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

The Democratic Socialist Republic of Sri Lanka

Complainant

CA 296/2008

Vs.

H.C. Colombo – HC:2197/2004

Gangodawilage Manoshantha

1st Accused

AND NOW BETWEEN

Gangodawilage Manoshantha

1st Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: S. DEVIKA DE LIVERA TENNEKOON J

S. THURAIRAJA, PC, J

COUNSEL:	**Accused – Appellant – Jagath Abeynayake** **Complainant – Respondent – DSG Dilan Rathnayake**
ARGUED ON	**27.10.2017**
WRITTEN SUBMISSIONS –	**Defendant – Appellant – 14.09.2017** **Complainant–Respondent – 27.09.2017**
DECIDED ON:	**19.01.2018**

S. DEVIKA DE LIVERA TENNEKOON J.

The 1st Accused Appellant (hereinafter sometimes referred to as the Appellant) along with 3 others were indicted in the High Court of Colombo for the following offences;

1) Being a member of an unlawful assembly on or about 31.12.1994 with the common object of murdering Marasinghe Arachchige Nihal Gunasiri under Section 140 of the Penal Code,

2) Being a member of an unlawful assembly of which a member or members committed murder of Marasinghe Arachchige Nihal Gunasiri under Section 146 of the Penal Code read together with Section 296 of the Penal Code,

3) Committing murder of the said Marasinghe Arachchige Nihal Gunasiri under Section 296 of the Penal Code read together with Section 32 of the Penal Code.

The Prosecution led the evidence of Rasika Sanjeewa (PW3) who was the son of the deceased, Somawathie Dabare (PW1) who was the wife of the deceased, Dr. S. M. Colombage (PW6) and K.N. Ranaweera (PW8) and closed the case. The Appellant and the 2nd Accused made dock statements and denied any involvement in the said chargers.

The case in brief for the prosecution is that the deceased had been enlarged on bail soon before he was murdered and the deceased had been at home when two of his friends had come home and they had proceeded to move towards the boutique at which point a white van with about 7 persons had stopped in front of the house of the deceased. At this point the deceased had started running and these persons had followed him and when he slipped and fell the Appellant along with others had proceeded to attack the deceased with manna knives which resulted in his death.

The learned High Court Judge by her Judgment dated 18.12.2008 found the Appellant and the 2nd Accused guilty of the 1st and 2nd count aforementioned and sentenced both the Appellant and the 2nd Accused to death.

Being aggrieved by the said conviction and sentence the Appellant has preferred the instant Appeal on mainly the following grounds;

a) Can the Appellant be convicted for an unlawful assembly when two co-accused had been acquitted in trial?

b) Whether the evidence of PW3 and PW1 can be relied upon?
c) Whether the evidence of identification was satisfactory in view of the fact that no identification parade was held during investigations?
d) Whether PW1 and PW3 were really at the scene at the time of the incident?
e) Whether the prosecutions failure to call PW2 and PW4 on the indictment should result in Court drawing an adverse inference against the prosecution?
f) Whether the evidence of the motive was established on hearsay evidence?
g) Whether the learned Trial Judge analysed the evidence before Court on a legal basis?

At the outset it must be noted that the learned DSG submits that the 2nd Accused in this case who was also convicted and sentenced for the same counts as the Appellant has not filed an Appeal to the best of his knowledge.

With regard to the first ground of appeal above mentioned; Can the Appellant be convicted for an unlawful assembly when two co-accused had been acquitted in trial? The learned Counsel for the Appellant contends that out of the four accused who were charged, two accused were acquitted by the learned Trial Judge as there was no evidence placed at trial against them and therefore since Section 138 of the Penal Code stipulates that "an assembly of five or more persons is designated an "unlawful assembly" the Appellant cannot be convicted for same since the number of the members fall short of this requirement.

The learned DSG submits that as per the 1st charge contained in the indictment dated 29.11.2004 the four accused named in the indictment together with two

others, namely, Roshan Wasantha Gomez and K. Sanjeewa Perera who were deceased by then constituted the unlawful assembly. Therefore, as per the indictment, the unlawful assembly was constituted by 6 persons. The learned DSG further submits that the evidence led in trial establishes that 7 persons came together to attack and kill the deceased and therefore, the acquittal of the 3rd and 4th Accused does not raise a doubt as to the existence of 5 or more persons being together at the time of the alleged offence.

The learned DSG relies on the case of Rex Vs. Diaz et al 1935 16 Ceylon Law Recorder 16 in which Soertsz AJ held that though there must be five persons possessed of the same transaction, it is not necessary that they should all be jointly brought to trial for some of them may abscond and evade justice but that would not affect the liability of those remaining.

This Court agrees with the submissions of the learned DSG and finds that the learned High Court Judge was correct in convicting the Appellant and the 2nd Accused on counts of a member of an unlawful assembly since it was established in trial by PW3 that there were 7 persons who were present on the date of the incident and further since the body of the first charge in the indictment discloses the names of two suspects, who were then deceased, which constitutes an unlawful assembly of 6 persons.

The learned Counsel for the Appellant submits that the evidence of PW3 and PW1 cannot be relied upon. The learned Counsel submits that PW3, who was the son of the deceased, was 10 years at the time of the incident and that he was 22 years old when he gave evidence and further that he could not remember how old he was at the time of the incident or the year or month of the incident. However, it is clear as correctly submitted by the learned DSG that the learned

High Court Judge who had a first-hand account of the incident as narrated by the witnesses has found that the evidence of PW3 is clear and credible. The learned Trial Judge has further stated that the eye witnesses i.e. PW3 and PW1 corroborate each other's narratives and that the defence has failed to mark any contradictions of evidence either *inter-se* or *per-se.*

In the case of **Ariyadasa Vs. Attorney General** 2012 (1) SLR 84 it was held *inter alia* that;

> "Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanour and the deportment of a witness. The contention that the eye witness was not a credible witness is rejected."

This Court also finds that the fact that the PW3 admitted to not seen PW1 at the time of the incident does not raise any doubt as to the credibility of the said witnesses nor does it suggest that either witness was not present at the scene. As per the narrative of the prosecution both PW3 and PW1 has testified to the events that unfolded in the night in question from different perspectives and yet, as the learned Trial Judge has noted, both witnesses have corroborated each other's testimony with no contradictions or significant omissions.

The next question this Court will consider as per the submissions of the learned Counsel for the Appellant is whether the identification of the Accused by PW3 and PW1 lacks credibility in the absence of an identification parade. As correctly submitted by the learned DSG, the need for an identification parade arises where the Accused was seen for the first time by the witnesses and where

such Accused were not known to the witnesses. In this case PW1 and PW3 identified the accused, some by name and some by their features. PW3 states in evidence that he knew the Appellant who lived close by and visited the same shop PW3 frequented and further PW3 identifies all the persons who attacked the deceased as persons previously seen by him and therefore known to him. PW1 in her evidence identifies 3 persons who attacked the deceased therefore, the question of identity does not arise in this instance.

The question of whether the prosecutions failure to call PW2 and PW4 on the indictment should result in Court drawing an adverse inference against the prosecution does not hold weight in the instant case as Section 134 of the Evidence Ordinance states that "no particular number of witnesses shall in any case be required for the proof of any fact" and as correctly submitted by the learned DSG the narrative of the prosecution has been wholly presented by PW1 and PW3 and as such there was no need for to have called any other witnesses.

On the other hand, the learned Trial Judge has correctly applied the dictum of Lord Elenborough as applied in the case of Ilangatilaka and others Vs. The Republic Of Sri Lanka 1984 (2) SLR 38 which held that;

> Where a strong prima facie case has been made out against an accused and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it would justify the conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests

In the circumstances as morefully discussed above this Court finds that the learned Trial Judge by her Judgment dated 18.12.2008 has carefully evaluated the evidence placed before her and has assessed the culpability of the Appellant beyond reasonable doubt as such we see no reason to interfere with the conviction and sentence in relation to the 2nd Count.

However, it seems that due to an oversight the learned High Court Judge has failed to sentence the Appellant on the first count under Section 140 of the Penal Code. Therefore, this Court whilst affirming the conviction of the Appellant on the 1st Count, imposes a sentence of 6 months rigorous imprisonment and a fine of Rs. 2,500/- and in default 3 months simple imprisonment on the Appellant in relation to same.

Subject to the above variation this appeal is dismissed.

Appeal Dismissed.

Judge of the Court of Appeal

S. THURAIRAJA, PC, J

I Agree.

Judge of the Court of Appeal