

**UPASENA AND 8 OTHERS
VS.
ATTORNEY GENERAL**

COURT OF APPEAL.

BALAPATABENDI J (P/CA)

BASNAYAKE J.,

C. A. 6-8/2003

HC HAMBANTOTA 38/98

SEPTEMBER 21, 22, 2005

AUGUST 4, 2004

OCTOBER 13, 2005

Penal Code - section 146/96, 32/296 - Unlawful assembly - Common intention-Ingredients-Participatory presence as agent- Mere presence ? - Evidence Ordinance - section 27

The accused-appellants (8) were charged under section 140, 146/296 and section 32/196 for causing the death of one C. After trial all accused were found guilty of all the charges and death sentence was imposed (The 4th accused died pending appeal)

It was contended in appeal that, the prosecution had failed to prove an unlawful assembly charge due to the reason that the accused meeting the deceased was by chance and that there was no preplan. It was also contended that the accused is alleged to have used a lethal weapon. It was further contended that, the accused were closely related to each other and there was some animosity between them and the deceased.

HELD

- (1) The crime was committed at the work place of the accused. The accused had a legitimate right to be present and to be in possession of the stiles (the alleged weapon used).
- (2) If any member of a crowd had indulged in any act of arson, or violence, it cannot from such an individual act, be presumed that it was either the common object or that every member of that crowd had necessarily shared the object of that individual who had committed the act. In other words the acts of only a few individuals of such a crowd cannot be held to be common object of that crowd. Nor can every member of that crowd be presumed to have shared the object with which such acts were committed by only a few members of that crowd.
- (3) If one becomes a member of an unlawful assembly and his association in the unlawful assembly is clearly established his participation in the commission of the offence by an overt act is not required to be proved if it could be known that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly.
- (4) When the injuries caused are cumulatively sufficient to cause death, it is necessary before holding each of the accused guilty under section

296 read with section 146 to find that the common object of the unlawful assembly was to cause death or that the members of the unlawful assembly knew it to be likely that an offence under section 296 could be committed in prosecution of the common object.

In the instant case there is no evidence that all the accused entertained a common object to cause injuries to the deceased. The prosecution had failed to prove an unlawful assembly charge—all accused would be acquitted from the unlawful assembly charge.

Held Further :

- (5) To make an accused liable under section 32 there should be evidence of a prearranged plan or pre concert to make the accused vicariously liable with the doer of the act for the criminal act. There is insufficient evidence to maintain a charge under common intention against the 5-9 accused, but there is evidence of a pre plan against the 1st, 2nd accused-appellants who are relatives.
- (6) In the absence of an explanation the Court is entitled to draw the reasonable inference from all the circumstances that his presence (3rd accused) at the scene was a participatory presence and not a mere presence, which would have entitled him to an acquittal.
- (7) "They also serve who only stand and wait" has to be regarded as applying not to a bystander, who merely shares mentally the criminal intention of others, but to a person whose act of standing and waiting itself as a criminal act is a series of criminal acts done in furtherance of the common intention of all.

Appeal from the judgment of the High Court of Hambantota.

Cases referred to :-

- (1) *In re Ambelavana* - 1982 1 SCR 271
- (2) *Mythu Naicker vs State of Tamil Nadu* — 1979 1 SCJ 194 at 199
- (3) *Sarwan Singh vs State of Punjab* - 1979 - 1 SCJ 157 at 159-60

- (4) *Swarm Singh Shri vs State of Himachal Pradesh* - 1984 Sim LL 122
- (5) *Narayan Singh vs State of Madhya Pradesh* 1985-1 Cr LR 404 (SC)
- (6) *Jai Ram vs State of Rajastan* 1985 RLW 490
- (7) *Balkar Sijnghe vs State of Punjab* 1994 Cr LR (SVI) 389 at 391
- (8) *Lakhu Singhe vs State of Rajasthan* — 1997-(4) Crimes 241 at 252, 253
- (9) *Mahbub Shah vs Emperor*-1925-A1118
- (10) *King vs Ranasinghe* - 47 NLR 373
- (11) *King vs Piyadasa*-48 NLR 295
- (12) *King vs Assappu* — 50 NLR 324
- (13) *Queen vs Mahatun* — 61 NLR 540
- (14) *Queen vs Vincent Fernando* - 65 NLR 265
- (15) *In Re Rom Lochan* - 1956-A1 576
- (16) *Richard vs State* 76 NLR 534 at 546
- (17) *King vs Endoris* - 46 NLR 498 at 499
- (18) *Barendra Kumar Gosh vs Emperor* — 1925 - AIR PC 1

Dr. Ranjith Fernando with *Ms. Deshani Jayatilake, Amila Udayangani* for 1, 2, 8 and 9 accused appellants.

Ranjith Abeyesuriya PC with *Thanuja Rodrigo* for 3rd accused-appellant

D. S. Wijesinghe PC with *Kaushalya Molligoda* and *Wasana Wickremasena* for 5, 6 and 7 appellants.

Kapila Waidyaratne Deputy Solicitor General for Attorney General.

APPEAL from the Judgment of the High Court of Ampara.

August 23, 2006.

ERIC BASNAYAKE, J.

The nine accused appellants (accused) were charged in the High Court of Hambantota under sections 140, 146/296 and 32/296 of the Penal Code for causing the death of Matara Gamage Chandrapala on 23.04.1982. After trial before a Judge, all the accused were found guilty of all the charges and the accused were sentenced to six months imprisonment on the first charge and the death sentence imposed on the other charges. The accused appealed against the conviction and the sentences.

The trial commenced on 29.05.2000 eighteen years after the incident. Three eye witnesses gave evidence for the prosecution with regard to the incident proper. They are Siripala, Leelawathie and Somawathie. The deceased was their brother. It has been clearly established that there was some enmity between the accused and the family members of the deceased. The accused are all related to each other. The 1st and the 2nd accused are brothers. The 3rd and 4th are brothers. The 4th accused is now deceased. The 5th and the 6th accused are also brothers. The 7th accused is the father of the 5th and the 6th accused. The 8th and the 9th accused are also related to the other accused.

There was a land dispute in the District Court between the deceased and the 7th accused. This dispute was decided in favour of the deceased. Over this, there was an altercation and one John was murdered. The deceased was taken into custody on suspicion and was remanded. At the time of the present incident the deceased had just been released on bail.

The incident occurred on a paddyfield. The extent of the field is more than 60 acres. The several plots of land belonged to different persons. The 7th accused too owned a plot. This was during harvesting time. The farmers at this time are usually engaged in cutting, bundling and threshing paddy at different places in the field. The threshing is done

by tractors. Thereafter the straw is separated from the seeds with the aid of long strong sticks used specially in the paddyfields. They are about five and a half feet long and made of hard wood. They are called "*dathi gaha*" in the village.

On the day of the incident the deceased was engaged in carrying bundles of paddy to a threshing floor. To reach this place the deceased had to pass the plot belonging to the 7th accused. There was some activity in this plot too. Threshing was done in this plot with the help of a four wheeled tractor. The 1st to the 9th accused together with some others were working on this plot at that time.

There is a discrepancy with regard to the time the accused arrived at the field. Siripala had arrived at the field with the deceased around 2.30 or 3 p. m. Siripala states in his evidence that the accused were at the field when Siripala came to work. Leelawathie states that the accused came at 4 p. m. There is no evidence with regard to the manner in which the accused came to the field, that is, whether they came together or separately. Anyhow there is evidence to suggest that a four wheeled tractor was engaged in the threshing of paddy. In addition to this tractor there were others also working in this plot. Therefore there is no evidence that the accused had come together on finding out that the deceased was working in the field and set upon him. At the time of this incident which took place around 4.30 p. m. the deceased had made several trips carrying bundles of paddy to a threshing floor situated near the land belonging to the 7th accused.

With regard to the sequence there is a disparity between the evidence of Siripala on the one hand and Leelawathie and Somawathie on the other. According to Leelawathie and Somawathie, while the deceased was carrying a bundle of paddy on his head, the 2nd accused hit the deceased on his leg with one of the sticks referred to earlier, to which the deceased fell on the ground. Somawathie stated that the 2nd accused hit the deceased several times. Thereafter that the 1st accused shot the deceased at close range. That the 2nd accused then having sat on the back of the deceased stabbed him. The 1st accused

threatened to shoot if the witnesses came closer. These two witnesses stated that 3 to 9 accused were armed with sticks and hit the deceased with them one after another. Siripala said that it was the 3rd accused who hit the deceased on the leg and thereafter stabbed him.

Medical evidence

The doctor who held the post mortem found 17 injuries on the body. Out of this Nos. 11 to 17 were gun shot injuries on the back of the left shoulder. The shoulder blade was found fractured. Injury No. 1 was a laceration found on the left leg. The underneath tibia bone was found fractured. Nos. 5, 7, 8 & 9 were stab wounds. Nos. 7 to 9 were found on the back of the chest while injury No. 5 was on the head. Injuries 7 to 9 had penetrated in to the chest cavity and as a result half a pint of blood had collected. These three injuries were sufficient, in the ordinary course of nature, to cause death. Injuries 2 and 3 were abrasions found on the knee and below the knee of both legs. These injuries had probably resulted due to a fall. Nos. 4, 6 and 10 were lacerations. They are simple injuries, skin deep, found on the back and side of the head.

According to the evidence of the witnesses injuries 11 to 17 were caused by the 1st accused. According to Leelawathie and Somawathie the stabbing was done by the 2nd accused. Leelawathie and Somawathie had gone to the police station immediately after the incident leaving others to take the injured to hospital. Leelawathie's statement was recorded by the police at 5 p. m. on the day of the incident. The stabbing was done with a knife marked P6. P6 was recovered on a section 27 statement of the 2nd accused. Injuries 5, 7, 8 and 9 are said to have been caused with this weapon and attributed to the 2nd accused. Injuries 2 and 3 being abrasions caused due to a fall, doubt remains only as to lacerations Nos. 4, 6 and 10 found on the head.

Submissions of the counsel appearing for 1st, 2nd, 8th & 9th accused

The learned counsel appearing for the above accused submitted that

the prosecution had failed to prove an unlawful assembly charge due to the reason that the accused meeting the deceased was by chance and that there was no pre-plan. He further submitted that the 1st accused caused firearm injuries only to the shoulder and the 2nd accused caused injuries to the legs and therefore the 1st and the 2nd accused could be convicted only for culpable homicide not amounting to murder. With regard to the 8th and 9th accused the learned counsel submitted that they should be discharged due to lack of evidence.

Submissions of the counsel appearing for the 3rd accused

The learned President's Counsel appearing for the 3rd accused also submitted that the attack on the deceased was not a pre-conceived one. Hence that the unlawful assembly charge should fail. It was the submission of the learned President's Counsel that this accused is alleged to have used not a lethal weapon of offence but an agricultural implement with which he had been working at the time. He submitted that on the prosecution evidence the appropriate finding against the 3rd accused should be that he caused hurt to the deceased even on a total acceptance of their evidence and to find him guilty of a charge under section 314 of the Penal Code. The learned President's Counsel refrained from mentioning the recovery of the gun.

Submissions of the counsel appearing for 5th, 6th and 7th accused

The learned President's Counsel appearing for the above accused submitted that the accused were working in their own paddy field and the deceased went pass that field. Further that the "dathigaha" alleged to have been used was an implement of their trade. He further submitted that the accused 5 to 9 did not charge towards the deceased as they saw him. The accused were closely related to each other and there was some animosity between them and the deceased. This was the reason to implicate everyone who was with them. He submitted that if at all, 5 to 7 accused could be convicted only for individual acts alleged to have been committed by them.

Submissions of the State

The learned Deputy Solicitor-General in his submissions does not dispute the vague reference made to 5 to 9 accused by the three witnesses (4th accused is deceased). The learned counsel submitted that 3 to 9 accused had been members of an unlawful assembly knowing that an offence is likely to be committed in prosecution of the common object.

Evidence against 5 to 9 accused

Siripala said that after the stabbing 4 to 9 accused assaulted the deceased with sticks. Once he stated that "others hit with stick" Again he stated that "everyone hit with sticks" අනෙක් කවිටිය දැනියේවලින් ගැනුවා කවුරුත් දැනියේවලින් ගැනුවා According to Siripala the 3rd accused stabbed the deceased and was not armed with a stick. Leelawathie stated that 3 to 9 accused hit the deceased with sticks one after another. She stated that the 3rd accused hit the deceased on the head. At one time she said that all the accused hit the deceased with sticks. Somawathie also stated that after the stabbing the 3rd accused hit the deceased with a stick and thereafter others hit him with sticks. Apart from the injuries caused by the 1st and the 2nd accused, the other remaining injuries are the three lacerations found on the head namely Nos. 4, 6 and 10. They are simple injuries skin deep. If six or seven accused hit the deceased with sticks, the deceased would have received more severe injuries than the ones described by the doctor. The injuries caused by the 1st and the 2nd accused are supported by medical evidence.

Unlawful Assembly

According to all three prosecution witnesses the presence of 1st to 9th accused is established (although an alibi was put forward by the 6th accused and a denial by 5th and 8th accused). At the same time, it is not in dispute that the 7th accused had a plot of land in this paddy field. The incident took place by this plot of land. At that time the accused appear to have been engaged in threshing paddy with the aid of a four wheel tractor. In addition to the accused there were others who were working in this plot of land.

The accused were said to be armed with sticks. These sticks were used to turn the hay. There is no evidence of any plan that the 4th to 9th accused had with the 1st to 3rd accused. There is no evidence that there was a common object to cause injury to the deceased. Although the deceased was suspected of the murder of John and the 7th accused had a land dispute with the deceased, that in itself is not conclusive proof that these accused had a common object to injure the deceased. The common object has to be clear although each accused need not know whether the other accused knew the object. If there was no such object then these accused were in the paddy field legitimately. They were not armed with weapons but instruments that help them to discharge their work effectively. However even a stick might be used in such a way as to cause death and each case should depend on its own facts In *Re. Ambalavanar*.⁽¹⁾

The accused had not gone in to the field worked by the deceased and to that extent they were not aggressors. The learned President's Counsel appearing for 5 to 7 accused suggests that these accused have been implicated as they happened to be there.

This crime was committed at the work place of the accused. The accused therefore had a legitimate right to be present and to be in possession of the sticks. When 5 to 9 accused became aware that a crime was being committed should they have left the crime scene to avoid an unlawful assembly charge being framed against them ?

In *Mythu Naicker vs. State of Tamil Nadu* ⁽²⁾ at 199-(mentioned in Gour's Penal Law of India 11th Edition Vol. 2 Pg. 1420) the intention of the crowd was not to commit criminal trespass, arson, loot or damage or any other act of this nature. Responsible Officers had tried to pacify this crowd but it had become uncontrollable. If any member of such crowd had indulged in any act of arson or violence, it cannot from such an individual act, be presumed that it was either the common object of the crowd or that every member of that crowd had necessarily shared the object of that individual who had committed the act. In other words the acts of only a few individuals of such a crowd cannot be held to be

the common object of that crowd. Nor can every member of that crowd be presumed to have shared the object with which such acts were committed by only a few members of that crowd.

If one becomes a member of an unlawful assembly and his association in the unlawful assembly is clearly established, his participation in the commission of the offence by an overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly, it is necessary to keep in mind the life in a village, ordinarily uneventful, except for small squabbles where the village community is faction ridden, and when a serious crime is committed where people rush to the scene just to quench their thirst to know what is happening.

It has also been held that when the injuries caused are cumulatively sufficient to cause death, it is necessary before holding each of the accused guilty under section 302 (section 296 of the Sri Lanka Penal Code) read with section 149 (section 146 of the Penal Code) to find that the common object of the unlawful assembly was to cause death or that the members of the unlawful assembly knew it to be likely that an offence under section 302 I. P. C. could be committed in prosecution of the common object. (*Sarwan Singh vs. State of Punjab* ⁽³⁾ at 159-60; *Swarn Singh Shri vs. State of Himachal Pradesh*; *Narayan Singh vs. State of M. P.* ⁽⁵⁾ *Jai Ram vs. State of Rajasthan* ⁽⁶⁾ *Balkar Singhe vs. State of Punjab*, ⁽⁷⁾ at 391; *Lakhu Singhe vs. State of Rajasthan* ⁽⁸⁾ at 252, 253 mentioned in Gour's Penal Law of India pg. 1409.

In the instant case, apart from the fact that the accused are related to each other, there is no evidence to establish that the accused 5 to 9 knew what the 1st and the 2nd accused were about to commit. There is evidence to suggest that they all worked together. Could we draw an inference from this that the other accused knew that the 1st and the 2nd accused were armed with a gun and a knife? The gun was said to be a short one and marked P1 at the trial. Apart from what took place

in the paddy field, the relationships among the accused and the enmity over the murder of John, there is no other evidence to connect the 5th to 9th accused to the crime. There is no evidence that all the accused entertained a common object to cause injuries to the deceased. Therefore I am of the view that the prosecution had failed to prove an unlawful assembly charge in this case. Hence all the accused are acquitted from the first two charges.

Common Intention

The accused were also found guilty under section 296 read with section 32 of the Penal Code. With regard to the 5th to 9th accused the evidence available is that they too hit the deceased with sticks. Due to the same reasons I have mentioned earlier I am of the view that the evidence is insufficient to maintain a charge under common intention against the 5th to 9th accused. Therefore the 5th to 9th accused are acquitted.

Evidence against the 1st and 2nd accused

In order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence direct or circumstantial, either of pre-arrangement, or 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" *King vs. Assappu* at 324. Both in India and Ceylon (Sri Lanka), the courts have accepted the principle that to make an accused liable under section 32 of the Penal Code there should be evidence of a pre-arranged plan or pre-concert to make the accused vicariously liable with the doer of the act for the criminal act. Alles J cited the Privy Council judgment in *Mahbub Shah vs. Emperor*⁽⁹⁾ where it said "Common intention implies a pre-arranged plan. To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove

the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case". Continuing Alles J. said "the principle in *Mahabud Shah's* case has been applied in cases of direct evidence. Invariably in such cases the material question is whether or not there was evidence of a pre-arranged plan among the assailants, where the facts disclose that assailants set upon their victim and assaulted him in pursuance of which he was injured or received fatal injuries; *King vs. Ranasinghe* ⁽¹⁰⁾ at 375, *Piyadasa*; ⁽¹¹⁾ *Assapu* ⁽¹²⁾; *Mahatun* ⁽¹³⁾; *Queen vs. Vincent Fernando* ⁽¹⁴⁾.

I have already set out in detail the evidence against the 1st and 2nd accused. Considering the evidence against these two accused there appears to be clear evidence of a pre-plan. The 2nd accused first hit the deceased to fall. After he fell on the ground the 1st accused went near the deceased and fired a shot. He wanted to make sure that he hit the target. Seven pellet wounds were found on the left side of the shoulder as a result. Injuries 11 to 17 were not sufficient to cause death in the ordinary course of nature. He was not dead yet. Then the 2nd accused having sat on the deceased stabbed him. There were four stab injuries out of which three were said to be sufficient to cause death in the ordinary course of nature. When the witnesses got closer the 1st accused threatened to shoot them, and prevented the injured from being taken for treatment. Thereafter the accused had left the scene. The police could not find them at their residences for two days and until such time as they surrendered to the police.

"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, then the accused will be guilty of murder". In *Romlochan* ⁽¹⁵⁾ quoted by Alles J in *Richard's* ⁽¹⁶⁾

Section 32 of the Penal Code states that "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. Illustration (c) is that "A intentionally gives Z a sword cut or club wound sufficient to cause death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z's death".

Considering the above facts and the fact that the 1st and the 2nd accused are relations, an inference could safely be drawn that these two accused had a common plan to commit this crime. Therefore the conviction of these two accused on the 3rd charge is affirmed and the appeals of these two accused are dismissed.

3rd accused

Although it was Siripala's evidence that the 3rd accused hit the deceased and thereafter stabbed him, this evidence has been rightly rejected by the learned High Court Judge. The learned High Court Judge appears to have accepted the evidence of the two sisters who were working at this field and who arrived at the scene while their brother was attacked. According to their evidence the 3rd accused hit the deceased with a stick. One of them stated that the 3rd accused hit the deceased on the head. The three lacerations, namely, injury nos. 4, 6 & 10 were found on the head. However the evidence with regard to the attack on the deceased with sticks by all the accused appear to be vague. The medical evidence does not support such.

Even if the court disregards the above evidence, the presence of this accused has been well established. There is another piece of evidence against this accused, namely, the recovery of the gun under section 27 of the Evidence Ordinance. The gun was marked P1. This accused had all the reason to take part in this crime, being a brother of John, who was allegedly murdered by the deceased. After the crime was committed this accused too had absconded for a period of two days

and surrendered to the police thereafter. Before passing the sentence too, this accused had absconded again and appeared in court on another day. The 3rd accused gave no explanation in court with regard to the incriminating evidence adduced against him. He remained silent.

Alles J in *Richard vs. State (supra)* at 546 said "that in the absence of explanation . . . entitled to draw the reasonable inference from all the circumstances that his presence at the scene was a "participatory presence" as distinguished from a mere presence which would have entitled him to an acquittal". In *King vs Endoris* ⁽¹⁷⁾ at 499 Soertsz ACJ was of the view that in the circumstances of the case it was essentially one in which the third appellant should have given an explanation of his presence at the scene. In this case the 3rd appellant did not take an active part in the actual attack on the deceased. He was present at the scene armed with a club at the time two shots were fired by the 1st and 2nd appellants and he fled with them after the shooting. "They also serve who only stand and wait" has to be regarded as applying not to a bystander, who merely shares mentally the criminal intention of others, but to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all" Lord Summer in *Barendra Kumar Gosh vs. Emperor* ⁽¹⁸⁾ cited by Alles J. in *Richard vs. State. (supra)*

The third accused is a cousin brother of the 1st and the 2nd accused. The third accused was present at the scene of the crime. Even if the evidence of assault by the 3rd accused on the deceased is not considered, the fact of the 3rd accused absconding after the incident and hiding the gun that was used and the fact of his silence against all this evidence would make the court draw an inference against the accused with regard to a pre-arranged plan with the 1st and the 2nd accused. Inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case (Mahabub Shah's). The presence of this accused would necessarily amount to a participatory presence. Therefore this appeal has no merit. Hence this appeal is dismissed.

Appeals of the 1st, 2nd 3rd accused appellants are dismissed. The appeals of the 5th, 6th, 7th, 8th & 9th accused are allowed and the 5th, 6th, 7th, 8th and 9th accused are acquitted.

BALAPATABENDI J.—I agree.

*Appeal of 1;2,3 allowed appeals dismissed appeals of
5,6,7,8,9 - allowed 5th, 7th, 8th; 9th and acquitted.*
