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

In the matter of an appeal under Section 331(1) of Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal
Case No: 165/2007

H.C. Kegalle No: 1238/97

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

Complainant

-Vs-

1. Wederalalage Gunathilake
2. Ganeralalage Upali Gunaratne *alias* Mahathun
3. Wederalalage Nihal Ajith Kumarathilake
4. Wederalalage Jayaratne
5. Wederalalage Saman Kumara
6. Muthupathiranalage Pradeep Nishantha Herath *alias* Deveniya
7. Wederalalage Mahinda Piyal Samantha

Accused

-And Now Between-

1. Ganeralalage Upali Gunaratne *alias* Mahathun
2. Wederalalage Nihal Ajith Kumarathilake
3. Wederalalage Saman Kumara
4. Muthupathiranalage Pradeep Nishantha Herath *alias* Deveniya

2nd, 3rd, 5th and 6th

Accused-Appellants

-Vs-

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

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Saliya Peiris, P.C., with Varuna De Saram for the 3rd Accused- 2nd Appellant.

Rienzie Arsecularatne, P.C., with Thejitha Koralage for the 5th Accused- 3rd Appellant and 6th Accused- 4th Appellant.

Ayesha Jinasena, P.C., ASG for the Respondent.

Written Submissions of the 2nd Appellant filed on: 09/11/2018

Written Submissions of the 3rd and 4th Appellants filed on: 09/11/2018

Written Submissions of the Complainant-Respondent filed on: 30/10/2018

Argued on : 13/02/2019

Judgment on : 14/03/2019

A.L. Shiran Gooneratne J.

The 2nd, 3rd, 5th and 6th Accused, presently 1st to 4th Accused Appellants (hereinafter referred to as the 1st, 2nd, 3rd and 4th Appellants) were among 7 other Accused who were indicted before the High Court of Kegalle for having committed the following offences.

1. being members of an unlawful assembly, the common object of which was to cause the death of Delankage Podimahattaya alias Somadasa an offence punishable under Section 140 of the Penal Code.
2. whilst being members of the said unlawful assembly caused the death of Delankage Podimahattaya alias Somadasa (hereinafter referred to as the deceased in the 1st count) an offence punishable under Section 146 read with Section 296 of the Penal Code.
3. whilst being members of the said unlawful assembly caused the death of Marasinghage Wimalawathie (hereinafter referred to as the deceased in the

2nd count) an offence punishable under Section 146 read with Section 296 of the Penal Code.

The 4th and 5th counts preferred against the Accused were for committing the offences referred to in count 2 and 3 on the basis of common intention, punishable under Section 32 read with Section 296 of the Penal Code.

At the conclusion of the trial, by judgment dated, 26/11/2007, all Accused were convicted on counts 1, 2 and 3 and sentenced to death on counts 2 and 3. The Learned High Court Judge did not proceed to convict the accused on counts 4 and 5.

The trial against the 2nd Accused, 1st Appellant, had proceeded in absentia. The 1st Appellant was arrested on 07/11/2009, and after inquiry in terms of Section 241 (3) of the Code of Criminal Procedure Act, (CCPA), the Learned High Court Judge imposed the death sentence on the said Appellant. Being aggrieved by the said decision, the 1st Appellant was before this Court to seek an order to set aside the conviction and sentence imposed by the Learned High Court Judge and to afford the said Appellant a fresh inquiry in terms of Section 241 (3) of the CCPA. Having gone into the merits of the said application this Court rejected the appeal of the 1st Appellant for reasons stated in order dated 04/12/2018.

The 2nd Appellant absconded from Court soon after the commencement of trial, and therefore, the trial against the 2nd Appellant, (3rd Accused) also proceeded in absentia. At the conclusion of trial, the 2nd Appellant was convicted on count 1, 2, and 3 and was sentenced to death on count 2 and 3. The said Appellant by Revision

Application, C.A. (PHC) APN 173/2010, is before this Court to have the said conviction and sentence revised. Both parties agreed that the said Revision Application be taken up together with the instant application and decided accordingly.

Therefore, the scope of this application would be limited to the Revision Application filed by Wedaralalage Nihal Ajith Kumarathilake, the 2nd Appellant (3rd Accused Petitioner) and the Petitions of Appeal filed by Wedaralalage Saman Kumara and Muthupathiranalage Pradeep Nishantha Herath alias Deveniya, the 3rd and 4th Appellants (5th and 6th Accused).

Dilanka Pedige Ajantha Jayalath Kumari (PW1), the eldest daughter of the deceased in the 1st and 2nd counts, in her evidence to Court on 20/03/2006, testified to an incident which took place on 03/03/1992. She stated that on the said date, the deceased in the 1st count and her younger brother had taken rubber to the smoke house which was around 600 feet from their main house. Soon after, the 2nd, 3rd and 4th Appellants together with the rest of the accused came to the compound of their house. The 1st and 2nd accused had entered the house and searched for the deceased in the 1st count in a threatening manner. (කෝ තොපෙ මහ එකා කියල ඇහුවා.) They had inquired from the deceased in the 2nd count as to the whereabouts of her husband, the deceased in the 1st count. At that time, the 1st and 2nd accused had been armed with a knife and a club respectively. PW1 further states that the 2nd, 3rd and the 4th Appellants were also in possession of weapons which she cannot re-call to

describe in detail. At this moment the deceased in the 2nd count had stepped out of the house to inform her husband about the incident, when the 1st accused had assaulted her with a club. PW1 had rushed out of the house to alert her father about the incident, however hearing cries, she had seen her father coming towards the house. PW1 further states that the 1st accused together with the rest of the accused having chased after her father, had assaulted him with a club.

In cross examination, it was suggested that, in her evidence in the non-summary inquiry, she failed to disclose any of the names of the accused stated in the trial Court, other than the 1st accused. This witness has specifically denied the said suggestion and reiterates that she had identified all the accused in her evidence at the non-summary inquiry. It is observed that at the conclusion of her evidence, there were no contradictions marked or any omission brought to the attention of the learned trial judge.

Delankage Inoka Shamali Herath PW2, also an eye witness to this incident, in her evidence stated that the Appellants together with the 1st and 2nd accused were searching for the deceased in the first count and when the deceased in the 2nd count stepped out of the house to proceed towards the smoke room, the 1st and the 2nd accused assaulted her mother, the deceased in the 2nd count. This witness has identified the 3rd and the 4th Appellants at the scene of the crime. At this point the witness had rushed towards Sunil's house where she had heard the deceased in the

1st count shouting not to assault. (තාත්තා ගහන්න එපා කියලා කියනවා විතරක් ඇසුනා.)

In cross examination, the defence suggested to this witness that in her evidence at the non-summary inquiry, she had only named the 1st and the 2nd accused been present at the scene of the crime. The witness has denied this suggestion. In re-examination, she stated that the Appellants whom she identified are known persons who can be identified by name.

Delankage Prasan Sanjeewa Jayalath (PW3), states that on the date in question, he had gone to the smoke room with his father, the deceased in the 1st count. After hearing screams of his sister (PW1), this witness had followed his father towards their house. Moments later, PW3 had seen her mother fallen on the ground with injuries and had identified the 1st and the 2nd accused armed, standing close to her. At this moment the 1st accused had assaulted the deceased in the 1st count with a club. When the said deceased ~~had~~ ran towards the rubber estate, the 2nd accused had given chase to the deceased inside the rubber estate and had stabbed him with a knife. The Appellants who were with weapons inside the rubber estate, had encircled the deceased in order to restrict his movements. (ඔවුන් වට කර සිටියේ. තාත්තාට රබර් වත්තට දුවලා බේරෙන්න බැරි වුණා.) The assault on the deceased in the 1st count by the 1st and 2nd accused had taken place thereafter.

In cross examination the defence suggested to this witness that in the non-summary inquiry the witness never stated that the Appellants were armed, to which the witness has answered in the negative.

Liyannalage Sunil Perera (PW4), in his evidence stated that he heard screams from the direction of the house of the deceased and soon thereafter PW1, PW2 and PW3 had taken refuge in his house. At that time, he had seen the 1st accused outside his house armed with a club and had warned him to be careful.

Delankage Sarath Guneratne (PW5), stated that he had seen the 1st and the 2nd accused assaulting the deceased in the 1st count. When asked about the presence of the Appellants at the scene of the crime his answer was that he did not see anyone else.

I will now turn to the main grounds of appeal which are common to all Appellants,

1. the learned High Court Judge has misdirected himself that all the accused were part of an unlawful assembly having a common object to commit the offence of murder.
2. the learned High Court Judge failed to consider vital omissions and contradictions.
3. the trial judge has failed to consider a reasonable doubt arising, when evaluating evidence for the prosecution.

4. that the trial judge has not dealt with the elements that should be proved to establish the guilt of the Appellants to establish liability under Section 146 of the Penal Code.

Before evaluating the available evidence I wish to draw attention to the case of ***Sirisena Ranawaka and Others vs. The Attorney General (1985) 2 SLR 210,*** where it was held that:

> *"The appellants were clearly members of the unlawful assembly the common object of which was to cause hurt to Heen Banda. The fact that all of them did not enter the house made no difference to their liability. Once they are found to be members of an unlawful assembly the extent of their participation is immaterial. They also serve who only stand and wait so far as liability goes."*

Eye witness account to this incident describes two separate fatal assaults on the two deceased persons on two separate locations in very close proximity to each other. PW1 and PW2 have identified the appellants present on both locations with weapons in hand. It is also revealed that the appellants were armed and present at the 1st scene of crime, when threatening language was used in search of the deceased in the 1st count. It is observed that the circumstances of such threat intensifies and the common object to cause death to that person is more likely, due to the Appellants being armed. When threatening language was used by the 1st accused in search of the deceased, none of the Appellants disassociated themselves with such

comment or discontinued to be members of such association. When the deceased in the 2nd count was moving out of the house due to the apparent threat posed by the accused to harm her husband, she was attacked, by the 1st and the 2nd accused. It is in evidence that the Appellants were armed and present at this location and therefore continued to be a part of the unlawful assembly to cause the death of the deceased in the 2nd count. Moments later PW3 describes the Appellants being armed and preventing the movement of the deceased in the 1st count, at which point he was fatally injured by the 1st accused.

The Privy Council in Khan v. Ariyadasa (1965) 67 NLR 145, held that:

> *"Under section 32 criminal liability results from the doing of a criminal act in furtherance of the common intention: under section 146 criminal liability may result merely from the membership of the unlawful assembly at the time of the commission of an offence known to be likely to be committed in prosecution of its object."*

In ***Queen vs. Appuhamy 62 NLR 484***, the Court held:

> *"that 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."*

Accordingly, eye witnesses evidence conclusively prove that the Appellants were members of an unlawful assembly and the offence was likely to be committed in prosecution of the common object.

In consideration of reliability of witness evidence, the defence contends that there were material omissions and contradictions which the trial judge failed to consider. The failure of PW1 to identify the accused by name and the particular weapons carried by them, and whether the evidence of PW1 and PW2 were contradicted by PW3, regarding the possession of weapons by the Appellants in their evidence given at the non-summary inquiry, are issues of contention.

At the outset, it is to be noted that the defence did not mark any contradictions or has drawn attention of Court to any omissions in evidence of the said witnesses. The defence has also failed to draw the attention of the witness to the parts of such oral and or written statements which the defence contends would impeach the credit of such witness. However, the Court observes that in cross examination, the defence did make suggestions to the witnesses regarding such omissions and contradictions referring to evidence given by the relevant witness at the non-summary inquiry.

In ***Samuel Vs. R. A 1935, A 935,*** it was held that:

> *"the witness should be informed of those parts of his statement which are to be used to contradict him. It is not enough to say whether a particular exhibit is his previous statement".*

In the Indian case of ***Shaik Subhai Vs. State of AP., 321(326) (AP),*** it was held that:

> *"by putting suggestions to the witness and the witness denying the same will not amount putting contradiction to the witness. The contradiction has to be put to the witness as contemplated under section 145 of the evidence Act. If a contradiction is put to the witness and it is denied by him, then his attention had to be drawn to the statement made by such witness before the police or any other previous statement and he must be given a reasonable opportunity to explain as to why such contradiction appears and he may give any answer if the statement made by him is shown to him and if he is confronted with such a statement and thereafter the said contradiction must be proved".*

As noted earlier, there are 3 material eye witnesses who testified to the involvement of the Appellants to this incident. All the eye witnesses testify to the fact that the Appellants were carrying weapons at all time material to this incident.

In the case of ***Brown Vs. Dunn 6 R 67, at page 76 Lord Halsbury*** observed that:

> *"to my mind nothing would be more absolutely unjust than not to cross examine witness upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character"*

"Giving a witness an opportunity to explain the discrediting facts is important to show that the evidence for and against the relevant issue is trustworthy or untrustworthy in order to believe or disbelieve in the witnesses story given in oral evidence". ***(Bombay C M Co Vs. Motilal 42 IA 110)***

It is observed that the defence did not follow the rules to impeach the credit of a witness to contradict previous statements in writing or oral statements reduced into writing as contemplated in terms of Section 155(c) of the Evidence Ordinance. However, the witnesses were given an opportunity to explain the facts deposed to and the type of weapon in possession of each of the accused. Having evaluated such evidence on the basis of observation and the power of memory of the said eye witnesses, the trial judge has acted upon the evidence to conclude on the type of weapon each of the Appellants were possessed with. In the circumstances, we see no reason to interfere with the findings of the learned trial judge.

The Appellants also contend that the failure on the part of the trial judge to consider the evidence of PW5 regarding the absence of the Appellants at the scene of the crime has occasioned a miscarriage of justice. PW5 has identified the 1st and the 2nd accused attacking the deceased in the 1st count. When the question was posed to him as to the presence of the Appellants at the scene of the crime, the witness has not denied the presence of the Appellants when the said attack took place, but stated that he did not see the Appellants. PW5 testified on events of a moving incident. Therefore, the failure to observe the presents of the Appellants by PW5 cannot be

given a narrow connotation to mean that the witness has denied the presence of any other accused other than the 1st and the 2nd accused at the material time. Furthermore, the presence of the Appellants at the scene of the crime is well established by evidence given by PW1 and PW2. Therefore, we have no hesitation to accept the reasoning of the learned trial judge in evaluation of evidence of PW1, PW2 and PW3 regarding the presence of the Appellants.

The counsel appearing for the 3rd and 4th Appellants brought to the attention of Court that the date of the judgment on record has been altered to read as 26/11/2007, with no reference to the source carrying out the said alteration and therefore, it was contended that since the judgment is not properly dated it does not comply with Section 283(1) of the Code of Criminal Procedure Act. It was also submitted that the evidence of the material witnesses were not led before the judge who delivered the judgment and therefore, the trial judge has failed to appreciate the discretion given to him under Section 48 of the Judicature Act, to re-call the witnesses. The said objection is raised on the basis that the trial judge should have used his discretion and heard the evidence of the eye witnesses a fresh to have an advantage of observing the demeanor and deportment of the said witnesses.

It is noted that the alteration of the date of judgment is in line with the date of judgment, which appear at page 1 of the judgment and also the corresponding journal entry. Accordingly, we hold that the said alteration is well within the confines of the law, and does not prejudice the cause of Justice. It is also noted that

at no time had the Appellants moved Court to re-summon witnesses to re-testify before the learned trial judge who delivered the judgment. The evaluation of evidence was centered around 3 eye witnesses who testified to the events which led to the murder of the deceased. The facts related to the said incident does not appear to be complicated or difficult. In the circumstances, we find that as a trier of facts, the decision to re-summon witnesses, ex mero motu, is well within the discretion of the trial judge, and therefore we see no infirmity arising out of the said decision.

In all the above circumstances, we do not wish to disturb the findings against the 2nd, 3rd and the 4th Appellants and accordingly we uphold the conviction and the corresponding sentence imposed by the learned trial judge. In view of the above finding the revision application submitted by the 3rd Appellant does not arise for consideration. The Petitions of appeal and the Revision Application are dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL