the witnesses with guns, tried to rob the gold chain of PW4 and shot at PW1 in furtherance of common intention. The weapons they possessed and the way that both had behaved clearly indicate that they had common intention in committing the crime. Further, carrying deadly weapons and using them to frighten the witnesses and firing at PW1 clearly established their common intention at the time of committing the offence.

The Learned High Court Judge in his judgement had very correctly considered the concept of common intention. The relevant portion is reproduced below:

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තවදුරටත් මෙම අපරාධයට බඳුන් වූ තැනැත්තියක ලෙස පැ.සා. 03 සාක්ෂිකාරිය විසින් දෙන ලද සාක්ෂියේ දී ඉතා පැහැදිලිව පළවන වූදින ලෙස එනම්, ඒ වන විට අධිකරණයේ නොමැති වූදින විසින් තමාගේ මාලය කඩා ගැනීමට තත් කළ බවත්, අනෙක් වූදින තම මවගේ කපේ එල්ලෙමින් මාලය කඩා ගැනීමට තත් කළ බවත් යන කාරණා පිළිබඳව සාක්ෂි දී ඇත. ඒ අනුව ඉතා පැහැදිලිවම ඔවුන් මෙම සාක්ෂිකරුවන්ගේ ගෙල බැඳී මාල කඩා ගැනීමට, නොඑසේ නම් කොල්ලකෑමට තත් කර ඇති බව එමගින් තහවුරු වේ. එමෙන්ම ආයුධ සන්නද්ධව යමෙකු නිවසක් තුළට පැමිණෙන්නේ අනිවාර්යෙන්ම එවැනි කොල්ලකෑමේ හෝ ඝාතනය කිරීමේ අරමුණක් ඇතිව බව පෙනී යයි. ඒ අනුව මෙම නඩුවේ වූදිනයිත් දෙදෙනා එක්ව ආයුධ සන්නද්ධව මෙම ප්‍රශ්නගත අවස්ථාවේ අදාළ සාක්ෂිකරුවන්ගේ නිවස තුළට රාත්‍රී ඇතුල් වී ඇති බව සහ මෙම ක්‍රියාදාමයන් සිදු වී ඇති බවට පැමිණිල්ල සාධාරණ සකයෙන් තොරව කරුණු තහවුරු කර ඇති බවට මෙම අධිකරණය නිගමනය කරයි.

As the prosecution had sufficient evidence to prove common intention, this ground has no merit.

In the second and third ground, the Learned Counsel for the Appellant strenuously argued that the Learned High Court Judge has erred in law by convicting the Appellant for both counts under Section 44A of the Firearms Act, whereas the prosecution has failed to prove that the alleged weapon falls under the legal definition of a gun and failed to analyze the glaring improbabilities and contradictions and omissions with regard to the incident and the alleged using of guns.

The recovery of the gun is not essential to successfully prove armed robbery. Such physical recovery is ideal; however, a conviction can still be secured by way of testimonial evidence, which includes reliable victim or witness testimony regarding the weapon and its use. The primary focus would be the victim's belief on whether a weapon was used.

In this case PW1 and PW3 had clearly seen that the Appellant and the 1st Accused had carried guns. Further, the witnesses had described the appearance of the guns.

PW7, the Doctor who examined PW1 clearly said the injury sustained by PW1 was a gunshot injury. Further, police investigations revealed of recovering a nose of the bullet (Busiya). Hence, I hold that the non-recovery of the guns is not fatal as the prosecution witnesses had given plausible evidence that the Appellant had possessed a gun and that the 1st Accused had shot at PW1. No contradictions or omissions were highlighted during the trial. The High Court Judge had very correctly considered the evidence given by the prosecution witnesses without any contradictions or omissions.

Hence, these two grounds also have no merit.

In the fourth ground of appeal, the Appellant contends that the Learned High Court Judge has misdirected himself by disregarding the effects of infirmities and gaps of evidence in the prosecution's case.

In this case the Learned High Court Judge had very correctly and accurately analyzed the evidence given by prosecution witnesses and their legal implication. Accepting evidence given by prosecution witnesses has not caused any prejudice to the Appellant. The Learned High Court Judge has not ignored improbabilities and contradictions when he analyzed the evidence. Therefore, I conclude that this ground also has no merit.

In the final grounds of appeal, the Appellant contends that the Learned High Court Judge has failed to correctly analyze the dock statement of the Appellant.

I totally disagree with the Counsel for the Appellant. The Learned High Court Judge in his judgment had very correctly considered the dock statement of the Appellant and given plausible reasons as to why he rejected the same. The relevant portion is re-produced below:

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කුමන තත්වයක් යටතේ හෝ මෙම අධිකරණයේ පෙනී නොසිටින දයානන්ද නැමැති චූදිතයා තමාගේ හිතවතෙකු බව සහ ඔහු තමාගේ නිවසට ආ ගිය තැනැත්තෙකු බවත්, ඔහු සමඟ යම්

සම්බන්ධතාවයක් තිබූ බවත් යන කරුණු මෙන්ම නමන් පොලීසිය විසින් අත්අඩංගුවට ගත් බව යන කරුණා වූදිනගේ විත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශයෙන් කියැවෙන බව සඳහන් කළ යුතුය. ඊට අමතරව දීර්ඝ ලෙස යම් යම් විස්තර සඳහන් කර ඇති නමුත් වූදිනගේ විත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශයේ සමස්තයක් ලෙස සලකා බැලීමේ දී එම කරුණා එලෙස සත්‍ය යැයි පිළිගැනීමට මෙම අධිකරණයට නොහැකිය. ඒ අනුව එමඟින් වූදින විත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශය මඟින් පැමිණිල්ලේ නඩුකරය කෙරෙහි යම් සැකයක් ඇති කිරීමට එය ශක්තිමත් හා ප්‍රමාණවත් යැයි කිසිවිටක සිතිය නොහැකිය. එසේ හෙයින් වූදිනගේ විත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශය අසත්‍ය යැයි මෙම අධිකරණය නිගමනය කරමින් එය බැහැර කරයි.

Hence, I conclude this ground also sans any merit.

Considering the evidence presented in this case by the prosecution, a prima facie case had been established against the Appellant.

Having considered the evidence led by the prosecution I am inclined to accept that the prosecution had adequately established the charges levelled against the Appellant beyond reasonable doubt. Thus, I am of the view that the Learned High Court Judge has rightly convicted the Appellant as charged.

Therefore, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar of this Court is directed to send this judgement to the High Court of Homagama along with the original case record.

JUDGE OF THE COURT OF APPEAL

R.P.Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL