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

In the matter of an appeal in terms of section 331 of the Code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

Court of Appeal Case No:
CA-HCC-373-375/2017

HC of Panadura Case No:
HC 2161/2006

Vs.

1. Meegahapola Arachchige Wasantha Alias Upali
2. Mallikarahige Duminda
3. Goonatilaka Mudiyanselage Priyantha

Accused

AND NOW BETWEEN

1. Meegahapola Arachchige Wasantha Alias Upali
2. Mallikarahige Duminda
3. Goonatilaka Mudiyanselage Priyantha

Accused-Appellant

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

Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Kolitha Dharmawardana with Chamindi Diloka Mannakkara for the 1st Accused-Appellant
Neranjan Jayasinghe with D.D.K.Katugampola for the 2nd Accused-Appellant
Saliya Pieris, PC with Yohan Pieris and Farhad Jiffry for the 3rd Accused-Appellant
Rohantha Abeysuriya, ASG, PC for the State.

Written Submissions On: 28.02.2020.(by the Accused-Appellant)
30.10.2018(by the Respondent)

Argued On: 27.06.2023

Decided On: 31.08.2023

Sasi Mahendran, J.

The 1st, 2nd, and 3rd Accused-Appellant (hereinafter referred to as 'the Accused') along with the 4th and 5th accused (both acquitted after trial) had been indicted before the High Court of *Panadura* on the basis of unlawful assembly to commit murder of one *Mathalge Weerasinghe*, alias *Kaluwa* and in the alternative on the basis of common intention to commit murder.

The prosecution led the evidence of eleven witnesses and production marked as P1 to P9. The 1st Accused provided evidence from the evidence box and the 2nd,3rd, 4th, and 5th Accused made dock statements. At the conclusion of the trial, the Learned High Court Judge convicted the 1st, 2nd, and 3rd Accused of murder, imposing the death sentence, and acquitted the 4th and 5th Accused.

Being aggrieved by the said conviction the Accused appealed to this court.

The Following are the Grounds of Appeal set out in the written submission:

1. The Prosecution has failed to establish the specific act or omission committed by the Appellant that would categorize him as a member of an unlawful assembly, despite claiming that witnesses saw the Appellant enter the house.
2. The Learned Trial Judge has relied on uncorroborated and inconsistent evidence to convict the Appellant.
3. The charge of unlawful assembly is untenable, as only three accused were charged with being members of an unlawful assembly.
4. The Learned Trial Judge failed to take into account that the Appellants acted under grave and sudden provocation while under the influence of liquor during their attack on the Deceased.
5. The Learned Trial Judge neglected to consider the demeanor and deportment of the prosecution witnesses when evaluating their evidence.
6. The Learned Trial Judge incorrectly applied the legal principles related to the dock statement and did not accord the dock statement the appropriate prominence and due consideration in line with established legal principles.

The facts and circumstances giving rise to this appeal are that:

According to PW2 *Pathirage Sumanawathie* (the Deceased's mother and eyewitness to this case), she stated that on the fatal day of October 30, 2001, she was seated on a rock near the foundation, which, according to her, was 3 feet away from her house. She was with her eldest son and *Washington* when she witnessed ten men approaching her house and heading toward the back of the residence. She recognized some of the men as she had known them personally; *Chaminda/Daminada* (2nd Accused) used to visit their house prior to these events. In addition to *Chaminda/Daminada,* she recognized Upali (1st Accused) and *Sudu* (3rd Accused) but did not know the names of the others as she had known them for only a short period. With sufficient lighting in the area, she observed that they were armed: one with a sword, others with knives, and a club. Although she had identified the 2nd and 3rd Accused, she could not confirm whether they were armed at that moment.

According to PW2, approximately 2 to 3 minutes after the accused retreated behind the house, she witnessed 10 men entering through the front door. Another 2 to 3

minutes later, two individuals emerged from the house, holding the deceased. At this point, the 1st Accused struck the deceased on his shoulder with a sword. The deceased was then moved to an area behind the house, where his body was left. Subsequently, the 1st Accused swung the sword in the direction of PW2. The group then departed toward the road, indicating that their task was completed. Overwhelmed by fear, PW2 fell unconscious and did not inspect the crime scene. Upon regaining consciousness, she learned of her son's demise, and her statement was subsequently recorded by the police.

During the prosecution's questioning, PW2 acknowledged the presence of the 4th and 5th Accused. However, due to insufficient lighting, she could not confidently identify what the 5th Accused was holding. Furthermore, at the trial, she couldn't identify any weapons.

During her cross-examination, PW2 stated that she had not seen her husband, *Sumanadasa* (PW1), at the time of the incident, as he had gone to take a bath. She asserted that she witnessed the gruesome event from the foundation of her property. Her testimony introduces some ambiguity, as she mentioned that along with the five Accused, another five individuals entered the premises. This creates uncertainty about the exact number of people involved. Although she claimed to have observed the event, she could not recall who was with her at the time, as previously indicated during her examination-in-chief. She also noted that she did not see what transpired behind the house.

PW2 stated that she saw her son being brought outside the front door frame. However, she could not identify who was holding the Deceased when he emerged from the house. She further mentioned that after the 1st Accused struck the Deceased on the shoulder, the sword also hit a wall, leaving a mark. She saw the 1st Accused carrying a blood-stained sword but could not confirm whether anyone else was armed.

It is pertinent to note that during her cross-examination she admitted that, she did not mention the 2nd Accused name in her police statement, despite his prior visits to their house. This omission calls into question the credibility of her testimony with regard to the 2nd Accused's involvement and was not adequately considered by the Learned Trial Judge.

In his testimony, PW1 *Mahethelge Sumanadasa*, (an eyewitness and the father of the Deceased), described the distance between their house and the well as approximately 30 to 33 meters. While preparing for a bath, he noticed a group of seven to eight

individuals approaching from the direction of *Kaddulla*. However, only five people entered his property. He was able to identify four of the five Accused by name. Notably, PW1 stated that the 2nd Accused was related to PW2, although this detail was conspicuously absent from her witness statement. He observed that the 1st Accused was armed with a sword, while the 3rd Accused had a knife; he could not confirm what weapons, if any, the other Accused carried.

PW1 heard his daughter-in-law shouting from inside the house. Subsequently, he heard a noise coming from the vicinity of the kitchen. Upon investigation, he found his son's lifeless body near a jack tree, observing that his son's shoulder had been severed. The 1st Accused then approached PW1 and swung a sword in his direction, asking, "**ඇෝ කොහෙද යන්නේ**" ("Where are you going?"). Stupefied by the events, PW1 was momentarily immobilized. After witnessing the tragic scene, he immediately rushed to the police station.

During his cross-examination, PW1 stated that he returned home from work at 6:30 p.m. on the fatal day and sat on the foundation, from where he had a clear view of the well. At that time, PW2 had left for a neighboring house. He claimed not to have seen PW2, despite her statement in her own cross-examination that she was also at the foundation. When questioned by the defense as to whether he witnessed the entire incident involving the Deceased being attacked, he initially denied it but later changed his answer to confirm that he did. It is noteworthy that this was not the first instance where PW1 went back from his testimony. When further probed by the Counsel for the 3rd Accused about whether the 3rd Accused was carrying a pole, PW1 confirmed, but later he stated that he saw the 3rd Accused had a knife. PW1 further stated that he saw four people holding the Deceased when they emerged from the house. After witnessing this horrifying event, he proceeded to the police station without informing his wife about the incident.

Counsel for the Accused argued that the Learned Trial Judge erred in law by inadequately analyzing the evidence presented before him, applying the theory of photographic memory to excuse the witnesses' inconsistencies and contradictions. Upon review of the evidence of PW1 in the light of the vital contradiction found in this evidence, we are unable to accept the Learned High Court Judge's view on accepting this evidence.

Considering the multiple contentions presented above, credibility becomes a matter of factual evaluation rather than a legal issue.When we analyse this evidence he

was not consistent therefore he is not a reliable witness, this evidence could not be deemed as reliable.

According to PW3, *Upul Wijerathne* (nephew to the Deceased), when he had gone to the shop at 5:30 pm, he saw his uncle (the Deceased) with the 1st, 2nd, and 3rd Accused. PW3 recognized the 1st Accused as he had known him personally; the 2nd Accused had a close relationship with the Deceased's family, and the 3rd Accused was a friend of the Deceased. At that time, the Deceased was playing "වීක් ගොල්ලා" (with marbles) along with the aforementioned Accused. Later, PW3 witnessed a commotion between the 1st Accused and the Deceased. The 1st Accused grabbed the Deceased's t-shirt and threatened to get back his money, and they had been arguing back and forth. Thereafter, the 1st Accused gave the Deceased money, and they both consumed some moonshine. Later, PW3 and the Deceased went home together. Subsequently, the 1st and 3rd Accused arrived on a bicycle and engaged in a heated altercation. The 2nd Accused also got involved on the premise that if the Deceased were to fight the 1st Accused, they would get involved as well. PW3's Loku mama and Podi mama also got involved, and they all dispersed and went back home. After a while, he saw four to five people approach his grandmother's house, and the 1st and 2nd Accused were armed with swords. He witnessed this while taking cover near a stack of cinderblocks and saw the Accused bring the Deceased out of the front door of the house. PW3 then fled to inform the police. On the way, he met his Loku mama, who said that he would inform the police and instructed him to return home. Upon arrival, he inquired about the Deceased from PW2 and was shown the Deceased lying outside the kitchen area with his right hand cut off.

In his cross-examination, he stated that he was at *Sandaya Achchi's* house during this time. The area was well lit where the Accused entered but was unable to recall how many were present, nor the weapons in the possession of the Accused. He could not confirm if there were swords or clubs, and he did not witness the Accused attacking or cutting the Deceased

According to PW8, Police Inspector Vipulasena, upon arresting the 4 Accused on 31/10/2001 at the Kirigala Bus station, after their statements were recorded, they left for Himagiri Colony at 20:05. The 2nd Accused directed the police officers to a cesspit situated 10 meters away from his sister's house; upon scrutiny, they discovered two swords and a

manna inside the cesspit. The recovery of the weapons was in accordance with Section 27 of the Evidence Ordinance.

According to the evidence of PW10, the Judicial Medical Officer, there were 10 injuries recorded that resulted in the loss of heart rate and lung function due to bleeding and trauma inflicted by cuts to the head and neck from a sharp-edged weapon. He indicated that the possibility of death was mainly due to the 5th injury recorded, which could result in instant death. Further, he stated that more than one weapon would have been used to inflict such injuries.

When we peruse the evidence testified under oath by the 1st Accused, he denied this allegation and stated that, on the fatal day, he had played "ටික් බොල්ලා," and there was an argument between him and the Deceased, which ended with no animosity between each other. He later learned from the 2nd Accused that the police were searching for the aforementioned Accused for the death of the Deceased. The 1st and 2nd Accused surrendered themselves to the police station thereafter, as their position was that the police were looking for them in connection with this incident.

The question arises whether the injuries inflicted on the Deceased during the fatal attack by the 1st Accused caused his death.

When we analyze the aforesaid Judicial Medical Officer's evidence with regard to the multiple injuries inflicted on the Deceased with a sharp-edged weapon, it is paramount to scrutinize whether the Deceased died of the injuries caused by a sharp-edged weapon or if they resulted from something else.

In order to answer this question, we shall look at the case of **Kumara de Silva and 2 others vs. Attorney General [2010] 2 S.L.R. 169, His Lordship Sisira De Abrew** held that,

"In all these the weapon used was a dangerous weapon and the location of the injury and the force of the blow was such that it is sufficient to impute knowledge on the part of the accused that bodies injury caused thereby could possibly lead to death. In order to establish a charge of murder under section 294(3) of the Penal Code there must be

material which would enable the Judge to hold that in the ordinary course of nature the injury or injuries caused by a particular accused were sufficient to cause death as opposed to a mere likelihood of causing death. E.g.: *Attorney General vs. Somadasa*. In this case no single injury caused by any single accused has created an antecedent probability of death. According to medical evidence only a combination of injuries no. 3, 7 and 8 inflicted by different accused persons has resulted in probability of death resulting in the normal course of events due to shock and haemorrhage. Therefore the charge of murder should fail, as against all 03 accused persons in respect of their individual acts. As to the mens rea of the accused at the time of the assault there is no conclusive proof whether any one or more of the accused were harbouring an intention to cause the death of the deceased. If they so intended they could have easily caused a necessarily fatal injury to a more vulnerable part of the body such at the neck or the heart. Resolving the doubt in favour of the Accused I hold that each of the accused committed the offence and inflicted the respective injuries on the deceased with the knowledge that he is likely by such act to cause death. Therefore the more appropriate finding is a conviction for the offence of culpable homicide not amounting to murder on the basis of knowledge, punishable under section 297 of the Penal code."

Therefore we hold that there is no clear evidence to show that the cut injuries inflicted by the 1st Accused resulted in the death of the Deceased.

Next, we must examine whether an unlawful assembly was indeed constituted by the three Accused with the aim of perpetrating an assault on the Deceased. The onus is on the Prosecution to demonstrate beyond a reasonable doubt that the Accused were active participants and that they harboured a common object. Mere presence at the scene of the crime is insufficient to sustain a charge.

Following the case of **Jagathsena and others v G.D.P Perera and others [1992], 1 S.L.R 375, His Lordship Ranasinghe, J** held,

"The mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he said or did something or omitted to do something which would make him a member of such unlawful assembly. The prosecution must place evidence pointing to each accused having done or said something from which the inference could be drawn that each entertained the object which is said to be the common object of such assembly. Omnibus evidence must be carefully scrutinized to eliminate all chances of false or mistaken implication as the possibility of persons in an

assembly resenting or condemning the activities of misguided persons cannot be ruled out and caution has to be exercised in deciding which of the persons present can be safely described as members of the unlawful assembly. Although as a matter of law an overt act is not a necessary factor bearing upon membership of an unlawful assembly, yet, it is safer to look for some evidence of participation by each person alleged to be a member before holding that such person is a member of the unlawful assembly, lest innocent persons be punished for no fault of their's. The common object of an assembly is an inference from facts to be deduced from the facts and circumstances of each case. The common object can be collected from the nature of the assembly, the arms used by them, the behaviour of the assembly at or before the scene of occurrence, and subsequent conduct. The common object must be readily deducible from the direct as well as circumstantial evidence, including the conduct of the parties. It is not sufficient for such evidence to be consistent with such an inference, but must be the only conclusion possible."

To further scrutinize the culpability of the aforementioned accused parties, it is imperative to delineate the shared mens rea among the trio. For the prosecution to successfully sustain a charge, mere physical presence at the scene is insufficient; rather, the prosecution must incontrovertibly establish an overt act evidencing the accused parties' requisite criminal intent.

In the case of **Queen v. Vincent Fernando 65 NLR 265, His Lordship Basnayake, J**, held;

"A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under Section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. In the Penal Code, the words which refer to acts done extend also to illegal omissions."

This dictum was followed in the case of **Piyathilaka and 2 Others v. Republic of Sri Lanka [1996] 2 S.L.R, His Lordship DR. GUNAWARDENA, J.**

There is no iota of evidence placed before the trial against the 2nd and 3rd accused with regard to whether they have actively participated in the assault on the deceased. That is to say, whether they had shared the murderous intention with the 1st Accused.

Hence in view of the facts stated above we are of the view that there was no unlawful assembly formed during the incident and we see that the 2nd and 3rd accused appellants should be acquitted from all charges found guilty by the trial judge. Hence the appeal of the 2nd and 3rd accused appellants are hereby allowed.

The next question is with regard to the culpability of the 1st accused.

From the evidence stated above we find that 1st accused caused injuries to the deceased. Then the question is whether that injury had caused death to the deceased. According to the doctor, there were several injuries found on the deceased's body, and further, he stated that there was more than one weapon that was used to inflict such bodily injury.

In light of the above, we set aside the conviction and sentence imposed by the Learned Trial Judge against the 1st Accused. We find him guilty of voluntarily causing grievous hurt by dangerous weapons under section 317 of the Penal Code. We therefore impose a sentence of 7 years of rigorous imprisonment, from the date of the conviction by the Learned Trial Judge.

As such the appeal of the 1st Accused appellant dismissed subject to the above variation.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL