

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

In the matter of a Petition of Appeal
in terms of Section 331(1) of the Code
of Criminal Procedure Act
No.15/1979 of the Democratic
Socialist Republic of Sri Lanka.

C.A.No. 143-147/2017

H.C. Panadura No. 2278/2006

1. Mallawa Thanthrige Saman
Pdamakumara.
2. Hikkaduwa Kariyawasam Namal
Priyantha Liyanage.
3. Bola Kenennahalage Premakeerthi
Udaya Kumara.
4. Kodithuwakkuge Sarath
Kodithuwakku.
5. Nagahawatta Mudiyansele
Premaratne.

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Anil Silva P.C. with Sahan Kulatunga for the 1st Accused-Appellant.
Srinath Perera P.C. with Darshana Kuruppu for the 2nd Accused-Appellant.
Neranja Jayasinghe with Sachitra Harshana for the 3rd Accused-Appellant.
Darshana Kuruppu with Chinthaka Udadeniya for the 4th Accused-Appellant.
Rienzie Arasacularatne P.C. with Chamindri Arasacularatne and Thilina Punchihewa for the 5th Accused-Appellant.
Sudarshana de Silva D.S.G. for the respondent

ARGUED ON : 28th February, 2019, 07th March, 2019, 21st March, 2019, 22nd March, 2019, 28th March, 2019, 03rd April, 2019, 08th May, 2019, 16th May 2019, 17th May 2019 and 22nd May, 2019

DECIDED ON : 18th July, 2019

ACHALA WENGAPPULI, J.

The 1st to 5th accused-appellants (hereinafter referred to as the “1st to 5th appellants”), by their individual petitions of appeal addressed to this Court, seek to invoke its appellate jurisdiction over the judgment and

sentence imposed on them by the High Court of *Panadura*. The five appellants were indicted by the Hon Attorney General under Sections 140, 296 read with 146 and 296 read with 32 of the Penal Code in respect of the death of *Mohammed Naumath Mohammed Munas* which occurred on the 1st June 1990 at *Bandaragama*.

Upon service of the indictment by the High Court of *Panadura*, the appellants opted for a trial without a jury. The trial against the appellants was commenced on 23.06.2010 and with the pronouncement of its judgment on 30.06.2017, all five appellants were convicted for the 1st and 2nd counts by the trial Court. The trial Court made no pronouncement on the 3rd count since it considered the said count only as an "alternative count to the second count".

Each of the appellants were sentenced to a six-month term of imprisonment in addition to a fine of Rs. 5,000.00 with a default term of one-month imprisonment on their conviction to the 1st count. All five appellants were sentenced to death upon their conviction for the 2nd count.

The prosecution presented a case against the appellants, based on several items of circumstantial evidence.

The team of police officers led by the 1st appellant, having arrested one "*Wappa*" had went in search of the deceased to his house. They arrested *Munseer* (PW2) on the information of *Wappa* near the deceased's house. The team then proceeded to the mosque in search of the deceased. They informed the trustees of the mosque that the deceased is wanted for questioning and the trustees undertook to surrender the deceased, once the Friday noon religious activities are over.

It was revealed that the three suspects were thereafter taken to a safe house operated by the police team in *Mavugama* of *Horana* area and were questioned about their involvement of melting robbed gold jewellery that were given to them by a subversive group that operated in the area. *Munseer* claimed that the officers have then taken them to a nearby school hall and they were assaulted after having suspended them on a cross beam by their thumbs after tying them together with shoe laces. When the witness was hung, he lost consciousness. He heard the deceased complaining of a stomach-ache after the assault and was purging. The deceased was thereafter taken in a vehicle and the following morning it was learnt that he had died of gunshot wounds.

The post mortem examination, conducted on the body of the deceased by medical officer Dr. de Almeida, revealed that he had suffered a ½ inch circular firearm entry wound on the front of his chest located 9 inches below the shoulder joint. This firearm injury caused damage to several blood vessels of his right lung and 1 ½ pints of blood was found collected in the chest cavity. She also found a bullet embedded on the back wall of the chest cavity over the right scapula, located 4 inches below the shoulder.

It is her opinion that the deceased may have died after about 1 ½ hours after receiving the injury on his chest, due to "shock and haemorrhage following firearm injury".

She also noted a circular shaped abrasion with a diameter of ½ inch, located 6 inches below the above described firearm entry wound. A one-inch-long lacerated wound was observed on the back of the deceased's

chest located over the 5th and 6th intercostal space and 3 inches from the midline.

In addition, multiple abrasions were also seen on his legs below knee joints.

Tudor Dias, was the Assistant Superintendent of Police, who investigated the incident of shooting reported to him by the 1st appellant immediately after its happening. He had visited the place of shooting at about 2.00 a.m. and had taken charge of the official revolver issued to the 1st appellant with the balance 23 of 25 ammunition, issued along with it. The barrel of the revolver smelt of recent fire. He recorded statements of the five appellants and visited *Batuwita* School and the house from which the rope was borrowed to hang the witness *Munseer* and the deceased.

His inspection of the place where the incident of shooting took place revealed that it is an isolated spot in a cinnamon plantation. He observed that the grass had flattened where there were several blood patches were seen.

At the close of the prosecution, the trial Court had ruled that the appellants had a case to answer and called for their defence. All five appellants have given evidence under oath.

The 1st appellant admitted having arrested the deceased in connection of receiving robbed gold jewellery for melting and after questioning he agreed to show where some of these items of jewellery were hidden. He led the police team to the cinnamon plantation where the incident occurred. The 1st appellant had held the deceased by one arm while holding his service revolver with the other. His service revolver was

defective as its safety latch was not working properly. They were walking along in a single file and they could see the area in the star light. Suddenly the deceased attempted to grab his revolver and during the ensuing struggle it fired accidentally injuring the deceased. He was then rushed to *Panadura* Hospital where he succumbed to the injury and the incident was immediately reported to his superiors.

The 2nd to 5th appellants stated that they saw the 1st appellant and the deceased struggling. They could not use the T 56 rifles they possessed to control the deceased due to the risks involved. They heard two gun shots and have transported the injured deceased to Hospital.

Perusal of the judgment of the trial Court revealed that it had considered the alleged previous conduct of assaulting the deceased by hanging him with thumbs by the appellants, taking the deceased to make recoveries when he complained of his illness, the failure to handcuff the deceased, the distance of fire and its angle supports the inference that they intended to cause his death. Hence, the trial Court found the appellants guilty to the 1st and 2nd counts of the indictment.

Being aggrieved by the said conviction and sentence, the appellants sought intervention of this Court to set them aside on the several grounds of appeal that had been urged on their behalf by Counsel.

Learned President's Counsel who appeared for the 1st appellant raised the following grounds of appeal;

- a. has the trial Court acted on the basis that the appellant was guilty of the offence and thereby throughout denied a fair trial guaranteed to him by the Constitution ?

- b. has the trial Court failed to consider that at least a reasonable doubt is made out by the appellant ?
- c. has the trial Court taken into consideration irrelevant questions of law whereby the assessment of evidence on real issues is forgotten ?
- d. whether the appellant was denied of a fair trial due to the extraordinary delay ?

In support of the 2nd appellant, learned President's Counsel who appeared for him raised the following grounds of appeal;

- a. there was no evidence of an unlawful assembly,
- b. the prosecution evidence is wholly unreliable,
- c. the errors committed by the trial Court vitiates the conviction entered against the appellant.

The grounds of appeal raised by the learned Counsel on behalf of the 3rd appellant are as follows;

- a. the evidence presented by the prosecution is grossly inadequate to draw the inference that the appellant was a member of an unlawful assembly,
- b. the trial Court rejected the appellant's evidence unreasonably.

Learned Counsel for the 4th appellant relied on the following ground of appeal;

- a. prosecution has failed to prove the 4th appellant was a member of the unlawful assembly,

Learned President's Counsel for the 5th appellant complained that his client was not afforded a fair trial before the High Court, upon the following considerations;

- a. the time duration of 27 years since the date of offence to the date of conviction,
- b. the prosecution failed to prove the identity of the 5th appellant since there were no witness for the incident of shooting which resulted in the death of the deceased,
- c. the trial Court failed to appreciate that the prosecution had failed to establish criminal liability of the 5th appellant in relation to its allegation of him, being a member of an unlawful assembly.

Learned Counsel who appeared for the five appellants, in their detailed submissions in support of the respective grounds of appeal they have raised, have mounted attacks broadly on two main areas of the prosecution evidence. One such area is the unreliability of the evidence of *Munseer* and the imputation of constructive criminal liability on the basis of the appellants being members of an unlawful assembly that had been formed with the common object of causing injuries to the deceased.

However, Learned President's Counsel for the 1st appellant, in addition to his submissions on these broad areas of dispute, complained of a probable prejudiced mind of the trial Court to the detriment of the appellants. He sought to impress upon this Court that the line of questioning undertaken by the trial Court of the appellants, is a clear indication of the existence of such a pre-determined state of mind and therefore its approach to the evaluation of their version of events was

tainted resulting in a denial of a fair trial for the appellants, a right guaranteed by the Constitution.

It is submitted that the repeated use of the word "inhuman assault/attack" in its judgment by the trial Court, in reference to the alleged assault on the deceased, as spoken to by witness *Munseer*, which claim had no support from the medical evidence. However, it had clearly coloured the mind of the trial Court, prompting it to indulge in an intrusive session of questioning of the appellants. Having probed the appellants with a pre conceived notion, the trial Court had thereupon failed to attach due weightage to the version of events, presented before it by the appellants, in their evidence.

This complaint by the 1st appellant has two inbuilt components to it. The propriety of the "intrusive" questioning by the trial Court is one while the repeated use of the word "inhuman assault/attack" without supportive medical evidence represents the other.

The question of the propriety of the line of questioning undertaken by the trial Court needed to be considered at the outset.

It is seen from the proceedings relating to the evidence of the 1st appellant that the trial Court had actively participated in the questioning during examination in chief as well as in cross examination. Although some of the areas on which the trial Court intervened to clarify could have been anyway done by the Counsel. What disturbs this Court is, of these several instances, the way the trial Court had formulated its question that had been put to the 1st appellant twice, on the incident. Those questions were formulated by the trial Court in the following manner;

- (a) ප්‍ර: මරණකරුට කොපමණ දුරකින්ද වෙඩි තිබීමේදී? (at p. 420 of the brief)
- (b) ප්‍ර: වෙඩි තැබීම ගැන හැර වෙන ගතවූ කිසිම ක්‍රියා මාර්ගයක් තිබුණේ නැතිද? (at p. 423 of the brief)

In addition, the trial Court questioned the 1st appellant during cross examination that “ ප්‍ර. තමන් කියන්නේ මෙ එක විශ්වාස කරන්න කියලාද, අත්විලංගු පොලීසියෙන් ගන්න කිසිම හැකියාවක් තිබුණේ නැහැ කියන එක, එය සධාරණ යැහීමකට පත්විය හැකි උත්තරයක්ද?” (at p. 438) clearly indicating its mind that his evidence on the point is not acceptable.

The questioning in relation to the incident had been put to the witness upon his claim that his gun with a defective safety mechanism had accidentally went off during the scuffle he had with the deceased, when he attempted to wrest the revolver out of his hand.

The most fundamental issue that had to be decided by the trial Court is whether the injury caused to the deceased was due to intentional act of the 1st appellant, as the prosecution claimed or it was due to an accidental firing of the gun as the 1st appellant claimed in his evidence.

The power to put questions by the presiding Judge is recognised in Section 165 of the Evidence Ordinance.

Delivering judgment of the Court of Criminal Appeal in *The Queen v Perera* 66 N.L.R. 553, *Basnayake* CJ thought it fit to add a caution to trial Judges, who preside over jury trials, in questioning an accused who elects to give evidence, as his Lordship stated that;

“A Judge acting under section 165 should be wary in questioning witnesses under the powers conferred

thereby, especially when the witness is an accused person giving evidence on his own behalf."

In *Sisilinona v Balasuriya* (2002) 1 Sri L.R. 404, it was held that;

"... by section 165 of the Evidence Ordinance a Judge is vested with power to put questions to a witness in order to discover or to obtain proper proof of relevant facts. While the widest powers in regard to examination of witness are undoubtedly conferred on the court by section 165 of the Evidence Ordinance and section 164 of the Civil Procedure Code, these powers are not without certain limitations. Discussing the aspect of power vested with a Judge to examine a witness, Monir in his book on Evidence, 4th edition vol. II, p. 949 says: One of the well-recognised limitations of the powers of the court under section 165 of the Evidence Ordinance is that the court must not question the witness in the spirit of beating him down or encouraging him to give an answer. One must also not forget the fact that even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of opposing counsel are in view of the deference with which they treat the court inclined to treat with greatest regard suggestions when they come from court and are couched in compelling language and it is a rare witness who will

steadily maintain his version in the face of such questioning by court."

Learned Deputy Solicitor General, in his submissions sought to justify the questioning by the trial Court by placing reliance upon a judgment of the Supreme Court of India in *State of Rajasthan v Ani & Others* - decided on 13.01.1997, where *Thomas J* expressed the view that;

"Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed lavishly studding it with the word "any" which could only have been inspire by the Legislative intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any question crossed into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words."

It is thus seen that the widest possible power had been conferred upon trial Courts by the said judgment. However, his Lordship then proceeds to identify the purpose for which the said section was enacted and then also to demarcate its scope, which could be found couched in the wording contained in the next paragraph, as it states that;

"A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witness, either during examination in chief or cross examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for the trial Judge to remain active and alert so that errors can be minimised."

The above quoted questions that had been put to the appellant, by the trial Court presupposes the fact that the 1st appellant had consciously shot the deceased. They were formulated in such a way to incorporate that supposition in to the body of its question. When a trial Court puts such questions to an accused, as it did during the trial stage, even before it considered the body of evidence that had been presented before it in its totality, it is quite reasonable if an appellant forms an impression that the trial Court had already made up its mind on the aforesaid fundamental issue. Such impression is further fortified into a belief when the trial Court

puts these questions even before his evidence was formally over and without applying any of the time tested evaluation methods for his credibility.

In considering the complaint by the learned President's Counsel in the light of the above quoted juridical precedents, it appears that the trial Court may have strayed away of its permissible scope of questioning as envisaged by Section 165 of the Evidence Ordinance.

It is evident from the judgment that the trial Court had used the adjectives "cruel, inhuman, merciless" when it referred to the alleged assault of the deceased by the appellants repeatedly in the impugned judgment. The appellants have challenged this assumption made by the trial Court on the basis that the evidence of assault as described by witness *Munseer* is not supported by the medical evidence. It was highlighted by the appellants that if the deceased was hung from a cross bar after tying his thumbs together with a shoe lace and rope, as claimed by *Munseer*, there would obviously be injuries that are indicative of such an action since his body weight is concentrated on the thumbs. *Munseer* admits that the full weight rested on the thumbs when the deceased was suspended by a rope by the appellants. The medical officer however was emphatic that she saw no abnormality in the hands or in fingers of the deceased at the time of her examination. She had filled the required space in her report with the word "Normal". The deceased had suffered multiple abrasions and contusions on his lower limbs as per the post mortem report but *Munseer* was clear in his evidence after the assault on the deceased, he saw

no injuries on the deceased. The only apparent difficulty the deceased had at that time was a stomach-ache and the appellants have provided some Panadol before they took him out in a vehicle that late evening.

In these circumstances and in the absence of any medical evidence to support, the appellants challenge that the use of the adjectives such as "cruel, inhuman, merciless" in describing the alleged assault is another factor that is indicative of the possible prejudiced mind of the trial Court.

This complaint by the appellants should be considered along with the challenge mounted by them on the reliability of the witness *Munseer*. All Counsel for the appellants referred in their submissions to the instances where, the said witness had made inconsistent statements before the trial Court, in his narration of the sequence of events which culminated with the death of the deceased.

It appears that there were two other persons when the appellants took *Munseer* and the deceased to the house at *Mavugama*. The prosecution did not call any of them as witnesses in support of their case. The prosecution totally relied on the testimony of *Munseer* to highlight the way the appellants have treated the deceased after his arrest at the mosque.

This aspect was relevant to the case presented by the prosecution since the charges were framed on the basis of constructive liability. *Munseer* was to disclose the culpable mind-set of each of the appellants, upon their actions during the period of interrogation that had followed the arrest.

It was highlighted that *Munseer* never made any complaint about the incident of assault, immediately after him being released on bail, subsequent to the death of the deceased in custody.

The investigations were commenced upon a petition sent by the wife of the deceased in seeking compensation for the death of her husband. A statement from the wife of the deceased, *Marsuna*, was recorded only on 02.12.1995, after five years since her husband's death. *Munseer* made his statement also on the same day regarding the incident. This factor favours the witness as it indicates his disinterestedness of the incident of shooting while it also invites consideration of the reliability of his claim in the light of a possible fabrication. The prosecution presented evidence of ASP *Dias*, who visited the place of the incident and recorded statements of all five appellants. In this context, *Munseer's* reference to the five appellants in connection with the death of the deceased, is not based on his own imagination. But his claim of assault on the deceased by hanging him by thumbs could not be afforded any reliability.

In this context this Court pause to frame an issue whether witness *Munseer* presented his evidence consistently on material points ?

The trial Court, in its judgment stated that it accepts the evidence of *Munseer* as credible evidence since there is no reason to disbelieve it (at p.714 of the brief). The trial Court also found the evidence of *Munseer* satisfied the test of consistency when compared with medical evidence since there were injuries on the body of the deceased. It concluded therefore his evidence is credible to a "very high degree" (at p.720 of the brief).

It is unfortunate that learned Counsel who represented the appellants before the trial Court had failed to invite attention to the improbability of the claim of *Munseer* that the deceased was hung up by his thumbs and then beaten up in the absence of any supportive medical evidence. Witness *Munseer* said the deceased was assaulted with clubs on his legs for over ten minutes. The prosecution, although elicited evidence through the medical witness that there were multiple abrasions and contusions seen on lower limbs of the deceased, did not connect them with the alleged assault by clarifying whether those injuries could be a result of a sustained assault by clubs. The medical evidence on these injuries lacked clarity as the medical officer generally referred to them as "multiple abrasions and contusions" without referring to any such injury individually. If the nature of the injuries is such that they could not be separately described or identified, then it poses a question whether those injuries are consistent with a claim of an assault sustained for over ten minutes using clubs as the prosecution states or consistent with the claim of the appellants that they were caused during the struggling with the 1st appellant over a rough surface.

The judiciary has showed no hesitation to condemn any acts of violence committed on the suspects who were arrested and detained by the Police. It took very serious note if and as when such evidence surfaced, irrespective of the nature of the legal proceedings during which it transpired. In this context, it is relevant here to quote *Atukorala J*, in the judgment of *Sudath Silva v Kodituwakku* (1987) 2 Sri L.R. 126, who strongly expressed the view of the apex Court on following terms;

"Article 11 of our Constitution mandates that no person shall be subject to torture or to cruel or inhuman punishment or treatment ... Constitutional safeguards are generally directed against the State and its organs. The Police Force, being an organ of the State is obliged by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. It is therefore the duty of this Court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right is declared and intended to be fundamental is always kept fundamental and that the Executive by its action does not reduce it to a mere illusion."

Therefore, it is natural that the trial Court had taken a serious view of the allegation of torture levelled against the appellants since it relates to an instance of a death of a suspect in police custody. The deceased is undoubtedly entitled to the protection of the presumption of innocence until a competent Court, after a duly conducted trial, displaces it. However, in taking a concerned approach to the allegation of torture, the trial Court must review the available evidence carefully, as it should do at all times, and arrive at a justifiable conclusion based on such evidence. It must be mindful not to grant an evidentiary concession wittingly or unwittingly to the prosecution in relation to its overall burden to establish

charges beyond reasonable doubt, when it presents a case with an allegation of torture in custody.

Returning to the appeal before this Court, it appears that either *Munseer* had added some embroidery to his evidence by claiming they were assaulted after hanging them by their thumbs or, considering the possibility in the other end of the spectrum, lied over this claim. Learned High Court Judge who delivered the judgment had only seen the latter part of *Munseer's* cross examination and therefore had limited opportunity to observe his demeanour. In fact, the trial Court had placed no reliance on the demeanour of the witness in its judgment in the determination of his credibility, since it was quite content with concluding his evidence is credible as it is consistent with the medical evidence. This conclusion reached by the trial Court is therefore seriously compromised one since it had failed to consider this vital inconsistency with medical evidence on the claim of hanging by thumbs.

In the contention of the learned President's Counsel for the 2nd appellant, his main thrust was on the imposition of criminal liability on constructive liability. Learned Counsel for the 3rd to 5th appellants too have made similar submissions in respect of their clients and posed the valid question as to the point of time at which the unlawful assembly was formed by the appellants in that evening ?

During their submissions learned Counsel raised the following points since the conviction of the appellants is based on constructive liability;

- a. there was no reliable evidence before the trial Court on participation of each appellant in the said unlawful assembly,
- b. there was no reliable evidence before the trial Court on the identity of those who participated in the said unlawful assembly.

It was also submitted that the prosecution has made an attempt to present a case of circumstantial evidence against each of the appellants. The prosecution had no evidence to explain the circumstances under which the deceased had suffered the only gunshot injury. Learned Counsel submitted that the appellants have offered a valid explanation to the death of the deceased in the form of accidental fire during a scuffle. But the trial Court had erroneously rejected that defence although the prosecution had no evidence to rebut it.

Learned Deputy Solicitor General sought to counter the appellant's submission on the basis that they established a strong *prima facie* case against the appellants through the several items of circumstantial evidence that had been placed before the trial Court and therefore it was incumbent upon the appellants to offer a valid explanation. The explanation offered by them could not be accepted by the trial Court as a valid one as it is unworthy of any credit due to the serious inconsistencies and improbabilities. He produced a table indicating the various times given by the several appellants indicating they were not consistent. In fact, the learned DSG submits that they made different statements in describing what took place after 7.00 p.m. when they took him out of the safe house at *Mavugama*. Learned DSG also indicated his doubts about the genuineness

of the claim of the appellants that the removal of the deceased that night was to make certain recoveries.

It appears that the prosecution has relied on the evidence of lay witnesses *Munseer*, *Marsuna* and the ASP *Dias* (who recorded statements of all five appellants immediately after the shooting incident was reported), in support of its allegation of an unlawful assembly.

The witnesses *Munseer* and *Marsuna* claimed they identified the appellants when they saw them at the Magistrate's Court of *Horana* and later in the High Court during trial. *Marsuna*, in her evidence in chief claimed that five or six male persons who were in their twenties came in search of her husband pretending to be his friends. She saw them again at the Magistrate's Court of *Horana*. She knows that one of her uncles had made a complaint after several years over the death of the deceased. However, during her cross examination she candidly admitted that she identified the appellants after lapse of several years in the High Court upon being told by witness *Munseer*.

Witness *Munseer* claimed that he saw the persons who assaulted them that night at *Bandaragama* Police soon after the death of the deceased. He said he did not identify any of them either by name or description at the Magistrate's Court. In response to clearly a leading question by the prosecution (at p. 192) the witness gave a general answer that all five of the appellants have assaulted him. In describing the assault on the deceased, the witness said one person held the rope while another hit him with a club. He could not identify the person who held the rope. Then he said

only the 1st to 3rd appellants assaulted him but thereafter added that all of them have assaulted (at p.194).

During cross examination, when the witness was questioned as to his reference to “ මම කවිටිය”, he replied it is relation of the five appellants. He then said there were six or eight persons at the time of the assault on the deceased and then said, in addition to the five appellants, there was another person.

Thus, it is clear that the identification of the appellants before the trial Court by these two witnesses is made because they were paraded in the dock. *Marsuna* relied on the identification by *Munseer* to identify the appellants in the High Court. *Munseer* however admitted that he did not identify any of the appellants at the Magistrate’s Court. There was no identification parade conducted; understandably due to the long lapse of time since the incident. However, that leaves the identification made by the said two witnesses in the High Court to a mere identification of the appellants from the dock.

In *Munirathne and Others v The State* (2001) 2 Sri L.R. 382 it was held by this Court that;

“Jurists on Evidence have expressed the view that it is undesirable and unsafe for the Court to rely upon the identification of an accused in Court for the first time or dock identification, the reason being that a witness may well think to himself that the police must have got hold of the right person and it is, so easy for a witness

to point to the accused in the dock. In this connection vide Cross on Evidence 6th Edition page 44 - 45; Archbold - Criminal Pleadings, Evidence and Practice 2000th Edition paragraph 14-2, 14-10 page 1303-1304; Phipson on Evidence 15th Edition 14-17 page 321 and also R vs. Howick. In Regina vs. Turnbull & Another at 228 Lord Widgery referring to the evidence of visual identification, had this to say "such evidence can bring about miscarriages of justice and has done so in few cases in recent years." Regard to the evidential value of dock identification in this country - Wijesundera, J had to make the following observation in his judgment in Gunaratne Banda vs. The Republic.

"The other witnesses identified the accused for the first time at the trial in the dock. Again it has been repeatedly said even in the recent past by this Court, in more cases than one that this type of evidence is worthless and, if I may add, no useful purpose will be served in leading such evidence."

The principle of evidence that had been laid down in the said authority clearly diminishes the value of a dock identification made by witnesses *Munseer* and *Marsuna* who made such claim of identification for the first time in the High Court. Of course the prosecution could rely on the reasonable inference that the five appellants were there at the time of shooting since their statements were recorded by the ASP who visited the scene soon after the incident of shooting. But the unreliability of the dock identification deprives the prosecution of the identities of the persons who were involved with the alleged assault on the deceased in support of its contention of unlawful assembly.

The discussion on the issue of identity had therefore led this Court to consider the main thrust of the appellants' collective contention, based on imposition of constructive criminal liability. The issues of whether there was an unlawful assembly which had been formed with the common object of causing hurt to the deceased, whether the appellants could be convicted for the offence of murder and whether the trial Court had properly decided those issues upon the evidence led before it had to be decided by this Court in the light of the submissions of Counsel for the appellants as well as for the prosecution.

It is important for the trial Court, when it proceeds to consider the case against each appellant in relation to the allegation that they were members of an unlawful assembly, also to consider the question at which point of time the unlawful assembly was formed. This is an important consideration since the appellants were serving police officers who were attached to an anti subversive unit at the time of the incident who were assigned with a safe house to conduct their operations. Ordinarily when

one person joins another four to form an unlawful assembly or joins an already formed unlawful assembly, he does so with his own free will. When a police officer is attached to a team on a selective basis, that decision is taken by his superior and there is no question of his consent in such selection. He must obey the orders of his superior. His duties are clearly laid down in Section 56 of the Police Ordinance and is duty bound to "promptly to obey and execute all orders ...".

When viewed in this light, at the time of making the arrest of *Munseer* and the deceased, the 2nd to 5th appellants led by the 1st appellant were clearly performing an official function to which they were assigned with. The prosecution is clear that they did so apparently on the information provided by a person called "*Wappa*" who was in their vehicle. *Munseer* admits *Wappa* was there when he was arrested and that they were questioned over the robberies of certain jewellery shops. He also admitted that they were engaged in the business of melting gold jewellery bought from the public auctions that are conducted by the banks. At that time there was no formation of an unlawful assembly.

The prosecution had no detailed evidence of what each of the appellants did when they took the deceased out late in the evening after leaving *Munseer* in *Mavugama* safe house. It is the 1st appellant who said that the deceased sustained a gunshot injury whilst grappling for his revolver when it accidentally went off.

In the opinion of the medical witness, the laceration on the back of the chest of the deceased could have been caused during a struggle. Then, if at all the 2nd to 4th appellants' participation in that process is limited to

the causing of the injuries that were seen on lower limbs of the deceased and accompanying the 1st appellant to the place where the incident took place.

The trial Court found the appellants guilty of the 1st count on the basis that they assaulted the deceased after his arrest and then took him to this lonely spot to be killed that night. There was no conspiracy charge levelled against the appellants by the prosecution. In relation to the 1st count which has been framed under section 140 of the Penal Code, it was incumbent upon the prosecution to prove that each of the appellants acted in furtherance of the common object of the unlawful assembly, which was to cause hurt to the deceased.

Dr. Gour in his treatise titled *The Indian Penal Code* (13th Ed) has identified several factors which should be established by the prosecution when it sought to impose "constructive criminality" on an accused by invocation of provisions of Section 149 of the Penal Code of India. These factors listed at p. 528 are as follows;

- a. *there was an unlawful assembly,*
- b. *that the accused was a member thereof at the time of committing the offence,*
- c. *that he intentionally joined or continued in that assembly,*
- d. *that he knew of the object of the assembly,*
- e. *that an offence was committed by a member of such assembly,*
- f. *that it was committed;*

- i. *in prosecution of the common object of the assembly, or,*
- ii. *was such, as the members of the assembly knew to be likely to be committed in prosecution of their common unlawful object.*

If the evidence of *Munseer* is accepted in its totality as credible evidence, then some of the 2nd to 5th appellants, and not all of them knew that the common object of unlawful assembly to cause hurt since they participated in the assault. Those who knew of the common object have achieved it when they assaulted the deceased after hanging him. But if only some of the appellants knew, then there are no five persons to form an unlawful assembly.

Then the appellants took the deceased in a vehicle when he complained of a stomach-ache. Thereafter only the news of his death had reached *Munseer*. That being the prosecution case, there was no evidence before Court that when the deceased sustained his fatal injury whether each of the appellants have acted either "*in prosecution of the common object of the assembly*" or they knew his death would "*likely to be committed in prosecution of their common unlawful object*", unless of course the unlawful assembly which had already formed continued beyond the school hall.

Dr.Gour in his book also considered the limitations of the scope of Section 146, in imposing constructive criminal liability which he identified in the following terms (at p.524);

"... a person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he endorses all that the other members say or do, nor is he, therefore, responsible for their acts of which he was not clearly cognisant."

He further adds that;

"... the members of an unlawful assembly may have community of object only up to a certain point, beyond which they mere differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to information at his command, but also according to the extent to which he shares the community of object and as a consequence the effect of this section may be different on different members of the same unlawful assembly."

This approach in the imposition of constructive criminal liability on an accused requires, if he was to find guilty to the offence another member of such unlawful assembly had committed, an individual treatment of the role played by each of the accused by a trial Court.

Divisional bench of the Court of Appeal, in *Ranawaka and Others v The Attorney general* (1985) 2 Sri L.R. 210 held the view that;

" ... the offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members... the act

must be one which upon 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."

In the judgment of the Court of Criminal Appeal in *Wilson Silva v The Queen* 76 NLR 414, Weeramanry J stated that ;

"The questions whether a person is aware of facts which render an assembly unlawful, whether he intentionally joins such an assembly or continues in it, and whether the common object of the assembly is to commit an offence, are all matters which must be determined from a series of circumstances. The acts or omissions of each alleged participant, the weapons used, the manner of their arrival at the scene, their prior utterances and so to speak every circumstance of significance in this regard would have to be evaluated. Such a task is only possible upon the basis of rules relating to the evaluation and assessment of circumstantial evidence.... On the degree of proof required of the sharing of a common object, the governing principles are no different from those relating to the degree of proof of common intention, and the authorities hereinafter referred to, showing

that such a conclusion must be an inescapable one, would be applicable."

The trial Court, in convicting the 2nd to 5th appellants under the 2nd count for the offence of murder, had acted on the circumstances such as; the deceased was taken to a lonely place in the late evening without handcuffs with the intention of causing his death after "inhumanly" assaulting him.

Clearly there were no circumstances placed before the trial Court by the prosecution to infer that the 2nd to 5th appellants ever did anything other than to accompany the 1st appellant and the deceased armed with their T 56 weapons, which they never used. Similarly, the prosecution placed no evidence as to why only the deceased was taken out that night leaving *Munseer* and *Wappa* and particularly selecting only the deceased awaiting his dreadful fate. There was no allegation that the appellants have acted with prior animosity in relation to the deceased.

When queried by this Court as to the exact point on which the appellants have formed an unlawful assembly, learned DSG replied that it was probably formed when the appellants have taken away the deceased that night. If that is the case, then it had placed no evidence before the trial Court to infer that each of the 2nd to 5th appellants knew that they would cause further hurt to the deceased and it is likely that one of them would shot him in prosecution of their common object. Merely carrying firearms would not satisfy this requirement.

After a careful consideration of the attendant circumstances this Court reached the opinion that in this instance the prosecution has failed to establish its case against the 2nd to 5th appellants as they fail to establish that all of them have participated in an unlawful assembly which had its common object as causing hurt to the deceased and while prosecuting their common object one of them is likely to cause the death of the deceased, without a shadow of reasonable doubt.

In relation to the 1st appellant, the prosecution has placed evidence before the trial Court that the service revolver was recently fired and two of the ammunition issued to him have been used presumably in the said firing. The death of the deceased was due to a gunshot wound. Therefore, he clearly owed an explanation.

The 1st appellant offered an explanation. He claimed that the deceased had tried to wrest the firearm out of him and in the process the weapon, which had a defective safety pin, accidentally went off causing the fatal injury. The trial Court had rejected this explanation on the footing that there was no sign of any close range firing as the 1st appellant claims and the deceased was in an upright position when the two shots that were fired at, from a position in front of him.

When considered these factors in the light of the circumstances under which the investigations were conducted and the medical evidence

it is questionable whether the prosecution had established its case beyond reasonable doubt against the 1st appellant.

There were no two shots fired at the deceased as erroneously held by the trial Court for he had suffered only one gunshot injury on his chest as per medical evidence. Similarly, the opinion of the medical witness that the shot was fired when the deceased was in upright position seemed unlikely for the reason that the entry wound is located 9 inches from the shoulder and a single bullet was recovered embedded within the chest cavity near scapula from a position described by the expert as 4 inches below the shoulder. If the deceased was shot at when he was upright (his height was 5'7") then it is reasonable to expect to find the bullet also embedded in the body around nine inches from the shoulder. It appears that the bullet had travelled in an upward trajectory inside the body which is indicative that the firing is from a lower elevation to that of the deceased, if he was standing upright.

The 1st appellant claimed that his gun went off when they grappled for it and the deceased was on top of him after their fall on the ground. This explanation clearly is not inconsistent with that upward trajectory.

It appears that the trial Court heavily relied on the expert opinion that the shot may have fired more than three feet away as there was no blackening and tattooing seen around the entry wound. However, the

medical witness expressed her opinion that it could be even from a distance of one foot away. She was not shown the weapon at any point of time by the prosecution, although it was produced during the trial as a production, and therefore it had deprived her of an opportunity of expressing a specific opinion thereby and limiting it only to a general opinion. Clearly she had limited experience in the ballistics and even with that, the prosecution should have clarified this issue.

The medical witness had also noticed another semi-circular contusion with a diameter of ½ inch, few inches below the entry wound. There was no explanation of it by the prosecution. The 1st appellant claimed that the deceased was on top of him and they struggled for the control of the weapon and it is possible that it was caused during such a struggle. The deceased also had a laceration on the back of his chest which could have been caused during a struggle.

H.N.G. Fernando CJ, in the judgment of the Court of Criminal Appeal in *Kandakutty v The Queen* 75 N.L.R. 457, considering the pivotal issue that had been placed before the Court; “*did the accused deliberately with the intention to kill shoot at the accused, or did this gun which the accused had with him fire off accidentally while he was struggling with the deceased's father-in-law Ponnann. In short the issue is, was the firing intentional or accidental ?*” proceeded to answer it in favour of the appellant, after adopting the principles of law enunciated in the judgments of *Dionis v The King* 52

N.L.R. 547 and *Thuraisamy v The Queen* 54 N.L.R. 449 in the following manner;

"The case of Dionis was, like the instant case, one in which the accused had stated in evidence that his gun went off in consequence of an attempt made by another man to wrest the gun. This Court made the following observations;

" In the opinion of the Court there was no burden on the appellant to prove any of the facts alleged by him. The burden lay throughout on the Crown to prove beyond reasonable doubt that the death in question was caused by an act done by the appellant and done by him with the intention or knowledge requisite for the constitution of the offence of murder. If his version of the circumstances created a reasonable doubt either as to the factum or as to the mens rea he was entitled to be acquitted of the offence charged. It was a misdirection to tell the Jury that there was a burden on the appellant to satisfy them that his version was probably true and that' he must not leave the matter in doubt'."

Again, in the case of Thuraisamy, where also the accused gave evidence as to an accidental shooting, this Court held that it was a misdirection to tell the

Jury that there was a burden on the accused to satisfy them that his version was probably true. Gunasekara, J. added that the appellant in that case would have been entitled to an acquittal " even if it was not proved that the injury was a result of an accident but there was a reasonable doubt on that point". In the instant case the Jury were not directed that, if on the whole of the evidence they entertained a reasonable doubt on the question whether or not the shooting was accidental the accused was entitled to an acquittal."

When the evidence placed before the trial Court is considered in its totality this Court is unable to decide that the incident of shooting is intentional on the part of the 1st appellant and not an accident as he claims without any reasonable doubt. As the apex Court quoted *Woordroffe & Ameer Ali on Law of Evidence* " if the data leaves the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion. If the mind of the adjudicating tribunal is evenly balanced as to whether the accused is guilty, it is its duty to acquit" (as per the judgment of SC Appeal No. 99 of 2007 *Padmatilaka v The Director General of Commission to Investigate Bribery or Corruption* - decided on 30.07.2009) this Court holds that the prosecution had failed to prove its case beyond reasonable doubt against any of the appellants and the defence was erroneously rejected. Their appeals are therefore entitled to succeed.

Accordingly , the conviction of the appellants on both counts and the corresponding sentences that are imposed by the trial Court are set aside by this Court.

The appeals of the 1st to 5th appellants are allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL