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

SC Appeal No: 97/09

CA Appeal Case No: CA Appeal 45/2007

HC (Kegalle) Case No: 1230/97

The Republic of Sri Lanka

Complainant

Vs.

(1) Kuruppu Arachchilage Wijetunge alias Wije

(2) Ganitha Devayalage Sunil Jayaratne

(3) Kuruppu Arachchilage Gamini Jayatissa

Accused

AND

(1) Kuruppu Arachchilage Wijetunge alias Wije

(2) Ganitha Devayalage Sunil Jayaratne

Accused – Appellants

Vs.

Hon. Attorney-General,
Attorney-General's Department,

Respondent

AND

Ganitha Devayalage Sunil Jayaratne

2nd Accused – Appellant

Vs.

Hon. Attorney-General, Attorney-General's Department,

Respondent - Respondent

Before : **Marsoof J**

Ekanayake J

Suresh Chandra J

Counsel : **Shyamal A. Collure with Weerasena Ranahewa for the 2nd Accused – Appellant**

Palitha Fernando P.C, A.S.G with N Pulle, SSC for the Attorney General

Argued on: **23rd November 2010**

Decided on: **29th July 2011**

Suresh Chandra J,

This is an appeal from the judgement of the Court of Appeal by the 2nd Accused -Appellant.

Three accused were indicted before the High Court of Kegalle for commiting the murder of one Godayalage Sadiris. Of the three accused, the third accused, Kuruppu Arachchilage Gamini Jayatissa died pending trial and the case proceeded against the 1st and 2nd accused. Both accused were convicted and were sentenced to death.

On 23rd January 1988 the deceased Godayalage Sadiris and his wife Emilin had gone to the Dadigama Police Station to be present for an inquiry, to be conducted against the 3rd accused against whom a complaint had been lodged by the deceased's wife. After the inquiry both parties had boarded the village bus but the deceased and his wife had got off at the Nelundeniya Junction to buy provisions for the house. The 3rd accused had proceeded further in the same bus.

Emilin who was the main witness in the case and the only eye witness, had stated in her evidence that when she and her husband were proceeding to their house, after having bought provisions, the 2nd accused had come towards the deceased and attacked him with a sword and the 1st and 3rd accused who had also come there had attacked him with clubs. They had thereafter dragged the deceased away. Emilin had at that stage run away and had given the child who was with her to Ramyalatha and Chandralatha and thereafter had gone to her husband's sister Asilin's house. Emilin had shouted out to Asilin stating that her husband was being attacked prior to reaching Asilin's house and she had run back towards the place of attack. Asilin had followed Emilin. When Emilin went to the scene of the attack the deceased had not been there nor were the accused there. She had then gone to the Dadigama Police Station to lodge a complaint. Whilst going to the Police Station she had stopped at Punchi Banda's shop to give the parcel of provisions she had with her.

When the Police had arrived at the scene they had found the body of the deceased floating in the river which was in the proximity of where the deceased was said to be attacked. The medical officer who carried out the post-mortem examination found injuries on the head of the deceased and the cause of death had been identified in the report as death due to drowning. The medical officer who had made the report was unavailable to give evidence and the evidence in relation to the medical report was given by an authorised medical officer.

The case for the prosecution was that all three accused attacked the deceased and dragged him and threw him into the river.

The defence put forward in cross examination that the evidence of Emilin was flawed and that her identification could not be considered to be accurate. They further suggested that she was lying in her evidence in relation to the fact that she did not see the attackers dragging the deceased to the river. Furthermore, the defence

suggested that the injuries on the deceased were incompatible with a sword being used in the attack. The defence further put forward in cross examination as to the reliability of Emilin's evidence due to the fact that she did not tell any of the people she met about the attack on her husband and she also did not tell the names of the attackers to Asilin when she told her about the incident initially. Both accused made statements from the dock at the conclusion of the prosecution case.

On appeal to the Court of Appeal, the appeal was dismissed. The grounds urged before the Court of Appeal were:

1. Identity of the accused had not been established and the learned trial judge had not considered the weaknesses in the identification.
2. Section 27 of the Evidence Ordinance statement which was led in evidence was inadmissible in the circumstances of the case.
3. The learned trial Judge having permitted the section 27 statement to be led, did not refer to what inference that she was drawing from the recovery.
4. Considering the circumstances of the case it was incumbent on the learned trial Judge to have considered whether there was common murderous intention.
5. The learned trial Judge had not considered the dock statements of the accused as she should do in law.

It was stated by the Court of Appeal that the Learned Judge of the High Court in her judgment had stated in relation to the issue of identification that the main intention of Emilin was to save her husband and that she could not do anything with the child with her. The fact that Emilin made a prompt statement to the police satisfies the test of promptness. Due to the fact that there was no inconsistency between the evidence given with her previous statements the test for consistency was also satisfied. Taking into consideration the judgment given in *Alwis v Piyasena Fernando* [1993] 1 SLR 119 by GPS De Silva CJ the learned judge reiterated that the Court of Appeal would not lightly disturb the findings of primary facts made by a trial judge

unless it is manifestly wrong as they have the priceless advantage of observing the demeanour of witnesses which the judge of the Court of Appeal does not have.

In relation to the evidence regarding the clubs being made admissible at the trial the Learned High Court Judge had stated that after taking the statements from the 1st and 2nd accused, the ASP had recovered two clubs. The fact that the investigating officer took the clubs into his custody shows that they were circumstantially relevant to the case. The clubs were handed over to the Magistrates Court and later the productions were sent to the High Court. No one at the trial had stated that the clubs were not produced at the non summary inquiry. Due to the length of time taken for the trial to proceed it had been shown in evidence that the clubs were destroyed due to natural decay. The Learned judge considered that the clubs were thus relevant evidence.

In relation to the issue of common murderous intention the Court of Appeal stated that due to the fact that the evidence of Emilin was considered to be accurate the fact that the accused together armed with weapons had attacked the deceased and dragged him to the river shows that there was a common murderous intention and the failure of the trial judge to address the issue has not caused prejudice to the accused. The Court of Appeal applied S.334 of the Criminal Procedure Code and Article 138 of the Constitution to reject the appellant's argument.

The 2nd Accused made an application for special leave against the said judgment of the Court of Appeal and this Court granted leave on the following questions of law:

1. Did the prosecution lead any evidence whatsoever to establish that the Petitioner and the other two accused entertained a common intention to murder the said deceased Godayalage Sadiris alias Madduma as required by law in order to apply the provisions of S.32 of the Penal Code?

2. In the circumstances, is the conclusion of the Court of Appeal that the failure on the part of the Learned Trial Judge to consider the existence of murderous intention has not caused prejudice to the accused, justified?

3. Have their Lordships of the Court of Appeal misdirected themselves by applying the provisions of the proviso to S.334 of the Code of Criminal

Procedure Act and those of the proviso to Article 138(1) of the Constitution to disregard the said failure in the circumstances of this case?

In the case of *King v Loku Nona and others* it had been held by Hutchinson C.J that if "A shoots B intending to murder him, and digs a grave and buries the body, but it turns out that B was not dead when he was buried, and that he was suffocated in the grave. I should hold that A murdered him." He further elaborated on the issue that the word "act" in the Penal Code denotes as well a series of acts as a single act (s.31), and the striking with a club, the cutting of the throat, and the throwing into the sea were an "act" within the meaning of s.293 and that all these acts were done with the intention of killing. It could not be that the acts could be separated to say that this was done with the intention of killing, and the other was done with another intention. In the present case too although the cause of death was drowning the intention to commit murder was clear when considering the evidence of the eye witness.

In the case of *Wijithasiri and another v The Republic of Sri Lanka* 1990 1 SLR 56 which had very similar facts to the present case the issue of common murderous intention was looked into very closely. The relevant facts in relation to that case were that the sole eye witness for the prosecution was an 8 year old boy who was the son of the deceased. They were going home on the deceased's bicycle and when they had dismounted and were going up a hill the first accused in the case came and hit the boy's father on the head with a club and the second accused said 'hit him till he dies'. The boy said that he had identified the accused by the aid of his father's torch light. The boy had run to a relative's house named Yakkala uncle and shouted stating that his father had been killed by Vijitha uncle the 1st accused. The boy had also informed another witness in the case of the assault on his father and the witness had gone to the scene and sent the deceased to the hospital. The statement of the boy was only made four days after the attack. Ramanathan J dealt with the issue of common murderous intention by laying down the test which was used to direct a jury in a jury trial. Referring to the case of *King v Assanna and others* 50 NLR 324 Ramanathan J stated that

" where the question of common intention arises the jury must be directed that –

i. The case of each accused must be considered separately

ii. That 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 similar intention entertained independently of each other.

iv. There must be evidence of either or circumstantial evidence of a pre-arranged plan or some other evidence of common intention.

v. The mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence of common intention unless there is other evidence which justifies them in so holding."

Applying the test stated by Ramanathan J to the present case even though the trial judge in her judgment did not mention the said law but as pointed out by the Court of Appeal in its judgment that even though the trial judge had not specified the term common intention in her judgment, by looking at the essential facts of the case specifically, by considering the reliability of the evidence of Emilin, that all three accused were armed with weapons and came almost together towards the deceased and attacked him, that they seemed to have been waiting for the accused and that the river where the body was found was in close proximity to the scene of the attack, had in fact considered all the relevant issues in the case which would have led the trial judge to the same conclusion as when applying the test laid down in *King v Assanna.* Common murderous intention is clearly portrayed by the accused as the said acts could not have been done unless there was a common understanding or agreement between the accused parties to carry out such an attack with the intention of killing the said deceased.

Furthermore in the case of *Don Somapala v Republic of Sri Lanka* 78 NLR 183 Thamotheram J held that the accused could satisfy the requirement of common murderous intention by either having gone with the intention of committing the murder or at the spur of the moment joined in the act of committing the murder. The main issue here is that the common intention can either be proven by showing that the accused had planned and carried out the act of murder together or that they through the act of committing the murder together had a common understanding

between them to carry out the murder thus satisfying the test of common murderous intention.

Considering all the above issues it is clear that the 2nd accused did have the requisite common murderous intention to commit the act of murder.

In relation to the procedural issue which has been brought up by learned Counsel it has to be stated that the correct provision which should have been considered for an appeal from a trial without a jury under the Code of Criminal Procedure would have been S.335 and not S.334 (as stated by the Court of Appeal) which deals specifically with trials by jury as stated in the case of *Sheela Sinharage v Attorney General* 1985 1 SLR 1. Though the issue has been raised, it does not have any application to the present context since under S.335 the only procedural issue that the Court of Appeal needs to consider in appeal is whether there is sufficient grounds for interfering with the original judgment and if there is none the Court of Appeal should dismiss the appeal. As it has been made clear by the abundance of evidence of common murderous intention, the Court of Appeal did not find sufficient grounds to interfere with the decision of the Learned High Court Judge who was able to hear the evidence at first hand and it is generally the view of the Court that unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first hand evidence put before her to which the Judge of the Appellate Court would not have the ability to witness. Also when considering the Proviso to Article 138(1) of the Constitution it is evident that the judgment of the Learned High Court Judge need not be reversed or interfered on the account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice as stated in the judgment of the Court of Appeal. In the above circumstances the 1st and 2nd questions of Law on which leave was granted are answered in the affirmative and the 3rd question is answered in the negative.

Therefore the appeal of the 2nd Accused – Appellant is dismissed and the conviction and sentence imposed by the Learned High Court Judge is affirmed.

JUDGE OF THE SUPREME COURT

SALEEM MARSOOF J,

I agree.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE J,

I agree.

JUDGE OF THE SUPREME COURT