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

In the matter of an appeal in terms of the Section 331 of the code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

Court of Appeal Number:
CA-195-197-2014 **VS**

High Court of Colombo
HC 2396/2005

1. Panagodage Sujith
2. Ooralage Chandima Sudharshana
3. Ooralage Anura
4. Kahandagala Aarachchige Sunil Perera
5. Roshan Douglas (Deceased)

Accused

And Now Between

1. Panagodage Sujith
2. Ooralage Chandima Sudharshana
3. Ooralage Anura

Accused-Appellants

Vs

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

Complainant-Respondent

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	Indica Mallawaratchy for the 01st Accused – Appellant
	Saliya Pieris PC with Rukshan Nanayakkara and Nuwan Beligaswatta for the 02nd Accused – Appellant
	Neranjan Jayasinghe with Isansi Danthanarayana for the 03rd Accused – Appellant
	Rohantha Abeysuriya PC, ASG for the Respondent
Written Submissions:	By the 01st Accused – Appellant on 08.05.2018
	By the 02nd Accused – Appellant on 12.09.2018
	By the 03rd Accused – Appellant on 11.07.2018
	By the Respondent on 09.11.2018.
Argued on:	29.03.2021
Decided on:	**08.11.2021**

N. Bandula Karunarathna J.

The 01st, 02nd and 03rd accused-appellants along with the 4th accused and one Roshan Douglas, (5th accused, deceased by the time the trial had commenced) were indicted in the High Court of Colombo in the year 2005 on seven counts which charged them;

1. with having been members of an unlawful assembly, the common object of which was to cause hurt to Patapilige Athula Devendra thereby committing an offence punishable under section 140 of the Penal Code,
2. with having committed murder by causing the death of afore-named Athula Devendra in prosecution of the said common object thereby committing an offence punishable under section 296 to be read with section 146 of the same,
3. with having attempted murder of Dannagoda Kankanamlage Patrick Perera by causing hurt in prosecution of the said common object thereby committing an offence punishable under section 300 read with section 146 of the same,

4. with having attempted murder of Rankothvidana Arachchige Anura Perera by causing hurt in prosecution of the said common object thereby committing an offence punishable under section 300 read with section 146 of the same,
5. alternatively, with having committed murder by causing the death of afore-named Athula Devendra thereby committing an offence punishable under section 296 read with section 32 of the same,
6. alternatively, with having attempted murder of afore-named Patrick Perera by causing hurt thereby committing an offence punishable under section 300 read with section 32 of the same and,
7. alternatively, with having attempted murder of afore-named Anura Perera by causing hurt thereby committing an offence punishable under section 300 read with section 32 of the same.

The accused opted for a trial without a jury which commenced before the learned High Court Judge of the High Court of Colombo on 30th June 2009. The prosecution led evidence of seven witnesses one of which was evidence given at the non-summary inquiry at the Magistrate's Court adopted under section 33 of the Evidence Ordinance and eight productions and 5 documents were marked during the proceedings. All the accused made statements from the dock without calling upon any witnesses to give evidence.

The judgment was delivered on 9th May 2014 and the accused-appellants were convicted and sentenced to,

1. rigorous imprisonment for six months for the 1st count,
2. death for the 2nd count,
3. rigorous imprisonment for seven years with a fine of Rupees 25,000/- carrying a default term of simple imprisonment for twelve months for the 3rd count and
4. rigorous imprisonment for seven years with a fine of Rupees 25,000/- carrying a default term of simple imprisonment for twelve months for the 4th count.

The 4th accused was acquitted and discharged of all charges and the 5th, 6th and 7th charges were not considered in the judgment since they were alternative charges.

This appeal has been brought before this Court by the 1st, 2nd and 3rd accused-appellants with regard to the aforementioned convictions and sentences.

Contentions of the 1st accused-appellant are that,

(i) the conviction by the learned High Court Judge of the accused-appellant for the 1st count which was based on the accused-appellant being a member of an unlawful assembly is legally flawed;
(ii) the conviction by the learned High Court Judge of the accused-appellant for 1st, 2nd and 3rd counts which were based on common object are legally flawed;

(iii) the learned High Court Judge had failed to convict the accused-appellant in respect of the alternative charges based on common intention;
(iv) that the conviction by the learned High Court Judge of the accused-appellant was factually untenable in view of the three wholly contradictory versions of evidence deposed by three of the prosecution witnesses.

Contentions of the 2nd accused-appellant are that,

(i) the learned High Court Judge had based his conviction of the accused-appellant solely relying on contradictory evidence of the 1st witness of the prosecution (PW1) who is not worthy of credit;
(ii) that the learned High Court Judge had erroneously convicted the accused-appellant under sections 140 and 146 of the Penal Code.

Contentions of the 3rd accused-appellant are that,

(i) the learned High Court Judge had failed to consider that four of the witnesses of the prosecution had given completely different versions of evidence regarding main events of the incident;
(ii) the learned High Court Judge had failed to take into consideration that the charge of being a member of an unlawful assembly had not been proved since the prosecution had failed to establish the presence of five or more people with the common object of the unlawful assembly;
(iii) that the learned High Court Judge had failed to take into consideration the contradictions marked by the defence which had gone to the root of the matter.

The narrative of the prosecution unfolds thus,

On or about the 26th of December 1995, Dannagoda Kankanamlage Patrick Perera (PW1) had visited the house of his long-time friend Athula Devendra (the deceased), located in an area in Kotahena known as 'Laundry Watta'. Subsequent to meeting, the two had gone to a nearby shop to have tea, at which point, a group of ten to fifteen people had rushed in creating chaos and shouting the phrase "api thamai chandi wena kauda mehe chandi".

The accused named above, who were among the said group, along with one Roshan Douglas (5th accused, who had died before the commencement of the trial) had then proceeded to attack PW1 and the deceased cutting, chopping and stabbing them with what was described by all witnesses of the prosecution as 'Manna' knives. PW1 had collapsed and lost consciousness which he later came to at the hospital.

The deceased had died at the scene of the incident owing to the first cut by Roshan Douglas. According to the evidence of the medical officer, Dr Upul Ajith Kumara Tennakoon (PW10), the very first stabbing had resulted in the decapitation of the deceased which was confirmed by the evidence of the police officer of the police station in Kotahena (PW6) who described that the severed head of the deceased was found in Paramananda Vihara Mawatha and the body was

recovered from a place approximately fifty meters away. PW10 had further stated that the body of the deceased had been cut and stabbed seventeen times subsequent to the decapitation.

While the injured persons were being treated at the General Hospital, Colombo and the post-mortem of the deceased was being carried out, the police had investigated into the whereabouts of the accused. Shortly after, the 1st, 2nd and 3rd accused had turned themselves into the custody of the police and the 4th accused had been arrested by, the police.

The defence in addition to denying involvement in all charges levelled against the accused, took up the position that the 1st accused had been falsely implicated by the family of the deceased and 2nd and 3rd accused so had been by the police. Learned counsel for the 1st, 2nd and 3rd accused-appellants argued that the convictions based on accused-appellants being members of an unlawful assembly was legally flawed.

Learned Counsel for the 3rd accused-appellant submitted that the prosecution had not been able to establish the existence of five or more people with the aforementioned common object without relying on the evidence of PW1. Learned Counsel for the 1st accused-appellant submitted that in the backdrop of the acquittal of the 4th accused that the charges would only be levelled against four accused named in the indictment as the indictment had not been presented with the phrase "with those unknown to the prosecution".

It was the view of the counsel for the 2nd accused-appellant that there was nothing in the evidence other than the evidence of PW1 to suggest that, there was an assembly of five or more persons and that the 2nd accused-appellant was a member of such unlawful assembly and shared the said common object.

An unlawful assembly as set out in section 138 of the Penal Code consists of two elements which are;

(i) the existence of five or more persons;
(ii) the existence of a common object that relates to one of the six matters indicated in the said section.

As per the submissions of the counsel for the accused-appellants the first element listed above is in issue.

In Jayaram vs. Saraph 56 NLR 22 it was held thus,

> "…whereas if the charge against them was that they were members of an unlawful assembly, a conviction of less than five of those charged could be supported if there was evidence that others besides those acquitted constituted an unlawful assembly along with those who were convicted."

Upon perusal of evidence led in this matter, eye-witness PW1 had clearly testified to the fact that ten to fifteen people were present along with the accused-appellants when they were charging ahead with knives shouting "api thamai chandi wena kauda mehe chandi" and according to the

testimony of eye-witnesses Anura Perera (PW2) and Vijitha Kumari (PW3) it was evident that more than five people excluding the 4th accused and including the three accused-appellants, the 5th accused, one Chuti Suji and others were present at the scene when the incident in question occurred.

To ascertain whether a person was a member of an unlawful assembly section 139 of the Penal Code provides the following;

> "Whoever, being aware of the facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

PW1 in his evidence had stated that, the accused-appellants were present at the scene of crime armed with knives and the 2nd and 3rd accused-appellant had attacked him and the deceased. The evidence of PW2 further corroborates the account given by PW1 stating that all three accused-appellants had attacked the deceased and he had further stated that he was stabbed by the 2nd accused. Narration of eye-witness Shriyani Perera (PW4) corroborates the evidence of PW2 in stating that PW2 was stabbed by the 2nd accused-appellant in the presence of the 3rd accused-appellant who too was armed with a knife. As per the account of PW3, the 5th accused was holding the severed head of the deceased in one hand and his knife on the other in the presence of all three accused-appellants who were armed with knives. Evidence of the above eye-witnesses are anchored by the evidence given by PW6. From his statement it is evident that the weapons used to commit the above offences were recovered subsequent to the statements made by the 1st and the 2nd accused-appellants under section 27(1) of the Evidence Ordinance.

It is blatant that, from the above evidence the accused-appellants were members of an unlawful assembly with the common object of causing hurt to the deceased, for, the existence of the said common object can be inferred form the fact that neither of the accused-appellants had tried to withdraw from the fight nor the scene of crime and had in fact chosen to remain until the end which shows that the accused-appellants had knowledge in relation to the said common object and intended to remain nevertheless to further the said common object. This issue was discussed in the following authorities;

Kulatunga vs. Mudalihamy 42 NLR 33;

The Queen vs. N.K.A Appuhamy 62 NLR 484.

In the light of the authorities mentioned above, it follows that there is no reason for the charges based on, accused-appellants being members of an unlawful assembly, to fail and there is no bar in securing convictions on the same basis. Therefore, the learned High Court Judge had not erred in law in so deciding.

Section166 of the Code of Criminal Procedure Act as amended provides as follows;

> "Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the charge or those particulars shall not be regarded at any stage of the case as material, unless the accused were misled by the error or omission."

The accused were present in Court, when the indictment had been read to and understood by the accused at the commencement of the trial and throughout the proceedings during which the prosecution extensively led evidence in relation to the charges aforementioned. With reference to the provision stated above, there is little to no room for the accused to be misled in any which way in raising their defence for the offences committed by being members of an unlawful assembly despite the omission of the phrase 'with those unknown to the prosecution.

The American case, Hagner vs. United States of America (1931) 76 Law Ed 861: (285 US 427) held that the necessary facts must be set out in the charge in order to give the accused,

> "notice of the matter in which he is charged' and the true test of sufficiency of indictment is whether 'it contains the elements of the offence intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet."

In Berger vs. United States of America (1934) 79 Law Ed 1314: (295 US 78) it was observed that;

> "the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defence and not be taken by surprise by the evidence offered at the trial."

The Supreme Court of India in B.N. Srikantiah vs. State of Mysore; AIR 1958 SC 672 held thus;

> "the object of a charge is to warn the accused person of the case he is to answer. It cannot be treated as if it was a part of a ceremonial."

In a pragmatic perspective, the sole purpose for an indictment to be served and read to the accused in a criminal case is to provide a clear account of the offence that he is being charged with. Justice is not served by mulling over technicality or accuracy of the wording that was or should have been used in the indictment.

Learned counsel for the 1st accused-appellant further submitted that the learned High Court Judge had failed to convict the 1st accused-appellant in respect of the alternative charges based on common intention since there was no specific finding of guilt other than the fact that they were only referred to as alternative charges.

As laid out by the Privy Council in the case of Mahbub Shah vs. Emperor (1925) (A.C. 118)

> "it is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case."

In this matter in question, medical evidence alone is sufficient to establish the requisite *mens rea* pertaining to the offences, murder and attempted murder given the site of the injuries, the weapons used to inflict the same and injuries indicated in the post-mortem and other medical reports. The murderous intention of the accused could not have been deduced in any effective way owing to the evidence given by PW 10. It was explained that the deceased had sustained eighteen ghastly injuries, including the very first, which resulted the head of the deceased to be severed from the rest of his body. It was observed that all injuries were inflicted, on vital parts of the body, mainly by cutting and stabbing and the wounds were gravely deep that some of the internal organs had popped out of the body of the deceased. There were wounds that had, entered the chest cavity and blows that had pierced the skull of the deceased.

Section 300 of the Penal Code indicates the following with regard to constituting attempt to murder.

> "Whoever, does any act with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder…"

The Court of Appeal in England in R vs. Mohan [1975] All ER 193 CA defines *mens rea* in attempting any offence as;

> "a decision to bring about, in so far as it lies within the accused's power… (the relevant consequence) whether the accused desired the consequence or not."

PW 10 in his evidence had further stated that PW 1 and PW 2 had sustained deep cut and stab injuries respectively with serious wounds on the stomach which, under natural circumstances would have caused death. Therefore, a reasonable person can objectively draw an inference that, the accused when inflicting those wounds, at least had knowledge that death would have been virtually certain and had they died he would have been guilty of murder.

The question then to be considered is whether the 1st accused-appellant together with the other accused-appellants shared, the common murderous intention and in relation to attempt to murder, the common specific intention. The applicable law to establish common intention under section 32 of the Penal Code states thus:

> 'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

The developments of the law relating to section 32 of the Penal code was essayed in the case of W.M.M. Kumarihami vs Galagamage Indrawansa Kumarasiri and 3 Others S.C. TAB Appeal No.02/2012 and the following guidelines were listed.

(a) The case of each accused must be considered separately.
(b) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.

(c) Common intention must not be confused with same or similar intention entertained independently of each other.
(d) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.
(e) It must be noted that the common intention can be formed in the 'spur of the moment'
(f) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.
(g) The question whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact.
(h) The prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred
(i) The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.

It has been held by the Supreme Court of India in Rishideo vs. State of Uttar Pradesh (1955) (AIR 331) that,

> "the existence of common intention said to have been shared by the accused is, on an ultimate analysis, a question of fact."

Applying law to the facts of the present scenario, it is apparent that, the behaviour of the 1st accused-appellant at the time in question, in being present at the scene of crime from the inception, armed with a knife along with a group of people shouting and attacking the deceased, PW1 and PW2 and his subsequent conduct of making statements to the police under section 27(1) of the Evidence Ordinance which was indicative of his knowledge of the weapons used in committing the offences aforementioned prove his participatory presence.

The facts unveiled during the trial which were suggestive of prior animosity that the 1st accused-appellant had harboured against the deceased, given the relationship he had shared with the family of the deceased and the other accused-appellants shed light on the motive behind the offences that had been committed and thus satisfies the necessary pre-arrangement or common design that should be present in order to establish common intention. Hence, the question as to whether the 1st accused-appellant shared the common intention to murder and to attempt murder with the other accused-appellants can indeed be answered in the affirmative.

The Learned Counsel for the three accused-appellants then averred that adequate consideration had not been given to contradictory evidence marked at the trial by the learned High Court Judge. It was the view of the counsel for the 1st and 3rd accused-appellants that the versions deposed by each of the eye-witnesses at the trial are inconsistent inter-se thus casting serious doubt as to the liability of each accused-appellant. Learned Counsel for the 2nd accused-appellant asserted that the learned High Court Judge had erroneously relied on the contradictory evidence of PW1 and questioned his credibility as a witness.

Further contentions were made by the counsel with regard to many facts in relation to the testimony of PW1 which included that there was no clarity in the evidence of PW1 as to, whether the deceased was attacked in the presence of PW1, who out of the three accused-appellants attacked the deceased, PW1 and PW2 and whether the 2nd accused-appellant was implicated for the very first time in the High Court by PW1.

It is worth noting that all convictions are, based on and within the purview of the law relating to unlawful assembly as defined in sections 138 and 139 of the Penal Code which has already been dealt with elsewhere in this judgment and to establish with precision the person who made the fatal blow or caused grievous hurt is therefore immaterial provided that, all accused-appellants were members of an unlawful assembly and collectively acted in prosecuting its common object in the light of the definition given in section 146 which states that,

> "if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly is guilty of that offence."

At this point it is worth mentioning the law that is being followed in dealing with contradictions, omissions and credibility of witnesses.

The Supreme Court of India in State of U.P vs. M.K. Anthony; AIR 1985 SC 48 has held that;

> "Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief."
>
> "Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as whole."

Albeit the averments made by the learned counsel for the accused-appellants as to their inconsistency, going by the above premise, the evidence given by PW1, PW2, PW3 and PW4 have remained consistent inter-se when one considers the crux of the evidence that had already been discussed above which had clinched the guilt of the accused-appellants.

Further guidelines have been set forth in Bhoginbhai Hirjibhai vs. State of Gujarat; AIR 1983 SC 753 wherein the Indian Supreme Court held as follows;

"By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is overtaken by events. The Witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attuned to absorb the details."

"The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."

PW1 and PW2 were both attacked by the accused-appellants and had made their first statement to the police whilst receiving treatment at the hospital subsequent to the incident. Therefore, the infirmities present in their initial narrative can be overlooked assuming the trauma the said witnesses had undergone. All eye-witnesses had testified before the learned High Court Judge eighteen years after the incident in question and a person's memory and his ability to absorb and process facts falter with time and age.

The learned High Court Judge who heard the case had considered the contradictions and omissions stressed by the learned counsel for the accused-appellants and had convicted the accused-appellants nevertheless.

The learned Judge who saw the deportment and demeanor of the witnesses had the opportunity to assess the evidence. In this regard Fradd vs. Brown & Co. Ltd. 20 NLR 282 a judgment of the Privy Council can be considered wherein the Privy Council held thus:

"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance."

The above proposition had been reiterated in Alwis vs. Piyasena Fernando 1 SLR 119 and in SC. Appeal No. 140/2010.

As to the concerns of learned counsel for the accused-appellants in relation to the credibility of eye-witness PW 1, it is apt in citing the following observations made by the Court of Appeal of Ontario in R V Morrissey; (1995), 22 O.R. (3d) 514, 80 O.A.C. 161 (Ont. C.A.). which are relevant to the instant case.

"Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes

it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony."

Testimony of PW1 had been to a great extent consistent within itself and with the rest of the eye-witness accounts and other circumstantial evidence in relation to causing the death of the deceased and causing hurt to PW1 and PW2 which were without any doubt crucial facts that determined the guilt of the accused-appellants and seemed to have stood the test of cross-examination with regard to the same crucial facts. Nothing in his evidence suggested that he was insincere or unwilling to speak the truth.

In the light of the gruesome nature and the gravity of the offences committed nothing had been brought before the learned High Court Judge by the defence that hints at the issue of false implications prior to giving statements from the dock apart from blanket denials at the commencement of the trial. Therefore, at this stage stressing over trivial contradictions that do not bend the basis upon which the prosecution had formed its case is futile.

For the reasons aforesaid, having regard to the facts of the present case and relevant principles of law upon which the above convictions had been based, there is no error committed by the learned High Court Judge and therefore, the convictions and the sentences are affirmed.

Appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal