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 Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Vs

1. Mohommad Seyin Mohommad Hamza
2. Abdul Kareem Mohommad Ravishdeez *alias* Raja
3. Mohommad Gawus Mohommad Haadi
4. Mohommad Riashd Mohommad Anaaz
5. Mohommad Vipri Mohommad Jinna
6. Mohommad Jipri Mohommad Fitherwoos
7. Mohommad Saahir Mohommad Siyam
8. Mohommad Nilamdeen Mohommad Ajeel

Accused

AND NOW BETWEEN

1. Mohommad Seyin Mohommad Hamza
2. Abdul Kareem Mohommad Ravishdeez *alias* Raja

Court of Appeal Case No.

CA/HCC/15-22/24

High Court of Kaluthara Case No.

HC 577/05

3. Mohommad Gawus Mohommad Haadi
4. Mohommad Riashd Mohommad Anaaz
5. Mohommad Vipri Mohommad Jinna
6. Mohommad Jipri Mohommad Fitherwoos
7. Mohommad Saahir Mohommad Siyam
8. Mohommad Nilamdeen Mohommad Ajeel

Accused –Appellants

Vs

Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent

Before	:	**P. Kumararatnam, J.**
		Pradeep Hettiarachchi, J.
Counsel	:	Saliya Peris P.C. with Pasindu Thilakarathna and Andrew Wijewansha for the 1st, 2nd, 3rd, 5th, 7th and 8th Accused – Appellants. Asthika Devendra with Aruna Madhushanka for the 4th and 6th Accused-Appellants
Argued on	:	23.09.2025
Decided on	:	14.11.2025

Pradeep Hettiarachchi, J

Judgment

1. The 1st and 8th Accused – Appellant (hereinafter the refer to as the Appellant) were indicted before the High Court of Kaluthara on 3 counts. Namely,

    a. On or about 24th March 2003, within the jurisdiction of this Court and in Southern Kalutara, the persons above-named being the members of an unlawful assembly acting in furtherance of a common intention to commit the death of one Mohamed Farisz committed an offence punishable under section 140 of the Penal Code.

    b. In the same course of conduct and as part of the same transaction, the persons above-named, being a member/members of the aforesaid unlawful assembly, caused the death of Mohamed Farisz and such offence was committed in furtherance of the common intention shared by the aforesaid unlawful assembly or in the alternative, the said members of the said unlawful assembly were at least aware that such offence was likely to be committed in pursuance of the said common intention; the persons above named, being the members of an unlawful assembly, have thereby committed murder punishable under section 146 read with section 296 of the Penal Code.

    c. In the same course of conduct and as part of the same transaction, the persons above named by causing the death of Mohamed Farisz, committed murder punishable under section 32 read with section 296 of the Penal Code.

2. The trial was conducted by the learned High Court Judge of Kalutara without a jury. At the conclusion of the trial, the learned High Court Judge found all the appellants guilty of the charges leveled against them and sentenced them to death.

3. Being aggrieved by the said conviction and sentence, the 1st, 2nd, 3rd, 5th, 7th, and 8th accused preferred an appeal. Similarly, the 4th and 6th accused also appealed against the conviction and sentence. Both appeals were taken up together for argument.

4. The grounds of appeal advanced by both sets of Appellants are as follows:

    1) PW 1's evidence lacks credibility.
    2) The Learned High Court Judge misdirected himself of the evidence of the defense.

5. On behalf of the prosecution, ten witnesses testified. Thereafter, the 1st, 2nd, and 3rd appellants gave evidence. The 4th, 5th, 6th, 7th, and 8th appellants made dock statements.

6. It could be observed that during the argument, the appellants primarily challenged the credibility of the testimony of PW1, who is the mother of the deceased. Accordingly, I will first consider whether the evidence of PW1 is sufficient to sustain the conviction of the appellants and whether its trustworthiness is satisfactory.

7. According to the evidence of PW1, during the relevant period, she was residing at Kaleel Place, Kalutara. The incident had occurred around 9.00–10.00 p.m. on that night. The witness heard someone shouting, "ෆාරිස්ට ගහනවා" ("They are assaulting Faris"). When she ran towards the road, she saw the deceased lying there with cut injuries. She further stated that the deceased was lying on his stomach and that the appellants were present at the scene, but upon seeing her, they ran away. Furthermore, the witness stated that all the appellants were armed, and the 6th appellant was carrying a sword in his hand. According to PW1, when she arrived at the scene, only the appellants were present. Thereafter, the deceased was taken to the hospital, and the witness made a statement to the police.

8. The second witness who testified on behalf of the prosecution was PW3, Jaizer Zaheed Mohamed, the father of the deceased. He did not witness the incident but went to the scene about ten minutes after PW1 had arrived there. When this witness reached the scene, no one was present. According to his testimony, he was unaware of any dispute or animosity between the appellants and the deceased. He stated that

he was informed of the incident by another person, and only thereafter did he proceed to the scene.

9. PW 4 K.Sunil Kumara is the Judicial Medical Officer who performed the autopsy of the deceased. According to him there were 18 injuries on the deceased and they were sufficient to cause death in the ordinary course of the nature.

10. It is in evidence that a vehicle was damaged due to an explosion at the scene. However, PW1, in her testimony, made no mention of such an occurrence. This omission casts a serious doubt as to whether PW1 was indeed present at the scene at the time the deceased was being attacked. The central thrust of the Appellants' argument is that PW1's evidence is unreliable and lacks creditworthiness. It could also be observed that, according to her own account, when she arrived at the scene, the deceased had already been attacked. At page 182 of the record, the witness testified as follows:

ප්‍ර : තමන් යන කොට කට්ටියක් දිව්වා කිව්වා ?

උ : ඔව්.

ප්‍ර : තමන් ඊට පසුව ගියා ද ත්‍රී රෝද රථයක් ගේන්න ?

උ : ඔව්.

ප්‍ර : තමන් එතනට ගිහිං ඒ එක්කම ත්‍රී රෝද රථයක් ගේන්න ගියාද ?

උ : නහැ. පුතා කපලා තිබුනා. ඒ වෙලාවේ තමයි මම ගියේ. එතනින් මෙහාට එන්න ඔන ත්‍රීවීල් එකක් ගන්න.

.....

Vide Page 182

11. It is also significant to note that when PW1 went to the Police, she had sufficient time to gather all the necessary information before making her statement. As elicited during cross-examination, PW1 gave her statement to the Police at around 7.20 p.m. on the following day. Furthermore, when PW1 went to the scene, the deceased had already fallen to the ground with injuries.

උ : නෑ කවුරුත් එහෙම සාක්ෂියක් දීලා නෑ.

ප්‍ර : දැන් තමුන් කියන විදියට තමුන් එතනට යන කොට මේ පුතා බිම වැටිලා හිටියා කිව්වා ?

උ : ඔව්.

ප්‍ර : පුතා වැටිලා හිටියේ තමුන් ඒ ගේ ගාව ඉඳලා තමුන් කියන විදියට තමුන්ට පේන දුරින් ?

උ : ඔව්.

…….

Vide Page 195

12. A careful examination of PW1's testimony reveals that she had not witnessed the deceased being attacked. It was nearly 20 hours after the incident that PW1 made a statement to the Police. There is no plausible explanation for this delay, which remains unexplained either by PW1, any other lay witnesses, or the Police Officers involved in the investigation.

13. The most critical issue in this case is the reliability of the evidence concerning the identification of the Appellants by PW1. The entire prosecution case rests upon the testimony of PW1, who is the sole eyewitness. Therefore, it is imperative to carefully examine and evaluate the credibility of her evidence, particularly in relation to the identification of the Appellants. As admitted by PW1, she first heard someone shouting and then proceeded towards the scene. According to her evidence, all the Appellants were known to her prior to the alleged incident.

14. Although PW1 stated that the 1st Accused was armed with a sword, she had not made such a statement at the inquest held before the Magistrate on the 1st of April. Furthermore, during the trial before the High Court, PW1 appeared confused when asked to identify the Appellants and made errors while identifying them in the dock.

15. The Investigating Officer, PW7, testified that when the Magistrate visited the scene of the crime and inquired whether there was anyone who could provide evidence regarding the incident, no one came forward. This evidence further casts doubt on whether PW1 had, in fact, witnessed the deceased being attacked. It is significant to note that PW1, in her own testimony, admitted that she went to the Police only on the following day around 7.20 p.m. According to the evidence of PW5, he visited the crime scene immediately after receiving the first complaint, around 11.10 p.m. on the day of the incident, but found no eyewitnesses present. More importantly, when the Magistrate visited the crime scene on 5th March 2023, no eyewitnesses were disclosed

at that time either. Therefore, the question arises as to whether PW1 actually saw the incident. Had PW1 witnessed the deceased being attacked by the Appellants, she could reasonably have been expected to come forward when requested to do so by either PW5 or the Magistrate. However, PW1 did not come forward as a witness until 7.20 p.m. on the following day.

16. The evidence of PW1, when analyzed, reveals that it is inconsistent and vague, particularly with regard to the identification of the appellants. During the trial, PW1 failed to make an accurate dock identification, as she wrongly identified the 3rd appellant as Kaffer. Similarly, PW1 identified the 5th appellant as the 6th appellant, and again, she identified the 4th appellant as the 5th appellant (vide pages 167 and 168).

17. In this case, PW1 is the sole eyewitness to the crime; therefore, in order to secure a conviction against the Appellants, her evidence must be clear, cogent, and free from uncertainties. In other words, the credibility and reliability of her testimony must reach a high standard so as to establish the charges against the Appellants beyond reasonable doubt.

18. At the trial before the High Court, PW1 stated that when she arrived at the scene where the deceased was lying, the Appellants were present, and upon seeing her, they ran away. She testified as follows:

ප්‍ර : තමුන් කිව්වා පුද්ගලයන් 08 දෙනෙක් හිටියා කියලා ?

උ : ඔව්.

ප්‍ර : කවුද?

උ : හම්සා, රාජා, ජින්නා, හාදී ඒ ගොල්ලෝ මාව දැකලා දිව්වා.

ප්‍ර : ඒ ගොල්ලෝ කොහේ යටද දිව්වේ?

උ : පුතා මරපු තැන සිට.

ප්‍ර : පුතා මොනවා වෙලාද වැටිලා හිටියේ ?

උ : කපලා තමයි තිබුනේ.

ප්‍ර : ඔබ දැක්කද?

උ : ඔව්.

ප්‍ර : මොනවද දැක්කේ?

උ : ලේ ඔක්කොම යනවා දැක්කා, කපලා දාලා තිබුනා..

ප : පුතා බිම වැටිලා හිටියා?

උ : ඔව්.

……..

Vide Page 165,166

19. During cross-examination, PW1 further stated that when she arrived at the scene, a group of people ran away, and she saw that her son had been cut.

20. It is also pertinent to note that although PW1 stated at the trial that the 6th Appellant was armed with a sword, she had not mentioned this fact at the inquest before the learned Magistrate, which was held six days after the incident.

21. Furthermore, the uncertainty in her evidence regarding the identification of the appellants can again be observed at page 214, where she stated that:

ප : තමන් මේ සිද්ධිය ඇසින් දුටු සාක්ෂිකරුවෙක් නොවන බව මම යෝජනා කරනවා?

උ : මේ ගොල්ලෝ ඔක්කොම කරල තියෙන්නේ.

ප : මේ සිද්ධියේ තමන් සිටියේ නැහැ කියලා යෝජනා කරනවා?

උ : නිල් පාට සරම ඇඳලා, ලන්කට් ඇඳලා මම වැටිලා ලේ ගලනවා.

Vide page 214

22. Similarly, at page 217, PW1 admitted that the appellants were fleeing when she arrived at the scene, which further demonstrates that by the time PW1 reached the location, the attack had already taken place, and she had no opportunity to witness the deceased being assaulted with weapons.

ප : තමන් එළියට ගිහින් බැලුවා?

උ : ඔව්.

ප : තමන් දැකපු පළමු දේ කිහිප දෙනෙක් පැනලා දුවනවා, හරිද?

උ : ඔව්.

ප : තමන් පළමුව දැක්කේ කිහිප දෙනෙක් පැනලා දුවනවා?

උ : කීප දෙනෙක් නෙවෙයි මේගොල්ලෝ පැනලා දිව්වේ.

ප : ඒ අයගෙන් එක්කෙනෙක් 05 වන විත්තිකරු, 05 වන විත්තිකරුව දන්නවාද?

උ : ඔව්, මේ ගොල්ලෝ තමයි දුවලා ගියේ.

ප : මේ ගොල්ලෝ දිව්වට පස්සේ තමන් ඒ ස්ථානයට ගියා ?

උ : මම යනකොට ඒ කට්ටිය හිටියා, ඒ අය දිව්වා. අනාස් මාව තල්ලු කලා. සිරිදවුස් කපලා, කට්ටිය අරන් ගියා.

……

Page 217

23. More importantly, PW7 Gamini Silva, in his evidence, stated that when he visited the scene with the Magistrate, several people had gathered there; however, when the Magistrate inquired whether there were any eyewitnesses, no one came forward.

24. Since the Appellants were charged under Section 296 read together with Section 32 of the Penal Code, it is essential to establish the participatory presence of each Appellant at the scene of the crime. Only on that basis can the Appellants be found guilty under the principle of common intention. Nevertheless, upon a careful consideration of PW1's evidence, it is difficult, if not impossible, to ascertain the participatory presence of the Appellants, as her testimony does not reveal any sharing of a common intention among them.

25. As held in ***King v. Assappu (50 NLR 324),*** the sharing of a common murderous intention is an essential ingredient in a charge of this nature. In the absence of proof of such shared intention, Section 32 of the Penal Code cannot be invoked to convict a person on the basis of common intention. In *Assappu*, it was held:

In a case where the question of common intention arises the Jury must he directed that:

- *(i) the case of each accused must be considered separately.*
- *(ii) the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
- *(iii) common intention must not be confused with same or similar intention entertained independently of each other.*
- *(iv) there must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention.*
- *(v) the mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.*

26. When two or more persons are indicted for murder under the principle of common intention, the participation of each accused must be examined separately. Particularly

in the absence of direct evidence, the Court must exercise great caution in determining whether the surrounding circumstances are sufficient to establish the guilt of all the accused. Mere suspicion or assertion cannot serve to establish the guilt of the appellants. Moreover, the trial Judge must be satisfied that each accused was acting with a common intention at the time of committing the offence.

27. In ***Wimalasena v. IP Hambantota 74 NLR 176,*** the court held that: *"Mere presence of an accused person is not sufficient to establish common intention within the meaning of section 32 of the Penal Code".*

28. Regrettably, the learned High Court Judge has not discussed the applicability of common intention to this case, despite the fact that the appellants were charged on that basis. In his judgment, the learned trial Judge failed to set out the grounds upon which all the appellants were convicted of the murder of the deceased. Notably, the learned High Court Judge did not analyze the evidence in the context of Section 32 of the Penal Code, nor did he explain how the appellants were convicted as members of an unlawful assembly under Section 140 of the Penal Code. The judgment contains no analysis as to how or why each appellant was found guilty of the charges, and in particular, the evidence against each appellant was never discussed, an omission which, in my view, is fatal to the sustainability of the conviction.

29. It is a settled principle that when appellants are charged with murder on the basis of common intention or for being members of an unlawful assembly, the prosecution must prove the culpability of each appellant by cogent and reliable evidence. The trial judge also bears an indispensable duty to analyze and evaluate the evidence against each accused to satisfy himself that their participation and shared intention are clearly manifested by the evidence adduced at the trial. As held in *King v. Assappu* (*supra*), the sharing of a common murderous intention is the very essence of a charge under Section 32 of the Penal Code, and in the absence of such proof, the section cannot be invoked.

30. Similarly, in ***Pandurang, Tukia and Bhillia v. State of Hyderabad (AIR 1955 SC 216),*** it was held that mere presence at the scene of the crime does not make a person liable under the principle of common intention unless there is clear evidence of participation and a pre-arranged plan. In ***Masalti v. State of Uttar Pradesh (AIR 1965***

SC 202), the Supreme Court emphasized that to establish liability under the concept of common object, it must be proved that each accused shared or was aware of that object.

31. Therefore, the mere presence of the appellants at the scene, without evidence of active participation or shared intent, is insufficient to sustain a conviction based on common intention or common object. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly, and he entertained along with the other members of the assembly the common object

32. Furthermore, to secure a conviction under section 146 of the Penal Code it must be proved either that the offence was committed in prosecution of the common object of the assembly or that the appellants were aware the offence was likely to be committed in prosecution of that object. In ***King vs Sellathurai 48 NLR 570*** it was held that:

> *In order to make members of an unlawful assembly vicariously liable for the act of any one of them under section 146 of the Penal Code, 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.*
>
> *The vicarious liability attaching to a person by reason of his being a member of an unlawful assembly is not sufficient for a member of such assembly who is unarmed to be found guilty of an offence under section 141 of the Penal Code.*

33. In the present case, the only common object of the unlawful assembly alleged in Count 2 was to commit the murder of Mohammed Fariz. The offence must have been committed in prosecution of that common object. The fact that all the appellants did not personally attack the deceased makes no difference to their liability under Count 2. Nevertheless, it must be established that each appellant, while being a member of the unlawful assembly, shared the common object of committing the murder of the deceased.

34. In other words, what has to be proved against a person alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and that he, along with the other members, entertained the common object.

35. As stated in ***The King Vs. Abeywickrama 4 NLR 254, 256,*** *"once they were found to be members of an unlawful assembly, the extent of their participation is immaterial when we are considering their liability in law. In regard to that liability, they also serve who stand and wait."*

36. However, the pivotal issue in the present case is whether the evidence of the sole eyewitness, namely PW1, inspires the confidence of the Court to sustain the conviction of the appellants, given the vagueness and inconsistencies discernible, particularly in relation to the identification of the appellants. Case law has consistently emphasized that while identification of an accused person is a crucial element in establishing guilt, such identification must be proved beyond reasonable doubt. Courts have repeatedly cautioned against relying on weak identification evidence, especially when it is based on a fleeting glance or solely on dock identification.

37. In ***R. v. Turnbull [1977] QB 224,*** the English Court of Appeal laid down important guidelines for assessing identification evidence, emphasizing that such evidence can be unreliable unless properly tested with caution. It is desirable to emphasize that when the identity of the accused is in issue, the testimony of an identifying witness must be subjected to the most careful scrutiny, and conviction should not rest on identification evidence unless the Court is satisfied that the witness had a clear and unobstructed view and sufficient opportunity for observation.

38. In the present case, it is evident that the testimony of PW1 does not provide a firm foundation for a finding of guilt. Her evidence reveals that she reached the scene only after the attack had taken place and that the appellants were fleeing when she arrived. This fact alone casts serious doubt on her ability to correctly identify the assailants. Furthermore, her failure to mention certain material facts at the inquest, such as the weapons allegedly carried by the appellants, and the inconsistencies in her testimony during the trial, substantially weaken the reliability of her evidence. In these circumstances, it would be unsafe to base a conviction solely on her uncorroborated

identification, which, according to established judicial precedent, demands the highest degree of scrutiny before acceptance. Thus, where identification evidence is weak, uncertain, or inconsistent, the benefit of the doubt must necessarily be extended to the accused.

39. It could be observed from the evidence of PW1 that she was inconsistent regarding the identification of the appellants at the scene. A careful examination of her testimony raises a serious question as to whether she had, in fact, seen the appellants attacking the deceased. On one occasion, she stated that when she went to the scene, the deceased was already lying with cut injuries and that the appellants ran away upon seeing her. However, at another point, she claimed that when she arrived, the deceased was being attacked by the appellants. When her testimony is examined in its entirety, it reveals vagueness and material inconsistencies concerning identification. Therefore, it would be unsafe to base a conviction solely on PW1's evidence, which is tainted with significant uncertainties and contradictions.

40. Unfortunately, the learned High Court Judge has failed to give due consideration to the aforesaid weaknesses discernible in the testimony of PW1, who was the sole eyewitness to the incident. Moreover, the learned High Court Judge misdirected himself by concluding that the appellants had evaded arrest for a period of three months and, on that basis, drew an adverse inference against them based on their subsequent conduct. However, the evidence clearly indicates that the appellants had surrendered themselves within a few days of the incident. Furthermore, the learned High Court Judge has not adequately evaluated the defence evidence, including the dock statements. Significantly, the rejection of the defence evidence appears to have been unduly influenced by the erroneous finding that the appellants had been evading arrest for three months.

41. Accordingly, in view of the foregoing observations, it is evident that the conviction of the appellants is unsafe to be sustained. The prosecution has failed to prove the charges beyond reasonable doubt, particularly in light of the infirmities in the testimony of PW1 and the misdirection apparent in the reasoning of the learned High Court Judge. Therefore, I find that the conviction and sentence entered against the appellants cannot stand in law.

42. Accordingly, the conviction and sentence are hereby set aside. The appellants are acquitted of all charges. The appeal is accordingly allowed.

Judge of the Court of Appeal

P.Kumararatnam, J.

I agree.

Judge of the Court of Appeal