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

In the matter of an Appeal in terms of Article 154P and Section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Court of Appeal No:

CA/HCC/298/302/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kuliyapitiya

Case No: HC/263/2001

1. Kachchikaduge Gamini Tissa
2. Hitihamy Appuhamilage Gamini Kinsley Joseph
3. Arampath Piyanlage Thilakarathne
4. Liyana Aarachchilage Thilakarathne
5. Athukoralalage Chandrapala
6. Handun Pathirannahalage Ranjith Pathirathna
7. A. P. Chaminda Wijerathne

ACCUSED

AND NOW BETWEEN

1. Kachchikaduge Gamini Tissa
2. Hitihamy Appuhamilage Gamini Kinsley Joseph
3. Arampath Piyanlage Thilakarathne (Died pending appeal)
5. Athukoralalage Chandrapala
6. Handun Pathirannahalage Ranjith Pathirathna

ACCUSED-APPELLANTS

Vs.

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

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Neranjan Jayasinghe with Harshana Ananda for the 01st Accused-Appellant

: Indica Mallawaratchy for the 02nd Accused-Appellant

: Jagath Abeynayake for the 05th and 06th Accused-Appellants

: Janaka Bandara, D.S.G. for the State

Argued on : 06-11-2023

Written Submissions : 10-03-2023 (By the 5th Accused-Appellant)

: 04-06-2018 (By the 6th Accused-Appellant)

: 01-06-2018 (By the 1st Accused-Appellant)

: 01-06-2018 (By the 2nd Accused-Appellant)

: 10-10-2018 (By the Respondent)

Decided on : 18-03-2024

Sampath B. Abayakoon, J.

This is an action where seven accused were indicted initially before the High Court of Kurunegala. Subsequently, the case has been transferred to the High Court of Kuliyapitiya after the said High Court was established.

Pending the trial, on the basis that the 4th and the 7th accused had passed away, the indictment has been amended. The amended indictment against the remaining accused reads as follows.

1. On 14-08-1996, the accused along with the now deceased Liyana Aarachchilage Thilakarathne and A. P. Chaminda Wijerathne were members of an unlawful assembly with the intention of causing injuries to one Makewita Liyanage Padmasiri, and thereby committed an offence punishable in terms of section 140 of the Penal Code.
2. At the same time and at the same transaction, being members of the said unlawful assembly, causing the death of the earlier mentioned Padmasiri, by assaulting him with the said common object, and thereby

committed an offence punishable in terms of section 296 read with section 146 of the Penal Code.

3. At the same time and at the same transaction, being members of the said unlawful assembly and with a common object, caused injuries to one Chaminda Nalin Kumara, and thereby committed an offence punishable in terms of section 314 read with section 146 of the Penal Code.
4. At the same time and at the same transaction, caused the death of the earlier mentioned Padmasiri, and thereby committed the offence of murder punishable in terms of section 296 read with section 32 of the Penal Code.
5. At the same time and at the same transaction, caused injuries to earlier mentioned Nalin Kumara, and thereby committed an offence punishable in terms of section 314 read with section 32 of the Penal Code.

When the charges were read over to the 1st, 2nd, 3rd, 5th, and 6th accused who were the available accused at that time, all of them have pleaded not guilty to the charges and had opted to have a non-jury trial.

After trial, the learned High Court Judge of Kuliyapitiya, pronouncing his Judgement on 08-11-2017 had found the accused guilty to the 1st and the 2nd counts preferred against them, and had acquitted them from the 3rd count. On the basis that the 4th and the 5th count should be considered as alternate counts, the learned High Court Judge has decided not to pronounce an order in relation to the said counts.

The said accused had been sentenced to 6 months each rigorous imprisonment on count 1 and had been sentenced to death on count 2.

It is against the said Judgement and the sentence the accused-appellants have preferred this appeal. While the appeal is pending, the 3rd accused-appellant namely Arampath Piyanlage Thilakarathne also has passed away while in prison

custody. Therefore, the appeal before this Court now only relates to the 1st accused-appellant namely Kachchikaduge Gamini Tissa, the 2nd accused-appellant namely Hitithami Appuhamilage Gamini Kinsley Joseph, the 5th accused-appellant namely Athukoralalage Chandrapala and the 6th accused-appellant namely Handun Pathirannahalage Ranjith Pathirathna (hereinafter sometimes referred to as the 1st accused, 2nd accused, 5th accused, and 6th accused for easy reference.)

It needs to be mentioned that although in the judgement, the learned High Court Judge has mentioned the already deceased 4th accused Liyana Aarachchilage Thilakaratne as one of the accused tried before the Court, it should stand corrected as the 3rd accused namely Arampath Piyanlage Thilakaratne, according to the indictment. However, I am of the view that since both these persons are now deceased, it has not caused any prejudice towards the other accused-appellants as a result of the above misdirection in the Judgement.

Before I would proceed to consider the grounds of appeal proper, I would now briefly summarize the evidence in the following manner.

Facts in Brief

The incident has occurred in the afternoon of 15-08-1996. On the said day after work, the deceased along with several other friends including some of the witnesses had gone to have a bath in a well near his house.

PW-03 Priyantha Senadeera was one of the friends who accompanied the deceased. Around 2.30 - 3.00 in the afternoon, a known group of around 20-30 people including Chuti, Gamini, Pathiratne, Chaminda and several others have come in an agitated state towards them. The deceased was bathing at that time, and when he saw the crowd, he has told the witness and his other friends, namely Samantha and Ranjith, to run. The witness did not know the reason for the crowd to attack them. The persons who ran after the deceased had got hold of him, and Gamini, the second accused has started assaulting him using a club. The others have also joined him, and among them, the witness has seen Sujee,

Chuti, Pathiratne and Chaminda. The witness has identified the person called Chuti as the first accused and the person called Sujee as the 4th accused. He has stated that the 5th accused was also present, but he was unable to remember his name, while the 6th accused, namely Pathiratne was also a participant of the assault. According to him, the others also has attacked the deceased using clubs.

There appears to be a confusion as to whether the person who was dead at that time when the indictment was amended was actually Liyana Arachchilage Thilakarathne as mentioned in the amended indictment, or it was in fact, the 3rd accused, namely Arampath Piyanlage Thilakarathne.

According to the witness, the incident has taken place for about 20-30 minutes, and Samantha, who was one of the friends with them also sustained injuries as a result of this incident. The witness has observed the incident from few meters away, while hiding in a thicket.

It is noteworthy to mention that the witness has given evidence before the trial Court on 21-01-2015, nearly 18 years after the incident, and while being in prison for over 14 years for committing another offence. It appears from his evidence that as a result, he has forgotten most of the details of the incident, which has resulted in several contradictions and omissions in his evidence.

He has spoken about several persons who had assaulted the deceased while carrying swords with them as well.

PW-01 is the sister of the deceased referred to by PW-03 as Shantha, whose real name is Makewita Liyanage Padmasiri. According to her evidence, she has not seen the actual incident, but has gone to the place where her brother had been fallen after hearing that he has been attacked and injured.

When she reached there, the 1st, 6th, 4th and 5th accused, who are well known to her were present. The 1st appellant has told her to get ready to perform final rights (පාංශුකූලය) to her brother.

She has observed injuries all over his body, and after taking him to the hospital, she has come to know that her brother had passed away. She has testified that she is unable to remember whether the said persons had any weapons with them.

The injured person in the incident, namely Athukorala Chaminda Nalin Kumara has also given evidence at the trial, and has substantiated the version of events as stated by PW-03.

According to him, when they were running to escape from the crowd coming towards them, the deceased and he could not run away as they have fallen on the ground. The persons who came started to assault him and the deceased, and it was one Thilake who has initially attacked him. He has stated that the 1st accused is the one who rescued him from being attacked. He has identified the 1st, 5th, and the 6th accused as the persons who were among the group who assaulted the deceased and him.

The witness has admitted that he too is an accused in another case, but has denied the suggestion that he was falsely implicating the accused for the offence.

The doctor who examined the injured has marked his Medico-Legal Report (MLR) as P-03 and has testified that the injured had two contusions. He has also confirmed that in the history given by the injured, he stated that it was Gamini, Tikka and Sujee who assaulted him.

The Judicial Medical Officer (JMO) who held the postmortem was not present in the Court to give evidence and the defence has admitted the Postmortem Report, which has been recorded as an admission in terms of Section 420 of the Code of Criminal Procedure Act.

After the conclusion of the prosecution case, the learned High Court Judge has decided to call for a defence from all the available accused including the appellants, and all of them had made dock statements.

The 1st, 2nd, 4th and the 6th accused appellants had denied their involvement in the incident and has claimed that due to political rivalry, they were falsely implicated.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the 1st accused appellant formulated the following grounds of appeal for the consideration of the Court.

1. There is a serious doubt as to the participation of the 1st accused appellant in view of the *inter se* and *per se* contradictions.
2. There is a reasonable doubt as to the participation of five or more people with a common object of unlawful assembly.
3. The dock statement has not been evaluated separately and had been rejected in the strength of the prosecution evidence.

The learned Counsel for the 2nd accused appellant formulated the following grounds of appeal.

1. Evidence of PW-03, namely Priyantha Senadeera is wholly contradictory, unsafe and unreliable.
2. Evidence of PW-04, namely Chaminda Nalin Kumara is erratic, and no reliance could be placed on his evidence.
3. Following closely on the heels of ground 01 and 02, the learned trial Judge woefully failed to assess the credibility and testimonial trustworthiness of the said witness.
4. Conflict of evidence between PW-03 and PW-04 creates a serious doubt with regard to the prosecution case, which the learned trial Judge has totally failed to address his mind.
5. The judgement of the trial Court is in violation of Section 283 of the Code of Criminal Procedure Act and defective for the reasons set out below, namely;
    - Total failure to assess the testimonial trustworthiness of the eyewitness.

- Total failure to reason out the reliance placed on the eyewitness.
- Failure to apply the relevant law relating to unlawful assembly.
- Failure to address its legal mind to conflict of evidence and infirmities in the testimony of PW-03 and PW-04.

The learned Counsel for the 5th and 6th accused appellant associated himself with the ground of appeals urged by the learned Counsel for 1st and 2nd accused appellants.

In their submissions before this Court, the general contention of the learned Counsel was that the evidence of the witnesses was contradictory to each other and are not trustworthy and cogent enough to find the accused appellants guilty for the charge based on such evidence.

However, the main contention of the learned Counsel was that the judgement pronounced by the learned High Court Judge was not a judgement in terms of Section 283 of Code of Criminal Procedure Act, and there was no analysis of the evidence and conclusions based on such an analysis. Therefore, the purported judgement should stand vacated, as it cannot be said that it was a judgement pronounced in accordance with the law.

Consideration of the Grounds of Appeal

The learned Counsel for all the appellants made extensive submissions challenging the way the judgement has been written to argue that it should be vacated based on the failure of the learned High Court Judge to pronounce a correct judgement in accordance with law. Hence, I find it necessary to consider the said submission in relation to the judgement under appeal.

In his judgement which amounts to 13 pages, the learned High Court Judge has mentioned the charges and the number of witnesses led at the trial from 1st to 4th page. The learned High Court Judge has summarized the prosecution

evidence and the dock statement from 5th to 10th page and, thereafter, has stated the following:

"මා ඉදිරියේ ඇති සියලු කරුණු මම සලකා බලමි.

මෙහිදී මෙම සිද්ධිය 1996 වර්ෂයේ දී සිදු වී ඇති අතර, සාක්ෂිකරුවන් අධිකරණයේ දී සාක්ෂි දී ඇත්තේ, 2015, 2016 වර්ෂවලදී බැව් පෙනී යයි. එනම් ආසන්න වශයෙන් සිද්ධියෙන් වසර 20කට පමණ පසුව මෙම සාක්ෂි ඉදිරිපත් කර ඇති බැව් මා නිරීක්ෂණය කරන අතර, මෙහි දී එක් එක් චූදිත අත වූ ආයුධ සම්බන්ධයෙන් යම් නොගැලපීමක් ඇති බැව් මම නිරීක්ෂණය කරමි. එසේ වුව ද කිසිදු සාක්ෂිකරුවෙකු හට ඡායාරූපගත මතකයක් තිබීමේ අවකාශයක් නොමැති අතර, ඉදිරිපත් සිද්ධිය සම්බන්ධයෙන් සලකා බැලීමේ දී අධි චෝදනා ලැබ සිටින චූදිතයින් 7 දෙනා (මිය ගිය දෙදෙනා හා 1, 2, 4, 5, 6 චූදිතයින්) විසින් පද්මසිරි යන අයට පහර දුන් බවත්, එසේ පහර දීම හේතු කොට ගෙන ඔහුගේ මරණය සිදු වූ බවත්, ඉදිරිපත් සාක්ෂි මගින් තහවුරු කර ඇති අතර, ඉදිරිපත් කිසිදු කරුණක් මගින් ඒ පිළිබඳව කිසිදු සැකයක් ජනිත නොවේ.

දන්ඩ නීති සංග්‍රහයේ 296 වගන්තිය යටතේ වන චෝදනාවක් සඳහා වරද කරු කරනු වස් හුදෙක් පහර දීමක් හා ඒ මත සිදු වූ මරණයක් පමණක් ප්‍රමාණවත් නොවන අතර, අදාළ පහර දීමේදී මරණීය චේතනාව හෝ දැනීමක් වූයේ යන්න සලකා බැලිය යුතු වේ.

ඒ අනුව මෙම චූදිතයින්ගේ ක්‍රියාකලාපය ඉදිරිපත් සාක්ෂි ආශ්‍රිතව සළකා බලමි.

පැමිණිල්ලේ සාක්ෂි අංක 1 තම සාක්ෂියේදී පැහැදිලිව ප්‍රකාශ කර ඇත්තේ, "පාංශුකූලය දෙන්න ලැස්ති කරන්න" යනුවෙන් 1 වන චූදිත රැස්ව සිටි සෙසු පිරිස සමග තමා වෙත ප්‍රකාශ කල බවයි. එම සාක්ෂි කිසිවක් හඬයකට ලක් නොවේ. ඒ අනුව පහර දෙන අවස්ථාවේ දී චූදිතයින් හට මරණකරුගේ මරණය සිදු කරනු වස් චේතනාවක් හා/හෝ පැහැදිලි අරමුණක් හා/හෝ පැහැදිලි දැනීමක් වූ බව මොනවට සාක්ෂාත් වේ.

මෙහෙදී ඉදිරිපත් විත්ති වාචක දිවුරුම් සාක්ෂි නොවන අතර හරස් ප්‍රශ්නයන්ට බඳුන් නොවූ විත්ති කූඩුවේ සිට කරන ලද ප්‍රකාශයන් පමණක් වුව ද එය ද සාක්ෂියක් වශයෙන් මම සලකා බලමි. එහිදී සියලු විත්තිකරුවන්ගේ පොදු ස්ථාවරය වනුයේ පැමිණිල්ලේ සාක්ෂි අංක 1 තමන් සමග ඇති දේශපාලන අමනාපයන් හේතු කොට ගෙන චූදිතයන්ට චෝදනා ඉදිරිපත් කරන බවයි.

මෙහි දී පැමිණිල්ලේ සාක්ෂි අංක 1 සාක්ෂි දෙන අවස්ථාවේ දී එවන් අමනාපයක් හෝ අසත්‍ය සාක්ෂි ඉදිරිපත් කිරීම සම්බන්ධයෙන් කිසිදු යෝජනාවක් හෝ ඉදිරිපත් කිරීමට කිසිදු චූදිතයෙකු උපදෙස් හෝ දී නොමැති අතර, පැමිණිල්ලේ සාක්ෂි අංක 1 ගේ සාක්ෂියට අමතරව

මෙම සිද්ධිය ඇසින් දුටු වෙනත් සාක්ෂිකරුවන්ගේ සාක්ෂි මගින් කිසිදු සාධාරණ සැකයකින් තොරව තහවුරු වන බැවින් විත්ති වාචක මගින් විත්තියේ ස්ථාවරය පිළිගත නොහැකි වේ.

ඉදිරිපත් සාක්ෂි අනුව විශාල කණ්ඩායමක් වශයෙන් පිරිසක් පැමිණි බවත්, එම පිරිස අතර 1 සිට 7 දක්වා චූදිතයින් වූ බවත් 1 සිට 7 දක්වා චූදිතයින් විසින් පහර දීම හේතු කොට ගෙන මරණකරු මිය ගිය බවත් තහවුරු වේ. මෙහිදී චූදිතයින් පිරිසක් වශයෙන් එක්ව පැමිණීම තහවුරු වන හෙයින් හා ඔවුන් පෙර සුදානමක් ඇතිව එක්ව ක්‍රියා කල බැවි තහවුරු වන හෙයින් ඔවුන් අතර පොදු අරමුණක් වූ බවත්, ඒ සඳහා ඔවුන් අතර නීති විරෝධී රැස්වීමක් වූ බවත් පැහැදිලිව උපකල්පනය කල හැකි අතර, එසේ නොවන බවට කිසිදු සාක්ෂියක් හෝ කරුණක් ඉදිරිපත් නොවේ.

ඒ අනුව මෙම නඩුවේ 1 වන චෝදනාවට හා 2 වන චෝදනාවට එක් එක් චූදිත වරදකරු බවට තීරණය කර තීන්දු කරමි.

ඉදිරිපත් 3 වන චෝදනාව සම්බන්ධයෙන් සලකා බැලීමේ දී එම පහර කෑමට ලක් වූ අය ප්‍රකාශ කරනුයේ, ඔහුට පහර දෙන ලද්දේ දැනට මිය ගොස් ඇති නිලකේ නමැති අය විසින් බව වන අතර, එය ඔහු විසින් වෛද්‍යවරයා වෙත කරන ලද ප්‍රකාශය හා නොගැලපේ. එකී නිලකේ යන අය වෛද්‍ය වාර්තාවේ සඳහන් "ටික්කා" යන අය ද සම්බන්ධයෙන් සැකයක් පහල වන නමුත් එකී සැකය මත කිසිදු චූදිතයෙකු වරදකරු කිරීමට අවකාශ නොවේ. ඒ අනුව 3 වන චෝදනාවෙන් සියලු චූදිතයින් නිදොස් කොට නිදහස් කරමි.

ඉදිරිපත් 4 හා 5 චෝදනා සලකා බැලීමේ දී එම චෝදනා විකල්ප චෝදනා වශයෙන් ඉදිරිපත් කර ඇති බැවින් හා මුල් චෝදනා සම්බන්ධයෙන් ඉහත දී දක්වා ඇති පරිදි කටයුතු කර ඇති බැවින් එම චෝදනා සම්බන්ධයෙන් මම සලකා නොබලමි.

ඒ අනුව 1, 2 එක් එක් චෝදනාවට මෙම ඉදිරිපත් එක් එක් චූදිත වරදකරු තීරණය කර තීන්දු කරමි."

When it comes to a judgement, it is needless to say that each Judge has his or her own way of judgement writing. However, it is my considered view that whatever the way of writing maybe, for it to be considered as a judgement in terms of the relevant provisions of the law, the necessary ingredients of a judgement should be considered and the judgement should reflect that it was so. The final determinations need to be reached based on considerations given to the evidence placed before the Court and the relevant law.

The essential ingredients of a judgement in terms of section 283(1), (2) and (3) of the Code of Criminal Procedure Act read as follows;

> **283. The following provisions shall apply for the judgments of Courts other than the Supreme Court or Court of Appeal:-**
>
> **(1) The judgement shall be written by the Judge who heard the case and shall be dated and signed by him in open Court at the time of pronouncing it, and in a case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.**
>
> **(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.**
>
> **(3) If it be a judgement of acquittal it shall state the offence of which the accused is acquitted.**

Our superior Courts have consistently interpreted the essential requirements of a judgement providing necessary guidelines for trial Judges to enable them to enhance their judgement writing skills, which in my view, our trial Judges should endeavour to follow all the time.

In this regard, **Jayasuriya, J.** with reference to several other decided cases, observed the following in the case of **Chandrasena and Others Vs. Munaweera (1998) 3 SLR 94 at 96;**

> *"In **Ibrahim Vs. Inspector of Police 59 NLR 235**, the Supreme Court emphasized that the mere outline of the prosecution and the defence without reasons being given for the decision but embellished by such phrases as "I accept the evidence of the prosecution and I disbelieve the defence" is by itself an insufficient discharge of duty cast upon the Judge by section 306(1) of the Criminal Procedure Code. Vide also the decision in **Thusaiya Vs. Pathihamy 15 CLW 119** by Nihill, J.- According to the presently applicable section 283(1) of the Code 283(1) of the Code of Criminal Procedure Act No. 15 of 1979, the Judgement shall contain the point or points for*

determination, the decision thereon and the reasons for the decision. The Supreme Court stressed that the object of the statutory provision is to enable the Supreme Court to have before it the specific opinion of the Judge in the lower Court on the question of fact, so that it may enable the Court to ascertain whether the finding is correct or not. The weight of authority is to the effect that the failure to observe the imperative provisions of the section is a fatal irregularity and that even in a simple case that the provisions of this statute must be complied with."

Considering grounds of appeal similar in nature, **Ranjith Silva, J.** in **C.A. Appeal No. 62-65/2005 decided on 07-06-2011** made the following observation emphasizing the importance of a proper judgement.

"We have perused the Judgement and the Judgement runs into nine pages but not a single paragraph contains any evaluation of evidence. The learned Judge has not said anything about omissions and had just brushed aside one of the contradictions stating that they are insignificant, but does not refer to the other two contradictions. This Judgement is only a repetition of evidence and does not amount to a Judgement in terms of section 283 of the Code of Criminal Procedure Act. The learned Judge appears to have very conveniently discharged her functions without taking any pains to write a proper Judgement. It is extremely pathetic to note how much time and how much money that has been spent on this case over the years and finally it has to end up in a situation where this Court is compelled to order a retrial. It is also true that the learned High Court Judge has turned a blind eye with regard to the dock statement. She has not mentioned the concepts or a single authority or tried to appreciate or evaluate the dock statement in that light. In this context although we find that the Judge could have easily supported the conviction with real evaluation of evidence and contradictions and omissions, we are unable to justify this although a Court of Appeal will not lightly interfere with the findings of facts especially with regard to the credibility as it was held in ***Fraad Vs. Brown and Company 20 NLR 282,***

***Piyasena Vs. Alwis (1993) 1 SLR 119 at 122, Wikramasooriya Vs. Dedolina (1996) 2 NLR 95**."*

It is well settled law that the duty of a trial Judge is to consider the evidence placed before the Court by both the prosecution and the defence as a whole, and come to his findings, rather than compartmentalizing as happened in the impugned Judgement.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167,** the trial Judge stated that, "I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

Held:

There is a serious misdirection in law. It is a grave error for the trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the defence of the accused in the light of the prosecution witness is to reverse the presumption of innocence.

Per Rodrigo, J.

*"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty or not guilty.- See the Privy Council Judgement in **Jayasena Vs. The Queen 72 NLR 313**."*

At this juncture, I find it relevant to cite the Indian Supreme Court judgement in the case of **State of Uttar Pradesh Vs. Anthony (1984) SCJ 236/ (1985) CRI L.J. 493 at 498/499,** which provides clear guidance as to how to approach the analyzing of evidence in a case by a trial Judge.

It was held:

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witness and whether earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit the rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

With the above guidelines in mind, I will now proceed to consider whether the submissions made by the learned Counsel on the basis that the judgement pronounced by the learned High Court Judge cannot be considered a judgement in terms of Section 283 of the Code of Criminal Procedure Act have any justification.

The first count preferred against the accused had been that they were members of an unlawful assembly with the common object of causing injuries to the deceased person. The second count upon which the accused were convicted had

been based on the fact that the accused committed the offence of murder while being members of that unlawful assembly.

Therefore, for the accused to be convicted of the first and the second count, it was paramount for the learned High Court Judge to consider whether the offence of unlawful assembly had been established beyond reasonable doubt, and whether the accused mentioned in the charge had in fact been members of the said unlawful assembly.

In terms of Section 138 of the Penal Code, to constitute an unlawful assembly, there must be five or more persons in that assembly with a common object of committing one or more of the offences mentioned in the section itself.

The learned High Court Judge has stated in his judgement that there was evidence before the Court to the effect that a large number of persons came as a group and 1st to 7th accused mentioned in the charge were members of that group. It has been stated that the deceased passed away as a result of the assault by the said group, who had a common object and a pre-arrangement, and there is no evidence to conclude that there was no unlawful assembly.

It is correct that a group of persons had come and assaulted the deceased. However, to prove the 1st and the 2nd counts against the accused, it becomes necessary to show that the accused were among the group who came and assaulted the deceased.

The only persons who have given evidence as eyewitnesses to the incident had been PW-03 and PW-04. PW-04 is the person who has sustained injuries in the incident and the person mentioned in the third count as the injured person. According to the evidence of PW-03, although he speaks about 20-30 persons coming towards them and assaulting the deceased, in Court he has only mentioned the names of four persons, namely Chuti, Gamini, Pathiratne, and Chaminda. He has identified the 2nd accused as Gamini and the 1st accused as Chuti, and had stated that the other two are not in the Court, probably referring to the accused who was deceased at that time. He has also identified the 4th and

5th accused as persons who were present there, and the 6th accused as a person who assaulted.

The evidence of PW-04 had been to the effect that several persons came to assault the deceased and the 1st accused came to the place of the incident afterwards, and it was he who rescued him from being assaulted. According to him, he has identified one Thilake and Chaminda among the persons who came and assaulted him.

I am of the view that the learned High Court Judge should have analyzed these pieces of evidence and come to a firm finding based on a proper analysis whether the evidence establishes an unlawful assembly and the accused were members of the said unlawful assembly, which I am unable to determine by studying the judgment.

The learned High Court Judge has viewed the evidence of PW-01, the sister of the deceased who had subsequently come to the place of the incident, the words allegedly uttered by the 1st accused to get ready to perform the final rites, as an indication of the common object.

Although the learned High Court Judge has stated that the evidences was unchallenged, there is no basis to come to such a conclusion as the evidence had been challenged by the accused. Under the circumstances, it was the duty of the learned High Court Judge to analyze the evidence and come to a finding in that regard, rather than making a statement that the evidence was unchallenged.

Commenting on the dock statements of the accused, the learned High Court Judge has come to a finding that when PW-01 was giving evidence, she has not been questioned about any animosity that existed between the parties. It has also been determined that apart from PW-01's evidence, the incident has been proved beyond reasonable doubt by the evidence of other eyewitnesses.

I am of the view that this is a highly unsatisfactory way to come to a determination of facts. In this case, the only other witness apart from PW-03, who has spoken about seeing the incident was PW-04, the other injured person.

However, the learned High Court Judge has acquitted the accused from the third count preferred against them in that regard on the basis that PW-03's evidence was unsatisfactory. If that was so, there is a duty cast upon the learned High Court Judge to analyze the evidence and state the reasons for his conclusion that there are other eyewitnesses who speaks about the incident.

The learned High Court Judge has observed that there are discrepancies as to the weapons used by the accused, and due to the fact that the evidence has commenced nearly 20 years after the incident, the witnesses cannot have a photographic memory, which is true. However, I find it necessary for the learned High Court Judge to elaborate more on that and to highlight the relevant discrepancies and justify them, rather than making a general statement in the judgement.

Having considered the above, I am of the view that the analysis of the evidence in this matter, as reproduced earlier, was inadequate to conclude that this was a conviction reached after proper analysis of the evidence. Therefore, I find merit in the ground of appeal urged by the learned Counsel on the basis that the judgement was not in accordance with the requirements of Section 283 of the Code of Criminal Procedure Act.

Accordingly, I have no option but to set aside the conviction and the sentence as it cannot be allowed to stand on the considered ground of appeal alone. Therefore, I find it unnecessary to give attention to the other grounds of appeal urged before the Court.

Hence, I set aside the conviction and the sentence of the appellants by the learned High Court Judge.

The next matter I would like to draw my attention is whether this is a fit case to be sent for a re-trial.

Considering the grounds upon a retrial should be considered, in the case of **L.C. Fernando Vs. The Republic of Sri Lanka 79-II NLR 313 at 374** it was held:

> *"It is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so require.*
>
> *The charge laid against the accused is of serious nature, and it may be, a trial Court may find the accused guilty at a retrial upon relevant and admissible evidence. But it must be remembered that the acquisitions have been made about seven years ago.*
>
> *…Further, the trial had been long and protracted. There have been no less than thirty-five trial dates. The accused would have to bear undue hardship and heavy expense to defend himself again. I must also state that the defence in no way contributed to the reception of inadmissible and irrelevant evidence, which prejudice the trial.*
>
> *Under the circumstances, it seems to me to be harsh and unjust to order a retrial. It does not appear to me that the interests of justice require a retrial."*

In the case of **Nandasena Vs. Attorney General (2008) 1 SLR 51,** it was held:

> *"A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration since the date of the appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subjected to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered."*

The incident relating to this case has occurred on 14-08-1996, nearly 28 years ago. As observed correctly by the learned High Court Judge in the judgement as well, it has taken nearly 20 years after the incident for the 1st witness to give evidence before the trial Court. By that time, two of the accused had already been dead, and after the conviction, another accused had also passed away.

The evidence of the key witnesses when they gave evidence nearly 20 years after the incident shows that they have forgotten most of the material points. There is no basis to believe that if they were to be called upon to give evidence again some 28 years after the event, their evidence would be reliable or can be relied upon to find the accused guilty.

The appellants had been in incarceration from the date of their conviction on 08-11-2017, which amounts to more than five years in total.

For the reasons as considered above, I am of the view that no purpose would be served by sending the case back for a re-trial after such a long period from the date of the crime.

Therefore, I acquit the accused appellants from the charges.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal