

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

**In the matter of an Appeal in terms
of Section 331 (1) of the Criminal
Procedure Act No. 15 of 1979**

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

Complainant

Court of Appeal
Case No. CA HCC 62-65/2020

Vs.

High Court of Kalutara
Case No. HC 274/11

1. Wishnakadawarage Jayantha
2. Gallage Rohana Pushpakumara
3. Gallage Sunil Ananda
4. Udagepalage Piyasena
5. Wishnakadawarage Thushan Chamara
alias Jeewan

Accused

AND NOW BETWEEN

Gallage Rohana Pushpakumara

2nd Accused-Appellant

Gallage Sunil Ananda

3rd Accused-Appellant

Udagepalage Piyasena

4th Accused-Appellant

Wishnakadawarage Thushan Chamara
alias Jeewan

5th Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Kalinga Indatissa, P.C. with Ovini Haththotuwa for the 2nd and
3rd Accused-Appellants.

Saliya Pieris, P.C. with Hirusha Fernando for the 4th Accused
Appellant.

Indika Mallawaarachchi for the 5th Accused Appellant.

Argued on: 18.11.2025

Judgment on: 02.12.2025

JUDGMENT

AMAL RANARAJA, J.

1. The accused appellants (hereinafter referred to as the “appellants”) together with the first accused named in the indictment have been indicted in the *High Court of Kalutara* in High Court case number HC/274/11.

The charges in the indictment are as follows:

Charge 01

That on or about October 06, 2005, in the district of *Kalutara* within the jurisdiction of this Court, the accused appellants were members of an unlawful assembly together with the first accused, the common object of which was to injure one *Udugepalage Rafiel*; and thereby committed an offence punishable under section 140 of the Penal Code.

Charge 02

In the same course of transaction as above, the accused appellants committed the murder of one *Udugepalage Rafiel*, being members of an unlawful assembly with the first accused; and thereby committed an offence punishable under section 296 read together with section 146 of the Penal Code.

Charge 03

In the same course of transaction, the appellants committed murder by causing the death of one *Udugepalage Rafiel*; and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

2. At the conclusion of the trial, the learned High Court Judge has convicted the appellants of all three charges and sentenced them to death.
3. The appellants aggrieved by the conviction, disputed judgment together with the sentencing order, has preferred the instant appeal to this Court.

Case of the prosecution

4. The deceased had been the father-in-law of PW01. On the day of the incident, PW01 has been at home alone as his wife had traveled to Colombo to visit their son in the hospital.
5. On that particular day, the deceased has visited the house of PW01. Upon his arrival, the deceased has complained to PW01 concerning an altercation he has had with the relative of the first accused named in the indictment and another individual on his way to PW01's house.
6. About 15 minutes later, PW01 has observed the first accused named in the indictment and the appellants approaching his house while hurling filth at the deceased, armed with bill hook knives ('kathi') and clubs. At that point, PW01 and the deceased have fled on to the neighbour's land. The deceased has hidden behind a hut used to store firewood, while PW01 has climbed an embankment and hidden in the nearby tea plantation.
7. Thereafter, PW01 has observed the first accused named in the indictment and the appellants arrive at the location where the deceased was hiding. Two of the appellants have attacked the deceased first using a bill hook knife and a club. The first accused named in the indictment

together with the other appellants, have also attacked the deceased with a bill hook knife and clubs, thereafter.

8. Anticipating harm from the appellants, PW01 has fled from the place he was hiding a while later and has subsequently learnt of the deceased's death.
9. *Dr. S. H. De Silva, Medico-legal Officer of the General Hospital in Kalutara*, has conducted the post-mortem examination on the deceased. He has observed eight cut injuries and two contusions on the body. The doctor has opined that the death of the deceased was due to hemorrhagic shock. The post-mortem report has been produced as evidence marked ~~s~~-01.

Case of the appellant

10. The appellants have maintained that they were unaware of the attack on the deceased and were in no way involved in the incident.

Grounds of appeal

11. When the matter was taken up for argument, the learned President's Counsel for the second and the third accused appellants urged the following grounds of appeal:

- i. The prosecution has failed to prove the case beyond a reasonable doubt against the appellants.
- ii. There is no proper evaluation of the prosecution evidence and no evaluation of the defence case.

- iii. The learned High Court Judge acted wrongly in accepting the evidence of the only purported eyewitness, namely PW01, and also failed to consider the belatedness of the statement made by him to the police and his failure to give a plausible explanation as to the delay.
- iv. The learned High Court Judge has failed to analyze section 32 or section 140 of the Penal Code and also the effects of the inconsistencies with regard to the evidence in that relation in the judgment.

The learned President' Counsel for the fourth accused appellant raised the following grounds of appeal:

- i. The evidence of PW 01 should not have been acted upon for the reason of his statement being a belated one, and also due to his failure to explain the delay, which creates a serious doubt as to the credibility of his evidence.
- ii. The learned High Court Judge was misdirected on the alibi taken up by the fourth accused appellant.
- iii. The judgment contains serious misdirections as to the facts and law.

The learned Counsel for the fifth accused appellant set out the following grounds of appeal:

- i. Conviction which solely hinges on the evidence of the sole eyewitness, namely *Premadasa*, is wholly unsafe.

- ii. Following closely on ground 01, the learned trial Judge's assessment with regard to the credibility and the testimonial trustworthiness of the said eyewitness is deficient and defective.
 - iii. The learned High Court Judge has misdirected himself on a critical issue of fact by asserting that the evidence of the sole eyewitness has not been challenged, which factual finding is demonstrably false, consequently being wholly prejudicial to the appellants.
 - iv. Although the conviction is based on the footing of unlawful assembly/common object and common intention, the judgment is depleted of the said legal principles as concepts which consequently renders the judgment legally unattainable.
12. While the appellant's Counsel have advanced distinct grounds of appeal, I will address them collectively as they arise similar issues.
13. Courts have consistently affirmed that the prosecution alone carries the legal burden of proving a criminal charge. Every element of the offence, i.e. conduct, mental state and attendant circumstances must be established beyond a reasonable doubt. The accused need say nothing; the presumption of innocence persists until it is overcome by cogent, credible evidence. This high standard has been crystallized in *Woolmington v DPP* AER 1 [1935] AC 462. Accordingly, if the evidence leaves the trier of fact with a reasonable doubt, the only permissible verdict is an acquittal.
14. In the instant case, the prosecution seeks to prove its allegations principally through the evidence of PW01, the purported eye-witness.

15. In this connection, the Court is mindful of the well-settled principle that no specific number of witnesses is required to prove any fact. Accordingly, the testimony of a single trustworthy witness can be sufficient to discharge the burden of proof.
16. The learned Counsel for the appellants contends that PW01 is an unreliable witness to support such contention. They have invited the Court's attention to several inconsistencies in his testimony and to the fact that he has given his statement to an investigating officer only after an inordinate delay. The learned Counsel also contended that the prosecution has offered no satisfactory explanation for this delay, a circumstance that, in their view, fatally undermines PW01's credibility.
17. PW01 has testified that when he was at home, the deceased came to his house. That the deceased complained to PW01 concerning an altercation he had with a relative of the first accused and another on his way to PW01's house. However, PW01 has not indicated about the fact that the deceased came to his house with a bill hook knife or that it had blood stains on it. However, in his statement to an investigator officer, he has stated that the deceased came to his house armed with a bill hook knife and that it had blood stains on it. The discrepancies have been highlighted and marked as contradictions V1 and V2.
18. Further, PW01 has also testified that the deceased had nothing in his hand and only attempted to hide from the "would be attackers" on the land of the neighbor of PW01. However, in his statement to an investigating officer, he has also stated that the deceased was armed with a bill hook knife, when the first accused named in the indictment got hold of the same and attacked the deceased with it. The discrepancy has also been highlighted and marked as contradiction V4.

19. The foregoing clearly shows that PW01 has not been forthcoming about what happened before and during the incident in which the deceased sustained the fatal injuries.
20. The other matter of concern to this Court is whether PW01 did see the incident of assault on the deceased as claimed by him.
21. According to the evidence of the investigating officer, the height of the embankment has been about five to six feet high. PW01 has claimed to have climbed the embankment and hidden in the nearby tea plantation.
22. The alleged assault has taken place in a narrow strip of land. On one side had been a construction, and on the other side, an embankment. The embankment has been five to six feet high.
23. PW01 has been on top of the embankment, about fifteen feet away from its edge, facing the narrow strip of land where the assault allegedly occurred. Given that there was a tea plantation on top of the embankment; PW01 would have had to hide among the tea bushes. In such circumstances, his vision would have been impaired by the vegetation and also because the alleged incident has occurred about six feet below his eye line abutting the embankment, when he was crouching among the tea bushes fifteen feet away, to avoid detection. Therefore, it is highly doubtful that PW01 saw what he claimed to have seen.
24. Further, PW01 has also testified that the first accused named in the indictment attacked the deceased first. However, in his statement to an investigating officer, he has stated that it was the fourth accused appellant (*Piyasena*) who attacked the deceased first. The discrepancy has been highlighted and marked as contradiction V3.

25. The position taken up by PW01 has been that when the deceased was attacked, he ran away from the place he was hiding and on his return about half an hour later, that he came to know from his wife's elder sister that the deceased had been killed. However, contradictions marked V6, V8 and V9 indicate that he has taken a different position as regard to where he was in hiding until about 17.00 hours and came to know about the deceased's death, thereafter.

26. The discrepancies mentioned earlier cannot be solely attributed to PW01's failure to accurately narrate the purported incident. This Court concurs with the submissions of the learned Counsel for the appellants, noting that such discrepancies were evident in PW01's testimony because he was describing an incident he had not personally witnessed.

27. In that context, I find that the learned High Court Judge has misdirected himself when he determined that the appellants have failed to challenge the testimony of PW01 on material points.

28. Also, PW01 has not made a statement to the investigators until seven days after the incident. More importantly, the statement has not been given voluntarily. It has been obtained only after the investigators have taken PW01 to the police station. PW01's attempts to justify the delay by citing his involvement in the deceased's funeral arrangements is unpersuasive since other witnesses some of whom were next of kin of the deceased had furnished their statements on the very next day.

29. The unexplained lapse of time ignites the inference that PW01's statement may be the product of reflection, outside influence or even coaching. Delay, especially when coupled with the absence of voluntary approach to the investigators undermine credibility. Consequently, the

Court should treat PW01's testimony with extreme caution, if not disregard it altogether.

30. The learned High Court Judge has convicted the appellants of all three charges preferred against them on the basis that the prosecution had proved the charges beyond a reasonable doubt. However, it is clear that the learned High Court Judge has failed to consider the basic ingredients that need to be established in order to prove the charge of unlawful assembly and committing an offence while being members of an unlawful assembly. Also, the learned High Court Judge has failed to apply the facts and consider as to whether the ingredients of common intention have been proved beyond reasonable doubt.

31. In the case of *King v Assappu* 50 NLR 324, Dias, J, held that;

"In a case where the question of common intention arises, the Jury must be directed that;

(1) The case of each accused must be considered separately.

(2) The accused must have been actuated by a common intention with the doer of the act at the time of the offence was committed.

(3) Common intention must not be confused with the same or similar intention entertained independently of each other.

(4) There must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention.

(5) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention."

32. Due to the above reasons, I am inclined to interfere with the conviction, disputed judgment together with the sentencing order. Accordingly, I set aside the conviction, disputed judgment together with the sentencing order and acquit the appellants of all the charges mentioned in the indictment

Appeal allowed.

I make no order regarding costs.

33. The Registrar of this Court is directed to send a copy of this judgment to the *High Court of Kalutara* for compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree

Judge of the Court of Appeal