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

The Attorney General
Vs

1. Brian Anthony Samual
2. Roger Christopher Samual
3. Rulston Desmond Decker
4. Mohamad Arun alias Choppe
5. Charles Samual alias Naughty
6. Babu

Accused

And now between

CA. No : 60-61 A-B/2008
HC Colombo : 980/2002

1. Brian Anthony Samual
2. Roger Christopher Samual
3. Rulston Desmond Decker
4. Mohamad Arun alias Choppe
5. Charles Samual alias Naughty

Accused– Appellant

Vs.

The Attorney General

Respondent

Before : Sisira de Abrew J &
Sunil Rajapakshe J

Counsel : Tirantha Walaliyedde PC with Indika Mallawaarchchi for the 1st and 5th accused appellants.

CR de Silva PC with Chinthaka Rankothge for
2nd accused appellant.
Janaka Amarasinghe with Nihara Randeniya for the
3rd accused appellant.
WD Dharmasiri Karunarathne for the
4th accused appellant.
Kapila Waidayarathne DSG for the Attorney General

Argued on : 28.11.2012, 29.11.2012 and 30.11.2012

Decided on : 11.2.2013

Sisira de Abrew, J.

The six accused in this case were indicted on three counts. The 1st count was that they were members of an unlawful assembly common object of which was to cause injuries to one Kapila Perera. The 2nd count was that they whilst being members of the said unlawful assembly committed the murder of said Kapila Perera which is an offence under section 146/296 of the Penal Code. The 3rd count was that they committed the murder of said Kapila Perera and thereby guilty of the offence of murder under section 32/296 of the Penal Code on the basis of common intention.

After trial the learned trial judge convicted all six accused of all three counts and sentenced them to death on the 2nd count. She did not impose a sentence on the 3rd count as she was of the opinion that it was connected to the 2nd count. She did not impose any sentence on the 1st count. Being aggrieved by the said convictions and the sentence 1st to 5th accused have appealed to this court. The 6th accused who was tried in absentia has not appealed. The facts of this case may be briefly summarized as follows:
On 21.7.1996 around 10.00 a.m. when Kelart was going on Parakumba Mawatha towards the junction he saw a group of about 10 people. Kapila

Perera was walking towards the junction and this group was coming from the direction of the junction. At this stage, members of the group started attacking Kapila Perera. He identified the 1st, 2nd, 3rd, 4th, 5th and 6th accused among the said group. He saw 1st, 4th and 6th accused stabbing Kapila Perera who is the deceased person in this case. The 2nd, 3rd and 5th accused were with 1st, 4th and 6th accused who attacked the deceased person. He says that all members of the said group attacked the deceased person. The 4th accused armed with a knife came towards Kelart to stab him when he raised his voice at the time of stabbing on the deceased person. At the time of the attack on the deceased person, the 2nd accused had a pistol and the 5th accused had a knife. The 2nd accused at this stage said he would shoot. When the attackers were leaving the scene of offence IP Palihakkara whose mane was unknown to Kelart at the initial stage of the investigation arrived at the scene and then Kelart told him that those who were running away stabbed the deceased person. This is the summary of evidence of Kelart.

IP Palihakkara the OIC Wellampitiya who was passing Parakumba Mawatha around 10.20.a.m. on 21st July 1996 stopped his jeep as there were 20 to 25 people gathered on the road. He noticed a person fallen on the road with bleeding injuries. When he made inquiries one Kelart came forward as a witness. IP Palihakkara who had no time to conduct investigation as he was on his way to attend an official commitment at Police office at Nugegoda after taking steps to send the injured person to the hospital got down SI Ratnapala Perera the OIC Crimes and left the scene of offence to go to Nugegoda.

SI Ratnapala Perera who went to the scene observed a large patch of blood at the scene. He instructed PS 13517 Tikiribanda to record the

statement of Kelart who was present at the scene. Kelart's statement was recorded at 11.30.a.m. on the same day.

The 1st, 2nd and 4th accused in their dock statements denied the incident. Further 1st and 2nd accused said that Kelart who is their mother's brother implicated them with the incident as he was angry with them.

The 5th accused who gave evidence under oath stated that on the day of the incident he was doing business at Pettah world market. But under cross examination he admitted that his claim that is to say that he was doing business at Pettah world market was false. Thus his defence of alibi taken up in examination in chief was disproved by his own evidence. He in his evidence admits that he did not surrender to police for about one year. The 5th accused admits under oath that he gave false evidence. He has given false evidence on the defence of alibi. Therefore the learned trial judge was correct when he rejected the evidence of the 5th accused.

Learned counsel for the accused appellant submitted that the evidence of Kelart could not be acted upon as he is not a reliable witness. Therefore one of the important questions that must be decided in this case is whether Kelart is a reliable witness or not. I now advert to this question.

According to Kelart when the accused persons were leaving the scene of offence after stabbing the deceased person, an inspector of police arrived at the scene and he came forward as a witness. IP Palihakkara says that when he arrived at the scene, Kelart came forward as a witness. This is one of the points that should be considered in his favour when one considers his credibility. He admits that he did not give names of the accused persons. The reason for this failure according to him was that he entertained fear of being stabbed. Entertaining fear is justified because the 4th accused armed with a knife came to stab him when he raised his voice at the time of

stabbing. He made a statement to PS Tikiribanda on the same day around 11.30.a.m. Thus he made a statement to the police within 90 minutes of the incident. Thus his evidence satisfies the test of promptness. Learned trial judge who observed the demeanour of this witness came to the conclusion that he had witnessed the incident. When I consider all these matters I hold the view that Kelart is a truthful witness. I therefore reject the contention of learned President's Counsel and other counsel that Kelart is not a reliable witness. When I consider the dock statements of 1st, 2nd and 4th, I hold the view they cannot be acted upon and that they have not created any reasonable doubt in the prosecution case.

Learned trial judge at page 254 of the judgment observed that the investigating officer had gone to each accused person's house and searched for them. But according to the evidence he had gone only to the house of the 1st accused. Therefore it is not correct to say that 2nd to 6th accused were absconding. The learned trial judge misdirected herself on this matter. But this misdirection has not occasioned a miscarriage of justice in view of the evidence led at the trial.

Learned trial judge at page 261 of the brief referring to the defence evidence observed that although 3rd and 6th accused were not present in court, evidence was produced against them too. She observed that evidence was led to prove that they too had attacked the deceased person. There is clear evidence that 6th accused too stabbed the deceased person. Kelart admitted that 3rd accused too was among 1st, 2nd, 4th, 5th and 6th accused at the time of the attack on the deceased person. When he was questioned as to what the 3rd accused did, he replied that all the members of the group attacked the deceased person. When I consider the said evidence I hold the view that the above observation made by the learned trial judge had not

caused prejudice to the 3rd accused. Learned counsel for the 3rd accused contended that conviction of the 3rd accused was wrong as he had not done anything to the deceased person. I now advert to this contention. In considering this question it is relevant to consider certain judicial decisions. In the case of Samy and others Vs Attorney General [2007] 2 SLR 216, the Supreme Court held thus: "It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion."

In Queen Vs NKA Appuhamy 62 NLR 484 Sansoni J held thus: "A person can become a member of an unlawful assembly not only by the doing of a criminal act but also by lending the weight of his presence and associating with a group of persons who are acting in a criminal fashion."

It is in evidence that a group of about ten people attacked Kapila Perera the deceased person and 1st to 6th accused were in the said group. Thus their common object was to attack Kapila Perera. Thus the 1st count has been proved beyond reasonable doubt. According to the evidence of Kelart when the 1st, 4th and 6th accused stabbed the deceased person, the 2nd accused and the 5th accused were respectively armed with a pistol and a knife and the 3rd accused was with them. When Kelart was questioned as to what the 3rd accused did at this time he replied that the members of the group attacked the deceased person. This shows that 3rd accused's presence at the scene was not a mere presence and he too was acting in furtherance of the common object of the unlawful assembly. Therefore 3rd accused too becomes liable under section 146 of the Penal Code. For these reasons, I reject the above contention of learned counsel for the 3rd accused.

Learned President's Counsel for the 2nd accused contended that the learned trial judge had used the statement made by Kelart to the investigating officer in order to decide the credibility of the witness and that this procedure was wrong. I now advert to this contention. The learned trial Judge at page 260 of the brief had used the said statement. At this stage it is pertinent to ask the following question. Can the court consider statements of witnesses made to the investigating police officer in the course of the investigation? In this connection I would like to consider the judgment in Keerthi Bandara Vs The Attorney General [2000] 2 SLR 245. Head note of the judgment states: "It is for the Judge to peruse the Information Book in the exercise of its overall control of the said book and to use it to aid the Court at the inquiry or trial." This should not be interpreted to say that the Judge is empowered to use the statement of the witness which was not produced at the trial when writing the judgment. It is pertinent to consider what His Lordship in the above judgment said at page 258. "We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue." Where does he do it? Is it open Court or Chambers of the Judge? Is it during trial or after conclusion of

trial? It is very clear that the Judge has to do the above things in open court during the trial. If it is a trial by a judge, same procedure should apply. When the defence counsel spot lights an omission or seeks to mark a contradiction, the trial judge must peruse the Information Book and decide whether the sentence in the statement which the defence counsel intends to mark as a contradiction is in fact found in the statement or the defence counsel is trying to confront the witness with an incomplete sentence in the statement or decide whether the omission is correct. This is how court uses the Information Book to aid the trial or inquiry. Thus the trial judge will have to peruse the Information Book in order to decide the above matters. This does not mean that he can use statements of witnesses made in the course of investigation to the police officer as evidence. This view is supported by following judicial decisions.

In King Vs Soysa 26 NLR 324 His Lordship Justice Jyawardene held: "A Judge is not entitled to use statements, made to the police and entered in the Information Book, for the purpose of corroborating the evidence of the prosecution."

In PAULIS APPU v. DON DAVIT. 32 NLR 335 "Where at the close of a case, the Police Magistrate reserved judgment, noting that he wished to peruse the information book,- **Held**, that the use of the information book for the purpose of arriving at a decision was irregular."

In WICKREMESINGHE *v.* FERNANDO. 29 NLR 403 "Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a

statement by him to the Police,-**Held**, that the use of the Police Information Book was irregular."

In INSPECTOR OF POLICE, GAMPAHA v. PERERA 33 NLR 69 "Where, after examining the complainant and his witnesses, the Magistrate cited the Police to produce extracts from the information book for his perusal, before issuing process,- Held; that the use of information book was irregular."

In PEIRIS Vs ELIYATAMBY 44 NLR 207 It was held that entries in a Police Information Book cannot be used as evidence for the purpose of testing the credibility of a witness.

Having considered the above legal literature and observation, I hold that in criminal trials court is not entitled to use statements made by witnesses to the investigating police officer in the course of the investigation as evidence. A statement made by a witness to the investigating police officer can be used for the purpose of contradicting the witnesses but the portion of the statement so produced cannot be used as evidence. Such portion of the statement can be used to decide the credibility of the witness. I further hold that the trial judge, when writing the judgment, is not entitled to use statements made by witnesses to the investigating police officer in the course of the investigation which were not produced at the trial.

Having considered the above matters, I hold that the learned trial judge in this case was wrong when he decided to use the statement of Kelart made to the investigating officer as evidence. What would have been the position if the learned trial judge did not use the above statement? Couldn't she have convicted the accused person in view of the evidence led at the

trial? In my view she could have convicted. When I consider the evidence led at the trial I hold the view that the above misdirection has not occasioned a miscarriage of justice. I therefore decide to act on proviso to section 334 of the Criminal Procedure Code which reads as follows: "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

For the above reasons I affirm the conviction of all the accused appellants and the sentences imposed on them and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal.

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal.