

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an application under Article 138 of  
the Constitution of the Democratic Socialist  
Republic of Sri Lanka

Athugalage Patrick Walter Karunasinghe  
Wattegedara, Kohilegedara.

1<sup>st</sup> Accused- Appellant

**Court of Appeal Case No.**  
**CA HCC 162-163/2017**

Athugalage Priyantha Karunasinghe  
Wattegedara, Kohilegedara.

**High Court of Kurunegala**  
**Case No. 197/2006**

3<sup>rd</sup> Accused- Appellant

V.

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

Respondent

**BEFORE**

: **ACHALA WENGAPPULI, J**  
**K. PRIYANTHA FERNANDO, J**

**COUNSEL**

: Kalinga Indatissa, PC with Samantha  
Premachandra, Theruni Fernando, Rashmini

Indatissa, Nimanka Jayawickrama and Razana Salih for the 1<sup>st</sup> Accused- Appellant.

Nalin Ladduwahetty, PC with Lakni Silva for the 3<sup>rd</sup> Accused- Appellant

Sanjeewa Dissanayake, SSC for the Respondent

**ARGUED ON** : 22.10.2020

**WRITTEN SUBMISSIONS**

**FILED ON** : 24.05. 2018 by the Accused-Appellants.

31.10.2018 by the Respondent.

**JUDGMENT ON** : 16.11.2020

**K. PRIYANTHA FERNANDO, J.**

01. The 1<sup>st</sup> and the 3<sup>rd</sup> accused appellants (hereinafter referred to as 1<sup>st</sup> and the 3<sup>rd</sup> appellants) with the 2<sup>nd</sup> accused were indicted in the High Court of Kurunegala with 31 counts.
02. In count No.1, that they were members of an unlawful assembly with the common object of causing hurt on 14 specifically named persons, an offence punishable under section 140 of the Penal Code.
03. In counts 4 to 15, that one or more members of the said unlawful assembly committed hurt on each victim named in each count 4 to 15 respectively, by shooting, in prosecution of the said common object, or was such as the members of such assembly knew to be likely to be committed in prosecution of the said object and as they would be guilty of murder if that victim was killed in the circumstances and on knowledge or intention of the person or persons who committed the act of shooting, an offence punishable under section 300 read with section 146 of the Penal Code.

04. In count No. 16, that in the same transaction, one or more members of the said unlawful assembly committed mischief on the vehicle No. 42-1313 that belongs to *Upul Shantha Bandara* in prosecution of the said common object, an offence punishable under section 410 to be read with section 146 of the Penal Code.
05. In counts 17 to 30, that they committed the offence of attempted murder punishable under section 300 to be read with section 32 of the Penal Code.
06. In count 31, that they committed the offence of mischief punishable under section 410 to be read with section 32 of the Penal Code. The 2<sup>nd</sup> accused pleaded guilty to the charges preferred against him and was sentenced accordingly. After trial, the learned High Court Judge convicted the 1<sup>st</sup> and the 2<sup>nd</sup> appellants on counts 1,3,4,5,6 and 10 and acquitted them on the rest of the counts in the indictment. For count No.1, the appellants were sentenced to 6 months rigorous imprisonment. For counts no. 3,4,5,6 and 10, the appellants were sentenced to 10 years rigorous imprisonment on each count to run concurrently, in addition, Rs. 10000/- fine on each count with a default sentence of 3 months imprisonment.
07. The instant appeal was preferred by the appellants against the above conviction and the sentence. The following grounds of appeal were pursued by the learned President's Counsel for the appellants at the hearing of the appeal;

1<sup>st</sup> appellant;

1. The evidence was not properly evaluated by the learned High Court Judge and the evidence led was not sufficient for a conviction.
2. The judgment of the learned High Court Judge lacks reasoning and is contrary to section 283 of the Code of Criminal Procedure Act.
3. Learned High Court Judge failed to appreciate that the prosecution has failed to prove the charges beyond reasonable doubt.
4. The learned Trial Judge failed to consider the defence's evidence on the defence of *alibi*.

2<sup>nd</sup> appellant;

1. The learned High Court Judge in her judgment has wrongly mentioned about identification of the appellant with the facts not elicited in evidence.
2. Defence of *alibi* not considered by the learned Trial Judge.

## Facts in brief

08. As per the prosecution's evidence, the alleged victims had gone in the night to decorate a political rally to be held the following day. They were coming back in a lorry at about 3.30 am. It had been an open truck and the victims had been travelling in the open back tray of the lorry. The accused from the opposite political party were travelling in a crew cab that belonged to the Pradeshiya Sabha, and had followed the lorry that they (the victims) were travelling in and fired gunshots towards the victims, injuring them. The firing had taken place while both the vehicles were moving. The lorry that the victims were being transported in had to stop at the railway crossing, at which point the victims who came in the lorry were further assaulted by the persons who came in the crew cab.
09. The learned Presidents Counsel for both appellants made lengthy submissions highlighting the instances where the learned High Court Judge in her judgment had referred to evidence that was different from what was lead at the trial. The contention of the learned President's Counsel was that the identification of the appellants is questionable in the circumstances, and that no identification parade had been held. Further it was submitted that the common object mentioned in count No.1 in the indictment was not proved beyond reasonable doubt by the prosecution. In that, the prosecution had failed to prove that the appellants shared the common object as alleged in count No. 1, and that they acted in prosecution of the common object mentioned in count No.1.
10. The learned Senior State Counsel following the best traditions of the Attorney General's Department conceded that the prosecution had failed to prove that the appellants have shared the common object as stated in Count No.1.
11. The common object of the unlawful assembly referred to in count No1 is that of causing hurt on the 14 persons those who are named in count No.1. Hence, the prosecution has to prove beyond reasonable doubt, the following;
  1. That there was an assembly of five or more persons, and
  2. That the common object of those members of the assembly was to cause hurt on those persons namely *liyanaralalage Dayananda Wijesiri, Godigamuwalage Gamini Jayasuriya, Jayasundara Mudiyanseelage Ranith kumara jayasundara, Basnayaka Mudiyanseelage Haren Bandara, Kajugamalage Piyal Kumara Gamage, Wagage Dinesh Manjula Jayasinghe, Nishan Kumara Ratnayake, Balasuriya Arachhilage Susantha Kumara,*

*Arambegedara Devage Bandula, Ratnayake Mudiyanseelage Saman Kumara, Abdul Cadar Senur farook, Habarakada Mudiyanseelage Kithsiri Sampath Habarakada, Morathennage Pushpakumara, Ranpatidevayalage Nalin Rajapaksha.*

12. There is evidence to prove that the lorry in which the victims travelled was followed by the crew cab and that the victims were shot at by persons who were travelling in the crew cab. Apart from the inconsistent evidence on the identity of the appellants, it is important to note that the prosecution has failed to establish that the appellants or the persons who fired the gun shots towards the victims shared the common object to hurt each of the persons named in count No.1.
13. Prosecution has called the witnesses PW1, PW2, PW3, PW4, PW7, PW8, PW12, PW13, PW14, PW6 as injured who travelled in the lorry. Their evidence reveals that about 20 people had been in the lorry on the back tray, when they were fired at. None of these witnesses could testify as to the exact number of persons who were in the lorry, nor they knew the names of all the persons who travelled with them. Even the witnesses were unaware of most of the persons who travelled in the same lorry with them. According to the above witnesses, after decorating a place for a rally, they had gone to an area called “Gonna” at about 2.30 am to drop some of the persons who assisted them in decorating the place. Even the witnesses were not aware of the exact persons who were dropped at Gonna and who exactly remained in the lorry. On the way back after dropping some persons at Gonna, the lorry had continued to go towards Kurunegala. It was then that the incident of firing took place. In the circumstances, it would not have been possible for the appellants to know the exact identity of the persons who travelled in the lorry to share the common object as mentioned in count No. 1. There is no evidence to establish that the appellants knew the injured by their names or as specific persons who were travelling in the lorry at that point in time, although in count No.1, the specific names are mentioned as the persons against whom the appellants shared the common object to hurt them.
14. In the case of *Samy and Others V. Attorney General [2007] 2 Sri LR 216 (Bindunuwewa Murder Case)*, it was observed that;

*‘The effect of this section was considered in the early case of Kulathunga V. Mudalihamy (1) where it was held that the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. ...’*

15. The common object as stated in the charge is to cause hurt to specific persons mentioned in count No.1. As stated before, prosecution has failed to establish that the appellants shared the said common object to cause hurt on the specific persons mentioned in count No.1, also as conceded by the learned Senior State Counsel. There is no evidence to establish that the appellants had any knowledge that those specific persons were travelling in the lorry. Thus counts 1 to 16 of the indictment should necessarily fail. Therefore, in view of the above findings, the other grounds of appeal need not be considered. Accordingly, I set aside the conviction of the 1<sup>st</sup> and the 2<sup>nd</sup> appellants on counts 1,3,4,5,6 and 10 and acquit them.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**ACHALA WENGAPPULI, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**