

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 Officer-in-Charge
Police Station
Sapugaskanda.

COMPLAINANT

Vs

Court of Appeal No:
CA/HCC/0368-372/2018
High Court of Gampaha
Case No: HC/41/2004

1. Don Pavulu Arachchige Chanaka
Madhawa alias Mana
2. Pothuvila Kankanamlage Dulip
Prabath alias Chaminda
3. Munasinghe Sirisena Silva
4. Pothuvila Kankanamlage Gunasiri
alias Chuti
5. Dolewatte Appuhamilage Sarath
Priyankara alias Lal
6. Korala Liyanage Ranjith
Priyashantha alias Ranji
7. Henegedera Tharaka Niranjana
8. Liyanage Ranthnasiri Perera alias
Gamini
9. Mudannayake Mudiyanseilage

Saman

10. Roy Jerad Wymon

11. Ranasinghe Arachchige Suranjith

12. Pothuvila Kankanamlage Madhura

ACCUSED

AND BETWEEN

1. Pothuwila Kankanamlage Dulip
Prabath alias Chaminda

2. Munasinghe Sirisena Silva

3. Pothuwila Kankanamlage Gunasiri
alias Chuti

4. Korala Liyanage Ranjith
Priyashantha alias Ranji

5. Liyanage Ratnasiri Perera alias
Gamini

APPELLANTS

Vs

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

RESPONDENT

BEFORE

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

COUNSEL : **Indika Mallawarachchi for the 1st and 5th Appellants.**
Shamal Collure with A.P.Jayaweera and P.S.Amarasinghe for the 2nd Appellant.
Niroshan Mihindukulasuriya for the 3rd Appellant.
I.B.S. Harshana for the 4th Appellant.
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **27/09/2023**

DECIDED ON : **17/01/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) along with seven other Accused were indicted in the High Court of Gampaha as follows:

1. That on or about the 22.07.1998 the accused named in the indictment were members of an unlawful assembly with the common object of causing hurt to Wanasinghege Ananda Suranimala 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 abducted the afore named Wanasinghege Ananda Suranimala thereby committing an offence punishable under Section 355 read with Section 146 of the Penal Code.
3. Section 355 read with Section 32 of the Penal Code. (Alternative common intention charge to count 02).
4. Causing the death of the aforementioned Wanasinghege Ananda Suranimala under Section 296 read with Section 146 of the Penal Code. (Common object charge)
5. Section 296 read with Section 32 of the Penal Code. (Alternative common intention charge to count 04).

As the 9th and 11th Accused had absconded before the commencement of the trial, evidence led under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case in absentia of them. While the trial was in progress, it was reported to the Court that the 10th Accused had passed away.

The trial commenced before the Judge of the High Court of Gampaha 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 considering the evidence presented by both parties, the learned High Court Judge convicted the Appellants and the 9th Accused for the charges 1-5 and sentenced them as follows:

- First Count 06 months rigorous imprisonment each.
- Second Count 15 years rigorous imprisonment each.
- Third Count alternative count to 2nd Count.
- Fourth Count death sentence each.
- Fifth Count alternative Count to 4th Count.

Open warrant had been issued against the 9th Accused by the Court.

As no sufficient evidence led against 1st ,5th ,7th ,11th, and 12th Accused, the Learned High Court Judge had acquitted them from the case.

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 (2nd Accused in the indictment)

2nd Appellant (3rd Accused in the indictment)

3rd Appellant (4th Accused in the indictment)

4th Appellant (6th Accused in the indictment)

5th Appellant (8th 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 due to the Covid 19 pandemic restrictions. Further, at the time of argument the Appellants were connected via Zoom platform from prison.

Background of the Case.

In this case the son of 3rd Appellant, namely Vidura Suranga, was found murdered 10 days prior to the date of offence and the deceased was the main suspect in the murder of the son of the 3rd Appellant. As such, the deceased was contemplating to surrender himself to the police on that fateful day. The deceased, his wife, his mother, and brother were living in the house of the deceased's mother-in-law in Mirigama, as the house of the deceased had been set on fire and the deceased was wanted by the police in connection of the murder of the son of the 3rd Appellant.

According to PW3, Hemalatha, the mother of the deceased, when they sought refuge in the house of the deceased's mother-in-law at Mirigama, at about 2-3 pm, the Appellants and the 9th Accused had gone to the house and assaulted the deceased and dragged him out and abducted in a bus driven

by the 3rd Appellant. First, the 9th Accused entered the house, grabbed the deceased, and assaulted him and this was followed by the Appellants using rods, swords and a pestle. Although PW3 had tried to prevent her son being taken in to bus, the 3rd Accused had assaulted her with a club. After the abduction, the witness had come to know the body of the deceased was lying at her house in Mabole at about 10.30 pm.

PW1, Anoma Damayanathi is the wife of the deceased. She had seen all Appellants and 9th Accused entering the house with arms and due to fear she had escaped through the rear door of the house. She remained in a neighbour's house for about one and half hours and when she returned home, she was informed that her husband had been taken away by the mob who entered her house.

PW6, brother of the deceased Jagath Sripal too had witnessed the incident from the roof of the house had corroborated the evidence of PW3. He had given evidence at the non-summary inquiry and was subjected to cross examination. As he was passed away before the commencement of the High Court trial, his evidence was admitted under Section 33 of Evidence Ordinance.

The JMO who conducted the postmortem of the deceased had noted 18 injuries all over the deceased's body.

The 2nd Appellant was identified at the identification parade.

Both the post mortem report and the identification parade notes were admitted under Section 420 of the Code of Criminal Procedure Act No.15 of 1979.

Having satisfied that the prosecution had made out a prima facie case against the Appellants, the learned Trial Judge had called for the defence and all the Appellants had made dock statements and had denied the charges.

The Appellants had separately canvassed their Appeal grounds through their respective Counsel.

The First and Fifth Appellants had filed following grounds of appeal.

1. At the time of the incident the 1st Appellant was below 18 years of age.
2. The trial court erred by failing to consider the dock statement of the 12th Appellant.

The 2nd Appellant had filed following grounds of appeal.

1. The Appellant has been deprived of a fair trial that is recognized by Article 13(3) of the Constitution as a result of assigning one common Counsel for all the Accused.
2. Attribution of a common murderous intention to the Appellant is wholly untenable in law, as the conviction of the Appellant cannot be supported on the evidence adduced at the trial; in this respect.
3. The charges based on unlawful assembly are misconceived in respect of the Appellant since there was no factual or legal basis to have joined him along with the other Accused.
4. The prosecution has failed to prove an unlawful assembly charge against the Appellant.
5. The prosecution has failed to establish a strong prima facie case against the Appellant warranting any explanation from him.
6. The Learned High Court Judge has failed to properly evaluate the evidence concerning the Appellant; and hence, the inference drawn and the conclusions reached in respect of the letter in paragraphs 46,47,50,52,54,56,58,59 and 60 of the Judgment are not maintainable in law.

The 3rd Appellant had filed following ground of appeal.

1. The Learned High Court Judge misdirected himself that the 04th Accused had a motive to commit the murder and failed to consider that the 4th Appellant was provoked.

The 4th Appellant had filed following grounds of appeal.

1. The dock statement of the 4th Appellant was not properly analysed by the Learned High Court Judge.
2. The prosecution has not proved the case beyond reasonable doubt.

In the 1st ground of appeal raised by the 1st Appellant, he contends that he was under 18 years of age at the time of committing the offence. Hence, the Counsel argued that the death sentence should not have been imposed on him as per the new amendment to the Penal Code.

Section 53 of the Penal Code of the Penal Code as amended by Act No.25 of 2021 states:

“(1) Sentence of death shall not be pronounced on or recorded against any person who is under the age of eighteen years, at the time of the commission of an offence by such person.

(2) The court shall, in lieu of sentencing such a person to death, sentence him to be detained in an institution established under any written law for the detention of persons under the age of eighteen years, for a period specified in the sentence and subject to the provisions of such written law.”

The question regarding the age of 1st Appellant was only brought to the notice of the Court at his allocutus made on 15.11.2018. The Learned High Court Judge had rightly recorded the allocutus and proceeded to pass the death sentence as per the Section 53 of Penal Code stood at that time.

Due to 1st Appellant’s position regarding his age, this Court permitted to file a certified copy of his birth certificate within two weeks from the date of argument along with relevant notice to the Learned Deputy Solicitor General and directed further to get the case mentioned within the stipulated two weeks’ time. The Learned Deputy Solicitor General undertook to consider

that fact and make submissions with regard to the birth certificate of the 1st Appellant.

But the Learned Counsel for the 1st Appellant by her motion dated 06th October, 2023 informed this Court that the wife of 1st Appellant has informed her that she is unable to obtain a birth certificate of the 1st Appellant as his birth certificate had not been registered. Therefore, this appeal ground was not pursued any longer.

In the second ground, the 5th Appellant contends that the Learned High Court Judge erred by failing to consider the dock statement of the 12th Accused.

The 12th Accused in his dock statement had made several revelations against 3rd and 4th Appellant. Hence, the Counsel the 5th Appellant contends that this should have been considered in respect of her client.

In **Monis Appu v. Heen Hamy** (1924) (26 NLR 303) where Bertram C. J stated that

“If one prisoner standing on the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court”.

While Dock Statements amount to evidence, a statement of one Accused should not be used to implicate another Accused.

In **The Queen v. Kularatne** [1968] [71 NLR 529] as follows: —

*“We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed.,
(c) That it should not be used against another accused.”*

This is especially important as Dock Statements are not strengthened by an Oath and cannot be subjected to cross-examination. The Learned High Court Judge had very correctly disregarded the dock statement of 12th Accused which implicated 3rd and 4th Appellant. Hence, this ground has no merit at all.

As the appeal grounds raised by the 2nd Appellant 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 determining whether an accused is innocent or guilty. This is an internationally recognised human right. Fair trials help 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 were represented by a Counsel throughout the trial. The court has followed all procedures correctly and has treated all parties equally. In this case the Appellants were convicted for Unlawful Assembly, kidnapping in order to commit Murder and committing Murder. No sentences passed on 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 for innocent persons.

The Learned High Court Judge in his judgment at paragraphs 54, 55, and 56 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 all the Appellants including 3rd Appellant and 9th Accused guilty of the charges. Hence, I find no merit to any of the grounds raised by the 2nd Appellant.

The 3rd Appellant in his sole appeal ground contends that Learned High Court Judge misdirected himself that the 3rd Appellant had a motive to commit the murder and failed to consider that the 3rd Appellant was provoked.

A motive can be useful in combination with other evidence to prove that a person committed a crime, especially if the suspected perpetrator denies committing the crime.

The Learned High Court Judge even referred to motive in his judgment, but had taken all precautions not to cause any prejudice to the Appellants. The relevant paragraph of the judgment is reproduced below:

Paragraph 42 of the Judgment.

මෙම අවස්ථානුගත කරුණු යටතේ මෙම මරණකරුව පැහැර ගෙන ගොස් තුවාල සිදුකිරීමට හෝ ඔහුගේ මරණය සිදුකිරීමට එකී පෙර සිද්ධියෙන් මිය ගිය මරණකරු වන විදුර සුරංගගේ පියා වන මෙම නඩුවේ 4 වන විත්තිකරුට හේතුවක් තිබුණු බව (Motive) මේ අනුව අනාවරණය වේ. එසේම විදුර සුරංග යන අයගේ මරණය සිදුකිරීමෙන් අනතුරුව එම මරණයට සැක කළ මෙම නඩුවේ මරණකරු වන ආනන්ද සුරනිමලගේ සහ ඥාතීන්ගේ නිවෙස් වලට ගිනි තැබීම සහ ඔවුන්ට ප්‍රදේශයෙන් පැන යාමට සිදුවීම හේතු කොටගෙන මෙම නඩුවේ මරණකරුව පැහැර ගෙන යාම සම්බන්ධයෙන් 4 වන විත්තිකරු සහ පවුලේ සෙසු ඥාතීන්ව ද සම්බන්ධ කොට සාක්ෂි ඉදිරිපත් කිරීමට හැකිවීමේ අවදානමක් ද ඇති බව මෙම සාක්ෂි විශ්ලේෂණය කිරීමේ දී අධිකරණය සැලකිල්ලට ගතයුතු වේ.

Hence, it is incorrect to argue that the Learned High Court put more weight on the motive than the other evidence.

As the provocation was not put as a defence on behalf of the 3rd Appellant, it is not necessary to consider in the judgment of the Learned High Court Judge. The 3rd Appellant even had failed to mention in his dock statement about the provocation.

The 4th Appellant through his Counsel complains that his dock statement was not properly considered in the judgment. Therefore, he argues that the prosecution has not proved the case beyond reasonable doubt.

The right to make an unsworn statement is recognized in several cases. Few of the important cases are cited below:

- **The King v Vallayan Sithambaram** 20 NLR 257
- **The Queen v Buddharakkita Thero and others** 36 NLR 433
- **The Queen v Kularatne** 71 NLR 529

Dock statement made by an accused from the dock must be looked upon as evidence. In this case, the Learned High Court Judge in his judgment very well considered the dock statements of all the Appellants. Hence, this argument is not tenable.

In this case the Learned High Court Judge had very well considered and analysed all the evidence placed before him to arrive at his decision.

The appeal grounds raised by all the Appellants are, therefore, not successful.

Due to the aforesaid reasons, I affirm the conviction and the sentence dated 15/11/2018 imposed on the Appellants by the learned High Court Judge of Gampaha.

The Appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL