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

In the matter of an appeal in terms of Section 331 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.

The Democratic Socialist
Republic of Sri Lanka

Court of Appeal Case No.
HCC/0145/2022 **Complainant**
High Court of Balapitiya
Case No. HCB 1077/2007

Vs.

Thommaya Hakuru Upali.

1st Accused

Kapila Eranga Herathge.

2nd Accused

AND NOW

Thommaya Hakuru Upali.

1st Accused –Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Epa Aruna Shantha with Dammika Perera and Navindu Kalansooriya for the Accused-Appellant.
Sudarshana De Silva, S.D.S.G. for the Respondent.

ARGUED ON : 09.05.2024

DECIDED ON : 13.06.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant with another was indicted in the High Court of Balapitiya on the following three counts.

1. On or about 06th October 2005, committing the offence of house trespass under Section 434 of the Penal Code read with Section 32 by entering the house of Welikala Hakuru Dayarathna in Agulugalle with another.

2. On the same place and time and during the same transaction committing the offence of attempted murder under Section 300 of the Penal Code read with Section 32 by causing injuries by shooting Bolanda Hakuru Jayanthi Violet.

3. On the same place and time and during the same transaction committing the offence of grievous hurt under Section 317 of the Penal Code read with section 32 to Welikala Hakuru Dayarathna by causing injuries using dangerous weapons.

The charges in the indictment were read over to both accused and they pleaded not guilty to the charges. From the commencement of the trial, the second accused absconded the Court and the trial proceeded against him in his absence. After trial, the learned High Court Judge convicted both accused in respect of all three charges leveled against them and sentenced them. This appeal is preferred by the 1st accused-appellant (hereinafter referred to as the "appellant") against the conviction and sentence.

Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned Counsel for the appellant and the learned Senior Deputy Solicitor General (SDSG) for the respondent made oral submissions.

In brief, the prosecution case is as follows:

PW-2 and PW-3 are husband and wife. On the day of the incident, about 2.00 am in the morning, PW-2, Dayaratne was sleeping with his wife in one of the rooms of the house where they were living. Their two children were also sleeping in the adjoining room. He had awakened hearing a big noise like a bomb explosion. The front door of the house had fallen into the living room. PW-2 had seen the 1st accused-appellant holding a torch at him and another person carrying a torch, inside their house. PW-2 has seen the two accused coming to the doorstep of the room where PW-2 and his wife were sleeping. While PW-2 and PW-3 were on their bed, one of the accused has attacked PW-3. PW-2 had stood up shouting not to beat his wife and at that time the 1st accused-appellant had attacked PW-2 using a cutting weapon, which PW-2 had explained as a sword and caused injuries to his mouth. After this attack, PW-3, the wife had turned a tube light that was kept near the bed they were sleeping. PW-2 has also seen her wife injured and seen blood on her chest and hand. He has seen a gun in the hand of the 2nd accused after the attack.

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

i. The identification of the 1st accused-appellant had not been established.
ii. The prosecution has not proved the case beyond a reasonable doubt.
iii. Common intention doctrine cannot be applied in this case.

The main argument of the learned Counsel for the appellant was that the prosecution witnesses have not properly identified the appellant. The learned Counsel stated in his written submission that PW-1 has not mentioned the names of any of the accused in the first complaint. PW-1 made the first complaint to the police but this is not an incident related to PW-1. The second count is an attempted murder charge in respect of PW-3 and the third count is a grievous hurt charge in respect of PW-2. In his evidence in Court, PW-1 has stated that her sister PW-3 shouted that Upali and Kapila (the 1st and 2nd accused) assaulted her. Then he had seen blood and injuries on the body of her sister and taken her to the hospital. It is clear that when making the first information in such a disturbing situation, PW-1 wanted to inform the police about the serious incident occurred in his sister's place without any delay and not the names of the people involved in the incident and other details. In these circumstances, PW-1, not mentioning the names of the accused in the first information does not cast a doubt regarding the identification of the accused.

The other argument of the learned Counsel for the appellant with regard to the identification was that PW-2 has stated in his evidence that the person who came to the room has covered his face with a piece of cloth. Also, the learned Counsel pointed out that according to the Medico-Legal Report, when PW-2 gave the history to the doctor, he had stated that he was assaulted by an unknown person who came to the house.

The learned SDSG contended that PW-2 had identified the appellant from his shape and the voice. Also, the learned SDSG stated that in re-examination, PW-2 has stated that he identified the appellant and other accused clearly with aid of lights switched on, when they were leaving the house. The learned SDSG contended further that, anyhow, PW-3 has given cogent evidence regarding the identification of the accused and she has clearly identified the appellant.

There is clear evidence that two persons entered their house, one person who was armed with a gun fired at PW-3, the other person who was armed with a sword assaulted PW-2, and then they went away. Undoubtedly, there was no involvement of any other person to this incident other than these two persons. PW-3 stated that she had switched the emergency light and identified both persons as the 1st and 2nd accused. Although the faces were covered, when these persons were seen at the first instant, it is clear from the evidence of PW-3 that after she had switched the emergency light, she identified both persons as the 1st and 2nd accused. There was no difficulty for her to identify both accused because according to the evidence, PW-3 had known both accused from their childhood and they were from the same village. In addition, PW-3 has stated that the appellant threatened to kill them if they divulged the names of the accused. From the said evidence, it is very clear that even the appellant realized that she had identified him. Also, it is evident that PW-3 identified the appellant and the other accused because PW-1 stated in his evidence that when she met his sister, PW-3 soon after the incident, she told him that the appellant and the other accused assaulted her. Also, in the history given to the doctor, PW-3 clearly stated that Upali and Kapila (the 1st and 2nd accused) assaulted and the said item of evidence also demonstrate that PW-3 clearly identified the appellant and the other accused. Hence, even though PW-2's evidence regarding the identification of the accused is disregarded it is precisely clear from the evidence of PW-3 that the two persons who came to her house and assaulted her and her husband

were the appellant and the other accused. Hence, PW-3's evidence is cogent and can be accepted without any doubt; no other evidence is needed to establish the identity of the appellant. Hence, the identification of the appellant is established beyond a reasonable doubt and the first ground of appeal fails.

In this case, the appellant neither gave evidence nor made a statement from the dock. The only witness called on behalf of the defence, a Senior Superintendent of Police stated that he could not find the file that he was asked to produce and give evidence. Therefore, there was no evidence from the defence to be considered by the learned High Court Judge in determining this case. Apart from the issues raised with regard to identification, the learned Counsel for the appellant did not raise any argument to demonstrate that the prosecution has not proved the case beyond a reasonable doubt. The prosecution evidence has been correctly and carefully analyzed by the learned High Court Judge. Hence, I see no merit in the aforesaid second ground of appeal.

In replying to the aforesaid third ground of appeal, the learned SDSG contended that this is one of the best cases that he has come across in illustrating the doctrine of common intention. In the case of ***Queen V. Mahatun*** – 61 NLR 540, it was 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 pre-arrangement. It can be formed on the spur of the moment".

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 the case at hand, the 1st accused was armed with a sword or a cutting weapon similar to a sword. The other accused was armed with a gun. Both of them used the weapons that they possessed. It is evident from the Medico-Legal Report of PW-3 that there were gunshot injuries to her. It transpires from the Medico-Legal Report of the PW-2 that the third grievous injury explained in the MLR has been inflicted with a cutting weapon. The intention of firing from a gun is to kill a person. Therefore, the murderous intention is apparent. The appellant and the 1st accused came together armed with a gun and a cutting weapon, entered the house of PW-2 and PW-3, caused injuries to them using the weapons at their hands and left the house together threatening not to disclose their names. Hence, the common intention is evident from their criminal acts. In the instant action, two of the accused committed different criminal acts, firing, and cutting, each act being in furtherance of the common intention of them, each of the two accused is liable for each such act as if it were done by one accused alone, as explained in the aforesaid judicial authority. Therefore, the common intention of the appellant to commit all three offences described in the three charges has been established.

For the foregoing reasons, I hold that the learned High Court Judge has come to a correct conclusion and there is no reason to interfere with his Judgment dated 21.07.2022.

Accordingly, the conviction and the sentence imposed on the appellant are affirmed. The appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL