

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

In the matter of an Appeal under  
Section 331 of the Code of Criminal  
Procedure Act No.15/1979.

01. Sithambaram Vashikaran  
04. Poniah Vadivel

1<sup>st</sup> & 4<sup>th</sup> Accused-Appellants

C.A.No. 040A/2016

H.C. Nuwara Eliya No. 56/2009

Vs.

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

Complainant-Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**  
**K. PRIYANTHA FERNANDO, J.**

COUNSEL : Amila Palliyage with Duminda de Alwis ,  
Sandeepani Wijesuriya Shakya Fernando, R.  
Doralagoda & Nihara Randeniya for the 1<sup>st</sup> and  
4<sup>th</sup> Accused-Appellants.  
Sudharshana de Silva S.S.C. for the Respondent

ARGUED ON : 14<sup>th</sup> September, 2020

DECIDED ON : 16<sup>th</sup> November, 2020

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**ACHALA WENGAPPULI, J.**

The 1<sup>st</sup> and 4<sup>th</sup> accused-appellants (hereinafter referred to as the 1<sup>st</sup> and 4<sup>th</sup> Appellants) have preferred the instant appeal, invoking appellate jurisdiction of this Court, in seeking to set aside the conviction entered against them and the consequential imposition of life sentences by the High Court of Nuwara Eliya on 01.04.2016.

In the indictment presented by the Hon. Attorney General to the said High Court, the two Appellants were indicted along with 10 other accused for committing multiple offences under the Penal Code, Offences against Public Property Act and Emergency Regulations.

At the conclusion of the trial, the High Court convicted only the two Appellants and the 5<sup>th</sup> accused to the counts 1, 6, 8 and 9. Other accused were acquitted of all counts in the indictment. The two Appellants too were acquitted from the counts 2,3,4,5 and 7.

Count 1 of the indictment was in relation to the Appellants, being members of an unlawful assembly of which the common object was stated as "to cause mischief" to unspecified property. Count No. 6 was in relation to being members of the said unlawful assembly and causing mischief to official residence of the Station Master of *Watagoda* Railway Station while the count No. 8 was in relation to causing destruction to railway carriages, an offence punishable under the Emergency Regulations.

Count No. 9 relates to causing mischief to *Watagoda* Railway Station and its buildings, also an offence punishable under the Emergency Regulations.

After their conviction, the Appellants were imposed the following sentences;

- i. 6-month imprisonment in relation to the 1<sup>st</sup> count,
- ii. Separate sentences of imprisonment for life, in relation to 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> counts.

Being aggrieved by the said conviction and in challenging its validity, learned Counsel for the Appellants had relied on the following grounds of appeal;

- a. the trial Court erred in law in failing to consider whether the prosecution had proved elements of unlawful assembly count, particularly, the common object,

- b. the trial Court did not consider the fact that the prosecution had failed to prove the elements of the offence recognised in section 24(1)(a) of the Emergency Regulations,
- c. the trial Court gave no reasons in its judgment for its finding of unlawful assembly counts and thereby seriously misdirected itself in law,
- d. the sentence imposed on account of the count No. 6 is *ex facie* illegal.

In view of the grounds of appeal raised on behalf of the 1<sup>st</sup> and 4<sup>th</sup> Appellants, it is incumbent upon this Court to consider the evidence presented against them by the prosecution *albeit* briefly.

It had transpired before the trial Court that the incident upon which the indictment was presented is a sequel to the incident that is generally known as *Bindunuwewa murders* which had taken place on 25.10.2000. In that particular incident 27 detainees have been killed by the unruly mobs that had rampaged through the Rehabilitation Camp at *Bindunuwewa*, while injuring another 14 of them. One such detainee, who had been killed during the said incident, was from *Talawakelle* area.

It is said that a local political movement had organised a *Hartal* as a mark of protest for the murder of one from their community. A public protest in *Talawakelle* town was conducted by hoisting black flags and obstructing vehicular traffic movement along the highways on the previous day, with the participation of members of that community who attended these events in large numbers.

In the same evening, a group of individuals came to the *Watagoda* Railway Station. They hoisted black flags in the premises and had threatened the Station Master, *Nayanakantha*, who then alerted the Police about the incident and sought security. The witness had learnt that the protesters have attacked *Great Western* Railway Station in the same night. ASP *Wimaladasa* of *Talawakelle* Police was aware that the situation was deteriorating and had assigned three officers to the *Watagoda* Railway Station in the morning of 29.10.2000. *Tillakaratne* was one of them and had served in the area for more than six years by that time. He knew the area and its people well. The Police party had reached the *Watagoda* Railway Station after 7.30 a.m.

At about 11.00 a.m. a train had arrived at the Station. It was the *Colombo-Badulla* train, on its way to *Badulla*. As the train reached the station, over one thousand protestors had swarmed the Station. *Tillakaratne* altered his superiors of this development. The crowd was armed with clubs and swords.

The 1<sup>st</sup> Appellant, who appeared to be the leader of the protestors, had approached *Nayanakantha* and told him that they want to conduct a *Hartal*. He further said that they will not allow any train to proceed beyond *Watagoda* and no Sinhalese person was to leave. The 4<sup>th</sup> Appellant too was with the 1<sup>st</sup> Appellant at that time, along with several others, when the latter spoke to *Nayanakantha*. When the 1<sup>st</sup> Appellant indicated his demand, *Nayanakantha* responded that they could hold their protest without harming anyone or any property. *Bandara*, a railway employee who was with *Nayanakantha*, was of the opinion that the 1<sup>st</sup> Appellant had talked to Station Master in a "friendly" manner ("ශ්‍රාත්‍යෝ") at that point of

time. However, the witness admitted that it was an impossible decision for *Nayanakantha* to take since it is an illegal act. By then the crowd had already obstructed the railway track, by placing sleepers and iron scrap, which had been removed from the Station, over it. At that point of time another train from *Badulla* had reached the station. The crowd ordered the passengers of both trains to disembark.

At this point of time, responding to *Tillakaratne's* message, a Police mobile patrol had arrived and with their intervention, the train bound to *Badulla* had proceeded on, leaving Colombo bound train stranded in *Watagoda* Station with all its passengers, because of the obstacles placed on its track. The passengers were made to entrain and detrain by the protestors repeatedly, prompting the Head Guard of the train to urge the General Manager of Railways for the issuance of orders authorising use force, in order to disperse the protestors. But *Nayanakantha* was of the view that the limited fire power was not sufficient to neutralise the large menacing crowd and in such a situation, if force is used, the result would be a total disaster. He had conveyed his view to his superiors. Meanwhile the protestors have started attacking the train and its passengers with stones.

The situation was tensed with the level of aggression displayed by the protestors escalated over time.

*Nayanakantha* felt situation was becoming graver and had then boarded the Colombo bound train for safety. The protesters have then ordered all passengers to detrain and if not they would set the train on fire.

Around that time about 10 soldiers from the Rapid Deployment Force had arrived at the station and, upon seeing their arrival, the 1<sup>st</sup> Appellant had grabbed *Nayanakantha* by his collar and dragged him from his office on to the platform. He had threatened the Station Master as to why he had called the Army to the scene. *Nayanakantha* felt his life is under threat. It was the Police who intervened at that juncture and told the 1<sup>st</sup> Appellant that *Nayanakantha* did not call the Army and thereby he had effectively prevented the protesters being shot. *Nayanakantha* was thereafter pushed back into his office by the 1<sup>st</sup> Appellant. Then there was an attack by the protesters using clubs and iron poles, and several gun shots too were heard.

*Nayanakantha* rushed to his official residence located at the adjoining premises. It had been already looted by the protesters and almost all valuable things were taken. At that point of time *Nayanakantha* saw the train and the Station were on fire. ASP *Wimaladasa* had observed that the last two carriages of the train and the Station building were damaged due to that fire.

It is in this backdrop of evidence, learned Counsel for the Appellants, in support of grounds of appeal, contended that the prosecution had failed to prove elements of unlawful assembly count, primarily the element of common object and had strongly relied on the item of evidence in reference to the friendly manner in which the 1<sup>st</sup> Appellant spoke to *Nayanakantha*, in support of the position that all what he wanted to do is to stage their protest peacefully. Learned Counsel contended at that particular point of time there was no unlawful assembly to cause mischief to property. He further contends that the subsequent

events had no connection to the 1<sup>st</sup> Appellant or to his request. Similarly, the only witness who implicates the 4<sup>th</sup> Appellant said that he was merely present at the scene and therefore, it was contended on behalf of the said Appellant that the prosecution had failed to establish that he too was a member of an unlawful assembly which caused property damage.

In his reply, learned Deputy Solicitor General submitted that the evidence clearly established existences of an unlawful assembly of which the two Appellants were members and are therefore responsible for causing mischief to public property. He also added that the initially displayed "friendly" approach by the 1<sup>st</sup> Appellant (in the opinion of the witness) had soon turned hostile with his act of accusing the Station Master for calling the Army, a factor in support of his continued prosecution of the common object of the unlawful assembly, to which he provided leadership. Learned Deputy Solicitor General, in support of his submissions, had relied on the judgment of the Supreme Court in *de Mel and three Others v Attorney General* 2018-19 BALJ Vol XXIV at p.188, where the apex Court stated the law relating to imposition of criminal liability under Section 146 of the Penal Code.

Before this Court sets out to consider the grounds of appeal raised by the Appellants relating to the elements in relation to the principle of vicarious liability, it is helpful to examine the applicable principles, that must be considered by a Court, before it proceeds to impose criminal liability on an accused under the Sections 140 and 146 of the Penal Code.

In defining what constitutes an unlawful assembly, Section 138 of the Penal Code states an assembly of five or more persons is designated an unlawful assembly, if the common object of the persons comprising that

assembly is to commit offences or activities that are specified in the said section. Section 139 similarly defines its membership as it states whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly.

The two Appellants were convicted on the basis of Section 146 of the Penal Code. Section 146 was considered by the Court of Criminal Appeal in the judgment of *Andrayas v Queen* 67 NLR 425 where it stated that;

*"In terms of that section, for vicarious liability to be imputed on the members of an unlawful assembly, the prosecution must prove either: -*

- (a) *that the offence was committed in prosecution of the common object of the unlawful assembly, or,*
- (b) *that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object."*

This clearly indicates that there are several considerations a Court ought to take into account in convicting an accused for being a member of an unlawful assembly, an offence punishable under Section 140.

Those considerations are;

- i. whether the prosecution had established that there was an unlawful assembly consisting of five or more persons,

- ii. whether the common object of the unlawful assembly, as alleged in the indictment, had been established by the prosecution,
- iii. whether the prosecution established that each of the accused was a member of that unlawful assembly.

When in imposing criminal liability on an accused under Section 146, in addition to above, a Court must satisfy itself;

- iv. whether the offence was committed in prosecution of the common object of that unlawful assembly,  
or
- v. whether the members of such unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

Before this Court considers the evidence in the light of the principles identified above, it is noted that the 1<sup>st</sup> Appellant's contention of his peaceful protest, which subsequently turned out to be a violent attack on public property, could not satisfy the elements of the offence of being a member of an unlawful assembly at that initial stage, indicate an underlying notion that he is not responsible for the violent end of his once peaceful protest.

It is relevant to note here that explanation to Section 138 of the Penal Code indicates that an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

This brings out the issue as to exactly when did the unlawful assembly, as described in the 1<sup>st</sup> count of the indictment, came into existence ?

Determination of this issue at the early stage of this judgment is therefore pivotal to the determination of the question of the legality of the conviction that had been entered by the trial Court, against both the Appellants.

This is the identical approach adopted by the divisional bench of the Supreme Court in *Samy & Others v Attorney General* (2007) 2 Sri L.R. 216 where the conviction entered by a High Court at Bar in relation to the indictment presented by the Hon. Attorney General, referred to as "*Bindunuwewa murder Case*". This was an instance where an unlawful assembly of persons from the surrounding villages of Bindunuwewa Rehabilitation Centre, have mounted an attack on its inmates killing and injuring some of them.

A divisional bench of the Supreme Court in *De Mel & Others v Attorney General* (supra), stated that;

*"While inference as to the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used and the behaviour of the assembly at or before the scene of occurrence, the prosecution will not succeed in discharging its burden by simply demonstrating circumstances which align with the common object. Conversely, it is their burden to not only establish the common object but also prove that the existence of common*

*object is the only conclusion consistent with the facts and circumstances existed at that point."*

Therefore, it is incumbent upon this Court to consider whether the trial Court's finding on the common object of the unlawful assembly is "*the only conclusion consistent with the facts and circumstances existed at that point*".

The incident at *Watagoda* Station is clearly not an isolated one. It is a continuation of a series of anti-establishment activities conducted by the emotionally charged protestors over the death of one of their own community at *Bindunuwewa*. The day to day activities of the town of *Talawakelle* along with the vehicular traffic movement were disrupted due to a protest campaign conducted in the town, in the previous evening. The Station Master was threatened over hoisting of black flags in *Watagoda* Railway Station at the same time. In that night, *Great Western* Railway Station was attacked by the mobs and damaged. Then there were reports that a "protest campaign" was to take place at *Watagoda* Railway Station, prompting the authorities to deploy armed policemen to its protection.

It is in this build-up, over thousand protestors, who were armed themselves with swords and clubs, have swarmed into the Station. The 1<sup>st</sup> Appellant appears to be the undisputed leader of the mass of protestors as he conveyed the purpose of their presence to the Station Master. It may have been done initially in a "friendly manner" in the opinion of the witness, but when *Tillakaratne*, being a Police officer assigned to protect the Government property, tried to explain the 1<sup>st</sup> Appellant that the

obstruction of trains is an illegal act, his "friendliness" had evaporated. The 1<sup>st</sup> Appellant and his supporters had vociferously challenged the Police as to who they were to tell them what they should do.

When the trains arrived, the protestors have obstructed the railway line by placing obstacles. The passengers were asked to disembark from the train. No person ordered the protestors to do so. They seemed to have well briefed as to their respective roles prior to their arrival at the Station. If their action was only a peaceful protest, the presence of swords and clubs, does not fit in with such peaceful intentions. The sustained attack on the train as well as on the Station with stones too was not a spontaneous reaction but seemed to be an execution of a part of "protest" campaign, which consisted of many such parts.

Certainly none of those protestors have come to the Station to board the trains that were to arrive at it during midday. Although the Railway Station could be considered as a public place, none of the protestors had a legitimate business, to be in its premises under those circumstances, and especially on railway tracks.

Simultaneously with the opening of fire by the security forces, the protestors have set the train on fire damaging two of its carriages beyond repair. It is obvious that setting a railway carriage on fire is not as easy as setting some dried leaves or a heap of scrap paper on fire and needed some quantity of combustible substance to sustain the fire till it consumes the railway carriage. The setting fire to railway carriages is therefore certainly not a spontaneous reaction of the protestors, venting out their anger for destructing their right to a peaceful protest, using lethal force by

Government forces, but an execution of the last phase of a carefully planned strategy of destruction.

In view of these circumstances, it is safe to infer that, the moment, over a thousand protestors, including the 1<sup>st</sup> and 4<sup>th</sup> Appellant, set off from whatever the point from which they have assembled, with the *Watagoda* Railway Station as their collective destination, they have formed an unlawful assembly as described in the count No. 1 of the indictment. Another factor that affirms this view is the timing of the act of the protestors in placing obstacles on the rail track. If they were to merely hold the trains proceeding beyond *Watagoda* Station, they could have placed these obstacles on the track no sooner they arrived at the Station. Instead, they waited until the train arrived at the Station to execute that phase of their "protest". Here again, no one commanded the mass of protestors. They were certainly not acting spontaneously dictated by their strong emotions in this instance. They were carrying out a particular phase of a clearly thought out strategical scheme, a third party had planned for them. The timing of placing obstacles must have been communicated to the unlawful assembly at the point at which they have set off in their journey towards the Station.

Therefore, this Court is of the view that the issue it had raised earlier on, as to whether the trial Court's finding on the common object of the unlawful assembly is "*the only conclusion consistent with the facts and circumstances existed at that point*", is answered in the affirmative.

Turning to the issue of the justifiability of imputation of vicarious criminal liability on the 1<sup>st</sup> and 4<sup>th</sup> Appellants, on the basis of Section 146 of

the Penal Code, it is preferable to consider the role played by each of the Appellants individually, in that unlawful assembly.

It is already noted that the 1<sup>st</sup> Appellant was clearly the undisputed leader of the unlawful assembly of the several hundred, if not for thousand, protestors. This is a reasonable inference, confirmed upon the fact that when he let off *Nayanakantha*, after accusing him of calling the Army despite the 1<sup>st</sup> Appellant's initial "friendly request" and accepting the Police officer's explanation that he did not, no member of that unlawful assembly protested against his decision and attempted to deal with *Nayanakantha* for his treachery of calling the Army.

The evidence is clear that from the moment the unlawful assembly had reached the *Watagoda* Station, the 1<sup>st</sup> Appellant was actively involved with the management of the assembly's affairs, up to the point of the above episode, referred to in the preceding paragraph and was present during the act of setting the carriages on fire that had followed soon after. The *Watagoda* Railway Station too was set on fire at the same time followed by the official residence of its Station Master. Apparently the protestors were apprehensive upon seeing the Army, who undoubtedly were perceived by them as a threat to their planned activities and have therefore lost no time in fulfilling their common objective by setting fire to the train, while pelting stones at the Army. The time gap between the said last act attributed to the 1<sup>st</sup> Appellant and the setting fire to the train is described by *Nayanakantha* as "rather a small interval" (ඇක වෙළාවක"). The 1<sup>st</sup> Appellant, who shared the same apprehension with his peers in seeing the Army at the Station, as indicative by his act of accusing *Nayanakantha* for that, was present as a member of the unlawful assembly, when the train

was set on fire. The Station was gutted soon after the train carriages were set on ablaze.

In the judgment of *Ranawaka & Others v Attorney General* (1985) 2 Sri L.R. 210, a divisional bench of this Court decided that;

*"The offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members. In other words, the act must be one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object".*

The prosecution alleged in the 1<sup>st</sup> count of the indictment presented to the Appellant that they were members of an unlawful assembly of which the common object was to cause mischief. It is evident from the above considerations that the 1<sup>st</sup> Appellant was an active member of that unlawful assembly which had caused mischief to the railway carriages, Watagoda Railway Station and the official residence of its Master by setting them on fire and destroying them.

In arriving at its conclusion that the 1<sup>st</sup> Appellant was a member of the unlawful assembly which set fire to the train, the trial Court had considered the evidence presented before it by the prosecution, in relation to the role played by him as its energetic leader.

This is an appropriate juncture to deal with the ground of appeal raised by the learned Counsel on the basis that the trial Court failed to

consider that the prosecution did not prove the elements of the offence recognised in Section 24(1)(a) of the Emergency Regulations.

Of the four counts upon which the Appellant were convicted of, only the counts 8 and 9 were based on the offences that are recognised under the Emergency Regulations published in the Government Gazette of 03.05.2000. The count No. 8 is in relation to causing mischief by destruction of or damage two railway carriages quantified at Rs. 24,800,000.00, while count No. 9 refers to causing destructions to *Watagoda Railway Station* and to its buildings quantified at Rs. 204,202.50. Both these offences are described in the said Regulations. Section 24(1)(a) states any person who "*does, any act which causes the destruction of, or damage to, property, whether movable or immovable, or any such change in any such property, as destroys or diminishes its value or utility*" shall be guilty of an offence, punishable under the punishment prescribed in the same section.

There is no dispute to the fact that the two railway carriages, the *Watagoda Railway Station* and its buildings belong to Railway Department were set on fire and had suffered extensive damage as a result. The estimated values of such damages were presented before the trial Court, in support of the accusation contained in the respective charges of the indictment and there was no contest by the Appellants. The trial Court need not, in this particular situation, deal with each individual element of the offences under Emergency Regulations with a descriptive treatment of each of these considerations. The overwhelming amount evidence presented before the trial Court by the prosecution, in support of its allegation of wilful destruction of Government properties, amply satisfies the requisite elements to the required degree of proof. The trial Court had

considered these elements in general terms, which is an indication that it was mindful of such a requirement.

Having perused the impugned judgment of the trial Court on this aspect, this Court find that there was undisputed evidence to prove the requisite elements of the two offences under the Emergency Regulations and the trial Court was correct when it held that the prosecution had proved the commission of these two offences. The only factual dispute raised before the trial Court by the Appellants was in relation to their identity. In relation to the proof of identity, there were several witnesses called by the prosecution, who identified the 1<sup>st</sup> Appellant, while a solitary witness had identified the 4<sup>th</sup> Appellant.

In view of the above reasoning, this Court is of the considered opinion that the conviction entered against the 1<sup>st</sup> Appellant in respect of Count Nos. 1, 6, 8, and 9 is justified and the grounds of appeal raised on his behalf are without merit.

Accordingly, this Court concurs with the said conclusion reached by the trial Court that the prosecution had proved beyond reasonable doubt of the guilt of 1<sup>st</sup> Appellant to the 1<sup>st</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> counts of its indictment and accordingly affirms the said conviction.

The contention of the learned Counsel on behalf of the 4<sup>th</sup> Appellant that he was merely present at the very early stage of the protest and well before it turned violent, effectively negates any imputation of vicarious liability on him, should be examined in the light of the applicable principles that had been enunciated in the judgment of *Samy & Others v Attorney General* (supra) where Five judges of the Supreme Court have

exhaustively considered the applicable judicial precedents and authoritative texts.

Their Lordships have quoted Dr Gour extensively from his authoritative text of Penal Law of India (Vol. II, p.1296, 11<sup>th</sup> Ed) where he states the law in respect of unlawful assembly as follows;

*"All persons who convene or who take part in the proceeding of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or from curiosity alone without taking any part in the proceedings are not guilty of that offence, even though those persons possess the power of stopping the assembly and fail to exercise it. "Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 I. P.C ... If members of the family of the appellants and other residents of the village assembled, such persons could not be condemned ipso facto as being members of that unlawful assembly. It would be necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears..... axes etc., this kind of omnibus evidence has to be*

*very closely scrutinized in order to eliminate all chances of false or mistaken implication."*

However, learned author further adds that;

*"caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly".*

The Supreme Court, in the said judgment stated that;

*"It is well settled law that mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he has said or done something or omitted to do something which would make him a member of such an unlawful assembly or where the case falls under section 139 of the Penal Code."*

It appears from the above statements, that the emphasis that was placed on the Courts is to consider each accused's position, in relation to the unlawful assembly at its formation, as indicative from the portion that "*caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly*". The purpose of this exercise is meant to "*to eliminate all chances of false or mistaken implication.*"

This Court, in consideration of the evidence presented before the trial Court, had already indicated its mind earlier on this judgment that there was in fact an unlawful assembly as per the count No. 1 and the 4<sup>th</sup> Appellant too was one of its members.

In view of the above quoted statement of law, the task before this Court would be to "*closely scrutinized [the evidence] in order to eliminate all chances of false or mistaken implication*" of the 4<sup>th</sup> Appellant, in the said unlawful assembly.

The concern, whether the 4<sup>th</sup> Appellant, having joined an unlawful assembly at some undisclosed point, before it had reached its destination at *Watagoda Railway Station*, was aware of the common object of the said unlawful assembly, cannot alter his liability because, he had a second chance to know what the common object of the assembly to which he had joined as a member. It is in his presence the 1<sup>st</sup> Appellant indicated to the Station Master of the intended "protest" by stopping the train and the latter's emphasis on not causing any harm, the Police officer's reply that the mode of protest is illegal and the 1<sup>st</sup> Appellant's aggressive reaction to it that who they were to tell them what to do. That is reiteration of the common object of the unlawful assembly of causing mischief, and the common object was evident from the fact that its members were carrying weapons when they reached the Railway Station.

Thus, the evidence reveal that the 4<sup>th</sup> Appellant, having joined an unlawful assembly as one of its members, walked with the assembly to its destination, the *Watagoda Railway Station*, was seen along with his leader the 1<sup>st</sup> Appellant when the latter indicated the purpose of their presence. The question whether the said conduct of the 4<sup>th</sup> Appellant attracts

imputation of vicarious liability on him, in relation to the offences described in counts 6, 8 and 9 could be answered in the affirmative with the application of the principles on imposition of vicarious criminal liability.

In *Samy & Others v Attorney General* (supra), their Lordships also have quoted a segment from the text of *Ratanlal and Dhirajlal's Law of Crimes* (Vol. I, p.598, 24<sup>th</sup> Ed) in which the below reproduced part is included;

*"Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. If one becomes a member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly."*

The time gap between the initial interaction with the Station Master by the 1<sup>st</sup> Appellant, in the presence of the 4<sup>th</sup> Appellant, and the eventual setting fire to Government property is about one hour, would not accrue to the benefit of the 4<sup>th</sup> Appellant. In *De Mel & Others v Attorney General*

(supra) the Supreme Court cited an Indian authority of *Bindeshwari Singh & Another vs The State* AIR 1958 Pat 12, where it had been held;

*"Normally and more particularly, when in the course of a single transaction many acts are committed by different members of the unlawful assembly in quick session within a short time, the rule of inference should be in favour of his continuing to be the member of that assembly till the close of that transaction. For if the interval between the different acts is short the probabilities are more against the inference that any of these members retired in the midst of the transaction and did not continue to be present till the time the transaction lasted. Otherwise the very application of constructive liability as contemplated by section 149 of the IPC will fail."*

The evidence revealed that the unlawful assembly, to which the 4<sup>th</sup> Appellant was a member, had descended upon the Railway Station simultaneous with the arrival of the Colombo bound train. The declaration by the 1<sup>st</sup> Appellant of their "protest", the arrival of the Badulla bound train, the blockade placed on the track of the first train, leaving of Badulla train with the intervention of Police, the intimidation and harassment meted out to the passengers, the threats issued to the Station Master on the allegation of calling the Army, attack using clubs and pelting stones to the security forces, firing and culminating with the setting of fire have taken place within the time space of an hour and in rapid succession.

Therefore, as the learned authors note, the short interval between these individual acts makes "... the probabilities are more against the inference

*that any of these members retired in the midst of the transaction and did not continue to be present till the time the transaction lasted".* Thus, the imputation of vicarious criminal liability on the 4<sup>th</sup> Appellant by the trial Court is amply justified. A different view on these items of evidence could not be entertained as the authors claims "*otherwise the very application of constructive liability as contemplated by section 149 of the IPC will fail.*"

Lastly the ground of appeal on the illegality of sentence should be considered.

Learned Counsel for the Appellant claimed that the sentence meted out to the Appellant in respect of the 6<sup>th</sup> Count is *ex facie* illegal. This is a valid complaint since the 6<sup>th</sup> Count is in relation to an offence punishable under Section 410 of the Penal Code and the prescribed sentence, if the loss exceeds Rs.50.00, is imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The trial Court, instead of the above sentence, had imposed a sentence of imprisonment for life, in relation to the 6<sup>th</sup> Count, on both Appellants.

In view of the above considerations, this Court holds that the three grounds of appeal relied upon by the Appellants in challenging their conviction to count Nos. 1, 6, 8 and 9 of the indictment are devoid of any merit. Accordingly, the conviction of the 1<sup>st</sup> and 4<sup>th</sup> Appellants to those four counts is hereby affirmed. The sentences imposed by the trial Court in respect of the 1<sup>st</sup> and 4<sup>th</sup> Appellants are also affirmed, except the imprisonment for life, imposed on both Appellants, in relation to the 6<sup>th</sup>

Count, which is set aside herewith and substituted with a two-year term of imprisonment each on the Appellants.

Subject to the above variation of sentence, only in relation to Count No. 6, the Appeals of the 1<sup>st</sup> and 4<sup>th</sup> Appellants stands dismissed.

JUDGE OF THE COURT OF APPEAL

**K. PRIYANTHA FERNANDO, J.**

I agree.

JUDGE OF THE COURT OF APPEAL