

**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.

The Democratic Socialist Republic of
Sri Lanka

COMPLAINANT

Vs

Court of Appeal No:

CA/HCC/0244-245/2020

High Court of Colombo

Case No: HC/2803/2005

1. Kohilamulla Arachchige Amila
Sampath
2. Siyabalapitiye Sarathchandra Ruwan
Kumara
3. Ranga Namal Samaranayake
4. Wellage Sasitha Sulochana De Silva
alias Sasitha
5. Solangaarachchige Luxman
Chaturanga alias Luxman

ACCUSED

AND BETWEEN

4. Wellage Sasitha Sulochana De Silva
alias Sasitha

5. Solangaarachchige Luxman
Chaturanga alias Luxman

APPELLANTS

Vs

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

RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Darshana Kuruppu with S.Weerasinghe for**
the 4th Accused-Appellant.
Delan De Silva for the 5th Accused-
Appellant.
Dilan Ratnayake, ASG for the Respondent.

ARGUED ON : **19/03/2024**

DECIDED ON : **24/07/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named 4th and 5th Accused-Appellants (hereinafter referred to as the 1st and 2nd Appellants) along with three other Accused were indicted in the High Court of Colombo as follows:

1. That on or about the 30.01.2003 at Pethiyagoda, the accused named in the indictment were members of an unlawful assembly with the common object of causing hurt to Abeysinghe Arachchilage Bandula Abeysinghe thereby committing an offence punishable under Section 140 of the Penal Code.
2. At the same time and same place and in the course of the same transaction the accused by being a member of an unlawful assembly caused the death of the abovenamed Abeysinghe Arachchilage Bandula Abeysinghe and thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. At the same time and same place, and in the course of the same transaction the accused being a member of an unlawful assembly attempted to commit the murder of Abeysinghe Arachchilage Chatura Tharanga Abeysinghe and thereby committed an offence punishable under Section 300 read with Section 146 of the Penal Code.
4. At the same time and same place, and in the course of the same transaction the accused being members of an unlawful assembly voluntarily caused hurt to Abeysinghe Arachchilage Isuru Sammera

Abeysinghe and thereby committed an offence punishable under Section 315 read with Section 146 of the Penal Code.

5. At the same time and same place, and in the course of the same transaction the accused caused the death of the afore named Abeysinghe Arachchilage Bandula Abeysinghe and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.
6. At the same time and same place, and in the course of the same transaction the accused attempted to commit murder of Abeysinghe Arachchilage Chatura Tharanga Abeysinghe and thereby committed an offence punishable under Section 300 read with Section 32 of the Penal Code.
7. At the same time and same place, and in the course of the same transaction the accused voluntarily caused hurt to Abeysinghe Arachchilage Isuru Sameera Abeysinghe and thereby committed an offence punishable under Section 315 read with Section 32 of the Penal Code.

The trial commenced before the Judge of the High Court of Colombo as the Appellants and other Accused had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence. The Appellants and other Accused had made dock statements and had denied the charges. After the case was fixed for Judgement, the 3rd Accused had absconded the court. Hence, evidence was led under Section 241(1) of the Code of Criminal Procedure Act and fixed the case in absentia of the 3rd Accused. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants and the 3rd Accused as charged and acquitted the 1st and 2nd Accused from the case. The 3rd Accused and the Appellants were sentenced as follows:

- First Count 06 months rigorous imprisonment each.
 - Second Count death sentence passed against the 3rd Accused and the Appellants.
 - Third Count 07 years rigorous imprisonment with Rs.5000/- fine with a default sentence of 06 months simple imprisonment against the 3rd Accused and the Appellants.
 - Fourth Count 03 years rigorous imprisonment with Rs.5000/- fine with a default sentence of 06 months simple imprisonment against the 3rd Accused and the Appellants.
- 5th ,6th, and 7th are alternative counts.

Open warrant had been issued against the 3rd Accused by the Court. Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court. For clarity the arraignment of the Appellants in the High Court Trial is as follows:

1st Appellant (4th Accused in the indictment)

2nd Appellant (5th Accused in the indictment)

The learned Counsels for the Appellants informed this court that the Appellants had given consent for this matter to be argued in their absence.

Background of the Case

In this case, the deceased, along with his wife and two sons (PW2 and PW3), resided in the upper part of a house belonging to the father of the 3rd Accused. The eldest son of the deceased had eloped with the sister of the 3rd Accused, which led to an enmity between the deceased and the 3rd Accused's faction. As the deceased suspected of a possible assault of him and his family, had gone to lodge a complaint at the Peliyagoda Police Station on the date of the incident.

According to PW2 and PW3, their father had instructed them to keep the house lights off until his return. At the time of the incident, PW2 was 16 years old and PW3 was 14. Following their father's instructions, they remained at home when the 1st and 3rd Accused arrived, tore down the front door curtain, assaulted their dog, and left. This incident occurred around 7:00 pm. Despite the lights being off, the individuals' movements were visible due to the streetlights.

When their parents returned home, a van arrived with approximately six individuals who disembarked and approached the house. As the door was not opened, the group broke in, dragged PW2 outside, and assaulted him under a jackfruit tree. When the deceased intervened to save his son, the 3rd Accused and the Appellants attacked him with a hockey stick and assaulted both PW2 and PW3. The witnesses unequivocally identified the 3rd Accused and the Appellants. The deceased succumbed to his injuries in the hospital, while PW2 and PW3 received treatment for their injuries. As such, both could not attend the funeral of their father. PW2 had sustained injuries on his forehead, hand, and legs. PW3 had sustained fracture on his hand and undergone a surgery.

The JMO who conducted the postmortem of the deceased had noted 12 injuries on all over the deceased's body. The cause of death was due to Cranio cerebral injuries due to assault with heavy, rigid, and elongated blunt weapons. Medico-Legal Reports of PW2 and PW3 were also marked at the trial.

Having satisfied that the prosecution had made out a prima facie case against the Appellants, the learned Trial Judge had called for the defense and all the Appellants had made dock statements and denied the charges. The Appellants had separately canvassed their Appeal grounds through their Counsel.

The First Appellant had filed following grounds of appeal.

1. The Learned Trial Judge had failed to consider the evidence against the 1st Appellant is wholly inadequate to convict him for the charges.
2. The Learned Trial Judge had failed to consider the identification of the 1st Appellant at the material time of the incident has not been established beyond reasonable doubt.
3. The Learned Trial Judge had shifted the burden on the 1st Appellant to rebut the evidence of prosecution witnesses.
4. The Learned Trial Judge had misdirected himself on law by applying the Ellenborough dictum to the facts of the case where there is no strong prima facie evidence against the 1st Appellant to warranting an explanation from him.
5. The Learned Trial Judge had failed to consider the evidence favorable to the 1st Appellant and thereby denied a fair trial.

The 2nd Appellant had filed following grounds of appeal.

The Counsel for the 2nd Appellant, while agreeing with grounds 1-4 of the appeal raised by the 1st Appellant, submitted the following two additional grounds on behalf of the 2nd Appellant.

1. The Learned Trial Judge had failed to consider the omissions on the evidence of PW2 and PW3 which creates a reasonable doubt on the prosecution case.
2. The Learned Trial Judge had failed to consider the inter se contradictions of the evidence given by PW2 and PW3 which too create a reasonable doubt on the prosecution case.

As the appeal grounds raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

The Sri Lankan Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court. The right to a fair trial led to determine whether an accused is innocent or guilty. This is an internationally recognised human right. Fair trials help to establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure fair and just societies, and limiting abuse by governments and state authorities.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done”.

In this case, all Accused named in the indictment had been given a fair trial by the trial judge. All Appellants have been represented by a Counsel throughout the trial. The court has followed all procedures correctly and had treated all parties equally.

Accordingly, the Appellants were convicted for Unlawful Assembly, Murder, Attempted Murder and Causing Grievous Hurt. Although sentences were passed on counts 5, 6, and 7, these are alternative counts.

Under Section 138 of the Penal Code, an assembly of five or more persons is an unlawful assembly if it has a common object to contravene domestic law.

In **Kulatunga v Mudalihamy** (1940) 18 TLR 21 the court held that:

“To prove a charge of unlawful assembly punishable under Section 140 of the Penal Code against an accused person it must be established that

the accused knew the common object; and that he intentionally joined the unlawful assembly and was a member of the unlawful assembly.

In **Samy and Others v Attorney General (Bindunuwewa Murder case)** [2007] 2 SLR 216 the court held that:

“It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion.

Hence, the case against every individual accused must be considered separately and that omnibus evidence of general character must be closely scrutinized in order to eliminate false or mistaken implications of innocent persons.

The Learned High Court Judge in his judgment at pages 27 and 28 had very clearly analysed the evidence given by the lay witnesses against Appellants. Further, the Learned High Court Judge, after considering the legal analysis of unlawful assembly had very correctly found that the Appellants including 3rd Accused guilty to the charges.

Identification evidence is utilized by the prosecution in a criminal trial to ascertain the individual accused of committing a crime. Various forms of identification evidence exist, including visual identification, fingerprint analysis, and DNA profiling. Visual identification evidence involves an eyewitness recognizing a suspect based on memory.

The court must consider the inherent risks associated with relying on visual identification evidence, as even sincere witnesses with ample opportunity for keen observation frequently make erroneous identifications.

The Attorney General v. Joseph Aloysius and Others [1992] 2 Sri L.R.264
the Court held that:

“...identification may be excluded only if the Court finds that its admission would have an adverse effect on the fairness of the proceedings”.

In this case, PW2 and PW3 had clearly identified the Appellants through the lights emanating from the street as the incident had happened on the road. Further, investigating officer had gone to the place of incident immediately after the information and had very well observed the light condition of the area, especially where the deceased was fallen down. The Learned High Court Judge in his judgment at pages 24-25 very clearly and accurately had considered the identification evidence and given plausible reasons as to why he believed the evidence given by PW2 and PW3 with regard to the identification of the Appellants.

The presumption of innocence is a cornerstone of justice, operating under the premise that an accused individual is deemed innocent until proven guilty. Shifting the burden of proof undermines this principle by obliging the accused to demonstrate their innocence, thereby inverting the traditional burden of proof. This practice can lead to unjust outcomes, as it unfairly compels the accused to substantiate a negative assertion. Such a shift is often regarded as inequitable, placing the onus on the accused rather than the prosecution. Conversely, the accused may bear the legal responsibility of refuting a statutory presumption or establishing a statutory defence or exception to liability.

Considering the judgement of the High Court Judge, we are of the opinion that nowhere in the judgement the Learned High Court Judge had reversed the burden on the Appellants to prove their innocence.

In this case the evidence given by PW2 and PW3 are cogent without any ambiguity. When this gruesome incident happened PW2 was only 16 years and PW3 was only 14 years. Their father had been assaulted in front of them. Even though both were children at the time of the incident, both had given evidence without any contradiction of the main incident. As such, the Trial Judge is very correct to conclude that the prosecution had presented prima facie a case against the Appellant. Hence, referring to the Ellenborough dictum, the judgement had not caused any prejudice to the Appellant.

The Learned High Court Judge, in his judgment, considered all the evidence presented by both parties and provided reasons for accepting the prosecution's version while rejecting the defence's version.

The Learned Counsel for the 2nd Appellant contended that the omissions highlighted are important and sufficient to affect the credibility of PW2 and PW3. The Learned High Court Judge in his judgment had very correctly considered the said omissions and had correctly held that the omissions highlighted are not sufficient enough to disturb the core of the case.

In **Bandara v. The State** [2001] 1 SLR 63 the Court held that:

“Discrepancies and inconsistencies which do not relate to the core of the prosecution case, ought to be disregarded especially when all probability factors echo in favour of the version narrated by a witness”.

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He had properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the Learned High Court Judge in this case cannot be faulted.

The subsequent conduct of the two Appellants who avoided the police nearly three weeks after the incident also go on to show that they were acting together in this case.

As discussed under the appeal grounds advanced by the Appellants, the prosecution had adduced strong and incriminating evidence against the Appellants. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and come to a correct finding that the Appellants were guilty of the charges levelled against them. Therefore, I dismiss the Appeal and affirm the conviction and the sentence imposed on them on 13.02.2020 by the Learned High Court Judge of Colombo.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL