

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

**In the matter of an Application under and in
terms of Article 138(1) of the Constitution
read together with Section 11(1) of the High
Court of the Provinces (Special Provisions)
Act No.19 of 1990 with Section 331 of the
Code of Criminal Procedure Act No. 15 of
1979 as Amended.**

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

Complainant

CA HCC 0418-0420/2019

Panadura High Court No.
HC 2088/05

Vs.

1. Uswatte Liyanage Wijayananda Perera
2. Nanayakkara Atulugamage Manju
3. Thalagaswattage Kumarasinghe
4. Thelikada Masachchilage Sanjeewa
5. Ruwan Ahaman alias Ruwan Ahamad alias
Ruwan Namal
6. Uswatte Liyanage Chandana Fernando

Accused

AND NOW BETWEEN

1. Uswatte Liyanage Wijayananda Perera
2. Nanayakkara Atulugamage Manju
3. Thalagaswattage Kumarasinghe

Accused-Appellants

Vs.

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

Complainant-Respondent

Before: **Sampath B. Abayakoon, J.**
 Amal Ranaraja, J.

Counsel: Darshana Kuruppu with Dineru Bandara, Tharushi Gamage,
 Buddhika Thilakarathna, Sudarsha P. de Silva and Sahan
 Weerasinghe for the 1st Accused- Appellant.

Indica Mallawarachchi for the 2nd Accused-Appellant.

Nihara Randeniya for the 3rd Accused-Appellant.

Dilan Ratnayake, P.C., A.S.G. for the State.

Argued on: 04.10.2024

Decided on: 02.12.2024

JUDGMENT

AMAL RANARAJA, J.

1. This is an action where the six accused were originally indicted before the *High Court of Panadura*. The indictment against the 1st, 2nd and 3rd appellants and three other accused read as follows;

Count 1

That the accused, on or about 14.04.2003, at *Alubomulla*, within the jurisdiction of this Court, being members of an unlawful assembly the common object of which was to cause hurt to one

Galahitiyawage Lakshman Thomas; have thereby committed an offence punishable under Section 140 of the Penal Code.

Count 2

That in the course of the same transaction, in the same place and day, one or several of the members of the unlawful assembly caused the death of *Galahitiyawage Ranjith Thomas* in furtherance of the said common object of the said assembly or knowingly that if the said death be caused, the accused, by being members of the said unlawful assembly, committed the offence of murder punishable in terms of Section 296 read with Section 146 of the Penal Code.

Count 3

That in the course of the same transaction, in the same place and day, one or several of the members of the unlawful assembly, caused injuries to the said *Galahitiyawage Lakshman Thomas* assaulting with clubs and swords in furtherance of the said common object or knowingly that if such act caused the death of *Galahitiyawage Lakshman Thomas*, the accused, being members of the unlawful assembly, would have been guilty of murder; have thereby committed the offence of attempted murder punishable under Section 300 read with Section 146 of the Penal Code.

Count 4

In the course of the same transaction, in the same place and day, one or several of the members of the assembly caused the death of *Galahitiyawage Ranjith Thomas*; have thereby committed the offence of murder punishable under section 296 read with Section 32 of the Penal Code.

Count 5

In the course of the same transaction, in the same place and day, one or several of the members caused the injuries to the said *Galahitiyawage Lakshman Thomas* by assaulting with clubs and swords in furtherance of the said common object or knowingly that if the death be caused, the accused, being members of the unlawful assembly be convicted for the offence of attempted murder punishable under Section 300 read with Section 32 of the Penal Code.

2. The three accused-appellants and the three other accused have pleaded not guilty to the counts and the matter has proceeded to trial without a jury.
3. At the conclusion of the trial, the Learned High Court Judge by her judgment dated **29.03.2017**, has found the 1st, 2nd and 3rd accused-appellants, and the 4th and the 5th accused guilty to all counts preferred against them. Upon conviction the 1st, 2nd and 3rd accused-appellants, and the 4th and 5th accused have been sentenced to death for the 2nd count; fined and jailed for the 1st and 3rd counts. The sentencing order is silent as regard to the punishment in respect of the 4th and 5th counts.
4. The 6th accused has been found not guilty and acquitted from all counts.
5. The 1st, 2nd and 3rd accused-appellants, and the 4th and the 5th accused aggrieved by the judgment and the sentencing order have preferred an appeal. The Court of Appeal has set aside the convictions and ordered a re-trial.
6. Since the 6th accused has been acquitted at the first trial and a re-trial has been ordered subsequent to an appeal preferred by the 1st, 2nd and 3rd accused-appellants, and the 4th and the 5th accused, the second trial has proceeded against them only. At the conclusion of the second trial the

Learned High Court Judge of *Panadura* by his judgment dated **19.12.2019**, has found the 1st, 2nd and 3rd accused-appellants guilty to the 1st, 2nd and 3rd counts preferred against them and not guilty to the 4th and 5th counts. Upon conviction the 1st, 2nd and 3rd accused-appellants have been sentenced to death for the 2nd count; fined and jailed for the 1st and 3rd counts. The 4th and 5th accused have been found not guilty and acquitted from all the counts preferred against them.

7. Aggrieved by the judgment dated **19.12.2019** and the sentencing order, the 1st, 2nd and 3rd accused-appellants (hereinafter referred to as the “appellants”) have preferred the instant appeal to this Court. They have prayed that the disputed judgment and the sentencing order be set aside.

8. Grounds of appeal on behalf of the 1st appellant;

1. Have the accused been denied a fair trial?
 - i. By the failure of the successor Judge to send the case record to the predecessor Judge to prepare the order under section 200(1) of the Criminal Procedure Code Act No. 15 of 1979.
 - ii. By holding that the appellants have no right to have the prosecution witnesses, whose evidence have been led before the predecessor Judge to be recalled.
2. Does the judgment dated 19.12.2019 violate the provisions in section 283 of the Criminal Procedure Code Act No. 15 of 1979 for the following reasons;
 - a. That the Learned High Court Judge has failed to judicially evaluate the omissions highlighted by the defence in the proper context and do such omissions create a very serious doubt with regard to the presence of the 04th and 05th accused at the scene of crime.
 - b. Has the Learned High Court Judge erred in law by convicting the 1st to 3rd appellants after acquitting 4th and 5th accused for the 1st to 3rd counts?

c. Has the Learned High Court Judge failed to consider in his judgment whether the appellants have realized the common object of the unlawful assembly?

d. Has the Learned High Court Judge failed to evaluate the contradictions and omissions of the prosecution witnesses in order to consider as to whether such contradictions and omissions go to the very root of the prosecution case?

9. Grounds of appeal on behalf of the 2nd appellant;

1. Does the multitude of omissions highlighted in the testimony of PW-01 namely *Indrani* and PW-03 namely *Lakshman* with regard to the complicity and/or presence of the 4th and 5th accused create a serious doubt with regard to their presence at the scene?
2. Has the Learned Trial Judge seriously flawed by failing to address his judicial mind to the aforementioned vital omissions?
3. Has the Learned Trial Judge flawed when evaluating the evidence of PW-01 namely *Indrani* and PW-03 namely *Lakshman*, thereby causing serious prejudice to the appellants?
4. In view of grounds 1, 2, and 3, has the prosecution failed to prove the formation and the existence of an unlawful assembly consisting of 5 members?
5. Has the failure on the part of the prosecution to prove count 1, necessarily rendered the convictions in respect of counts 2 and 3 which are on the footing of common object, legally untenable?
6. Has the Learned Trial Judge misdirected himself on the concept of "corroboration"?

7. Has the Learned Trial Judge flawed on the principles relating to burden of proof on the 2nd appellant?
8. Has the Learned Trial Judge misconstrued and misapplied the Ellenborough principle by applying the same to an eye-witness case?
9. Has the Learned Trial Judge treated the dock statement of the 2nd appellant with contempt and has drawn adverse inferences for his failure to call witnesses, consequently placing an undue burden on the 2nd appellant and causing serious prejudice to the 2nd appellant?
10. In view of all the aforementioned grounds of appeal, the judgment of the Learned Trial Judge defective and flawed thereby rendering the conviction unsustainable?

10. Grounds of appeal on behalf of the 3rd accused-appellant:

1. Has the Learned Trial Judge failed to consider vital contradictions and omissions in the evidence of PW 01 and PW 03?
2. Has the Learned Judge has failed to appreciate the probability factor of the prosecution witnesses?
3. Has the Learned High Court Judge failed to analyze the defence evidence in the correct perspective and rejected the same on a wrong premise?
4. Has the Learned High Court Judge erroneously applied the Ellenborough dictum?

Facts in Brief

11. PW-03 and PW-01 are husband and wife; the deceased is the brother of PW-03. PW-03 and his siblings live in plots of land adjoining each other in the village referred to as "*Alubomulla*". Access to those plots of land is from the road named "*Gramodya Mawatha*". The 1st, 2nd and 3rd appellants are also residents of the village referred to as "*Alubomulla*" hence known to PW-01 and PW-03. On **22.03.2003**, the 1st, 2nd and the 3rd appellants had come to the residence of PW-01 and PW-03 with five other persons. The persons who came to the residence of PW-01 and PW-03 with the 1st, 2nd and 3rd appellants were unknown to PW-01 and PW-03. The 1st, 2nd and 3rd appellants together with the unknown persons have found fault with PW-03 for tipping off law enforcement officials about the appellants. Subsequently, have assaulted PW-03 and left the premises. There has been some animosity between the parties since that day. On **14.04.2003**, PW-01 and PW-03 had been in their residence and around mid-day PW-01 had heard some people shouting obscenities while travelling in a threewheel scooter on the access road abutting the plot of land in which the residence of PW-01 and PW-03 was situated. PW-01 and PW-03 have gone to the neighbouring land which was owned by a relative of PW-03 and have attempted to ascertain as to what was happening.
12. They have seen the 1st, 2nd and 3rd appellants with two other persons on "*Gramodya Mawatha*". The 2nd appellant has had a steel pole in his possession. The 1st appellant has had a sword in his possession. The 2nd appellant has confronted PW-03. The deceased who was residing in another plot of land close-by on hearing the commotion, has come out of his residence and walked up to "*Gramodya Mawatha*". As soon as the deceased set foot on "*Gramodya Mawatha*", the 2nd appellant has hit him with the steel pole. Upon being hit with the steel pole, the deceased has fallen onto the ground. PW-03 at that moment has gone to help the deceased. The 1st appellant has attacked PW-03 with the sword and injured an arm of PW-03. PW-01, with two other females have dragged the deceased who was fallen on the ground, into the plot of land she was in at that moment of time. The 3rd appellant has thereafter walked up to

the place where the deceased was lying, held him by his hair and stabbed the deceased in his chest twice with a dagger. Allegedly the 4th or the 5th accused has had in his possession a knife. The accused who had a knife in his possession had tried to stab PW-03 with it. However, PW-01 has placed herself in between the two preventing PW-03 from being injured, the deceased has succumbed to the injuries later.

Have the appellants been denied a fair trial?

13. The Learned Counsel of the 1st, 2nd and 3rd appellants contend that the appellants have been denied a fair trial.
14. The second trial against the 1st, 2nd and 3rd appellants and two other accused has been taken up before two High Court Judges. The prosecution's case has been concluded before one Judge and the appellants case before another Judge. The High Court Judge (hereinafter referred to as the "Predecessor Judge") who heard the evidence of the prosecution witnesses as a whole has at the conclusion of the prosecution's case decided to apply the provisions in section 200(1) of the Criminal Procedure Code Act No. 15 of 1979 and reserved order accordingly. While such order was pending, the predecessor Judge who heard the trial from its inception up until the conclusion of the prosecution's case has been transferred to another station, hence a different High Court Judge (hereinafter referred to as the "Successor Judge") nominated to sit in the *High Court of Panadura*.
15. The Learned Counsel for the appellants and two other accused has brought to the attention of the successor Judge, the particular order pending and also directed his attention to the fact that the predecessor Judge has recorded the demeanor and deportment of some of the prosecution witnesses when the evidence of those witnesses were led, and has requested from him that necessary steps be taken to get the

predecessor Judge who reserved order be nominated to deliver the same. The successor Judge has disallowed the application, though, he has not given reasons for doing so.

16. The predecessor Judge who reserved the aforesaid order had only been transferred to another station and nominated to sit in a different High Court, hence the predecessor Judge has continued to function as a High Court Judge. He has not been absent from office due to an illness or any other inhibition. The predecessor Judge has not been hindered from delivering the order reserved by him upon being nominated to do so. Also, the successor Judge has not been hindered in making the request to the relevant authority to nominate the predecessor Judge to deliver such pending order. Despite the existence of such circumstances, the successor Judge due to unknown reasons has decided against making such a request.
17. Further, the successor Judge has erred in concluding that the predecessor Judge has not recorded the demeanor and deportment of PW1 and PW3. The Learned Counsel for the appellants has drawn my attention to page 1363 of the brief to manifest the instances on which the predecessor Judge has in fact recorded the demeanor and deportment of the relevant witnesses led on behalf of the prosecution and also to support the contention that such fact was brought to the attention of the successor Judge in those circumstances.
18. Such misdirection and omissions by the successor Judge, it is contended has denied a fair trial to the appellants. The Learned Additional Solicitor General, appearing on behalf of the complainant-respondent has not disputed the contention of the Learned Counsel for the appellants. He has admitted that the appellants have been denied a fair trial.
19. Due to the matters alluded to above, I conclude that there is no necessity to consider the remainder of the grounds of appeal at this moment.

Is this a fit case to order a re-trial?

20. The prosecution has attempted to prove its case based on the eyewitness accounts of PW-01 and PW-03. When PW-01 and PW-03 were cross-examined their attention have been drawn to the statements given by them to the investigating officers. Based on the contents of such statements, the attention of the Court has been drawn to about 30 omissions therein. Some of the omissions are with regard to the number of people who were present at the scene during the incident of assaulting the deceased and PW-03. Such omissions brought to the attention of Court indicate the fact that PW-01 and PW-03 in their statements have mentioned that only three persons had been present at the scene of the incident. Further, the credibility of PW-01 and PW-03 have been challenged in the proceedings before the High Court. The chances of upsetting their testimony will be increased by the passage of time. It is also noted that 20 years have lapsed since the commission of the offences. Further, the appellants have defended themselves in two long drawn out trials and it does not seem just to call upon them to defend themselves for a third time after an unconscionable lapse of time.

21. His Lordship, Howard CJ in the case of *King vs. H. R. S. Fernando* 48 NLR 249 at page 252 has stated,

"We have given careful consideration to the question as to whether we should direct a retrial. The offence was alleged to have been committed on December 30, 1945. The case for Crown rested on the credibility of Mary Nona. The evidence in regard to this witness's identification of robbers cannot be regarded as satisfactory. Its assailability will be increased by the passage of time. The chances of a conviction in the event of fresh trial are in our opinion remote. In these circumstances the appeal is allowed and there will be no order in regard to re-trial".

22. His Lordship Gratiaen J, in the case of **P. M. Peter Singho vs. M. B. Werapitiya** 55 NLR 155 at page 157 has stated,

"I have anxiously considered whether I should send the case back for re-trial before another Magistrate. The charges against the accused are of serious nature and it may be that, upon the relevant and admissible evidence, his conviction would have been justified. But we are here concerned with offences alleged to have been committed over four years ago, and it does not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time. I, therefore, set aside the conviction and acquit the accused".

23. In **The Queen vs. G. K. Jayasinghe** 69 NLR 314 at page 328, his Lordship Justice Sansoni has stated,

"...we have considered whether we should order a new trial in this case. We do not take that course, because there has been a lapse of three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution case rests.

We accordingly direct that the judgment of acquittal be entered".

24. In **Hon. Attorney General vs. Bimbirigodage Sujith Lal** [SC Appeal No.14/2016], (SC Minute dated 20.02.2018), his Lordship Justice Vijith K. Malalgoda, PC, has stated,

*"I too had the opportunity of going through several other judgments, both the Supreme Court and the Court of Appeal, where re-trials have been ordered for similar reasons **R.M.Ranbanda V. The State SC. SPL LA 65/09, Nimal Banda vs. The State 1996 1 SLR 214, Rajah and Another V. Republic of Sri Lanka 1996 2 SLR 403 CA 93/2007, CA 24/2004** but, I could not find a single case where the date of offence goes far back as 1997 for nearly 20 years. After 20 years what this court will have to now consider is not a delay but a 'long delay' in ordering a fresh trial".*

25. Having considered the above matters of fact and law, I am of the view that this is not a fit case to order a re-trial.

26. We set aside the disputed judgment dated **19.12.2019** and the sentencing order, and acquit the appellants of the counts preferred against them.

27. The Registrar of this Court is directed to communicate this judgment to the *High Court of Panadura* for compliance.

Appeal is allowed.

Judge of the Court of Appeal

SAMPATH B. ABAYAKOON, J.

I agree.

Judge of the Court of Appeal