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

In the matter of an Appeal under Section 331 of the Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No. CA/HCC/240 - 242/2019

High Court of Panadura Case No. HC/2938/2012

Democratic Socialist Republic of Sri Lanka

Complainant

V.

1. Gampala Waduge Suranjith Fonseka
2. Gampala Waduge Sujith Kumara Fonseka
3. Wattoru Thanthrige Ajith Fernando
4. Liyana Arachchige Bandula Fernando
5. Manthrihewage Nishantha Fernando
6. Gampala Waduge Dinesh Pradeep Kumara Fonseka
7. Weeruhennadige Priyantha Fernando Alias Koiyya

Accused

AND NOW BETWEEN

1. Gampala Waduge Sujith Kumara Fonseka (CA/HCC/240/19)
2. Gampala Waduge Dinesh Pradeep Kumara Fonseka (CA/HCC/241/19)
3. Weeruhennadige Priyantha Fernando Alias Koiyya (CA/HCC/242/19)

Accused - Appellant

V.

The Democratic Socialist Republic of Sri Lanka

Complainant - Respondent

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

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**

SAMPATH B. ABAYAKOON, J.

COUNSEL : Shavindra Fernando, P.C. with Sasikaran Perera and Umayangi Indatissa for the 2nd Accused – Appellant.

Dharshana Kuruppu with Sajini Elvitigala for the 6th Accused – Appellant.

Neranjan Jayasinghe for the 7th Accused – Appellant.

Dilan Ratnayake, DSG for the Respondent.

ARGUED ON : 06.10.2021

WRITTEN SUBMISSIONS FILED ON : 26.05.2020 by the 2nd Accused-Appellant, 19.05.2020 by the 6th Accused-Appellant & 19.05.2020 by the 7th Accused-Appellant.

30.04.2021 by the Respondent.

JUDGMENT ON : 16.11.2021

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. Six accused persons were indicted in the High Court of *Panadura* on the following three counts:

   I. That the accused persons along with others unknown to the prosecution were members of an unlawful assembly with the common object of causing hurt to *Abeykoon Mudiyanselage Chanaka Prasad* also known as *Janaka*, and thereby committed an offence punishable under section 140 of the Penal Code.

   II. At the same place, time and in the course of the same transaction, being one or more members of the said unlawful assembly, in prosecution of the said common object, caused the death of said *Janaka* and thereby committed the offence of murder punishable in terms of section 296 read with section 146 of the Penal Code.

   III. At the same place, time and in the course of the same transaction, the accused persons together with the others unknown to the prosecution caused the death of said *Janaka*, thereby committed an offence punishable in terms of section 296 read with section 32 of the Penal Code.

2. After trial the leaned High Court Judge convicted the 2nd, 6th, and 7th accused (2nd, 6th and 7th accused appellants) on counts 1 and 2 and discharged them on count No.3 on the basis that it is an alternative count. On count No.2, the 2nd, 6th and 7th accused appellants were sentenced to death. The learned High Court Judge acquitted the 1st, 3rd, 4th, and 5th accused on all counts.

3. Being aggrieved by the above conviction and sentence, the 2nd, 6th, and 7th accused appellants preferred the instant appeal. Although counsel for the appellants have urged several grounds of appeal in their written submissions, the grounds of appeal pursued by the counsel can be summarized as follows;

I. The learned trial Judge has erroneously relied on the evidence of the sole eye witness PW1 who is not a credible witness.

II. The learned trial Judge has disregarded the evidence of the defence.

III. The learned trial Judge erred in law by convicting the 2nd, 6th and 7th accused after acquitting the 1st, 3rd, 4th, and 5th accused without five persons to form an unlawful assembly.

IV. The learned trial Judge had misdirected in law by holding that an adverse inference could be drawn against the accused appellants form the fact that they had only made dock statements without calling a witness even though they should give an explanation as per the Ellenborough Dictum.

V. The learned trial Judge has failed to evaluate and appreciate the serious contradictions and omissions in the testimony of the sole eye witness PW1.

4. However, the learned counsel for the appellants at the argument pursued the following 2 main grounds of appeal:

I. That the learned trial Judge erred in law when he convicted the 2nd, 6th and 7th appellants after acquitting the rest of the accused without having five persons to form an unlawful assembly.

II. The learned High Court Judge erred in convicting the accused appellants on the evidence of the sole eye witness PW1 whose evidence was unworthy of credit without any evidence to corroborate his version.

5. Both these grounds on the issue of unlawful assembly as well as the credibility of the single witness will be discussed together.

6. Facts in brief:

   The only eye witness who has testified in the trial Court was *Baminihannedige Sumudu Kumara Peiris* (PW1). According to him he had gone to *Moratuwa* with the deceased in the three-wheeler. He had been driving the three-wheeler that was owned by the deceased. On the way back they have stopped at the place of the incident (*Aluth Paalama Handiya / Modara Watarawuma*) to buy cigarettes and some food. The deceased has sat on a cement wall by the side of the road and the witness had proceeded to the boutique. Then he had seen a lorry coming from *Modara* side and after taking a U-turn, it has stopped. He has seen 5 to 6 persons in the lorry. They have got down from the lorry carrying *manna* knives. He has identified the 2nd, 3rd, 4th, 5th, 6th and 7th accused getting down from the vehicle with the knives. He said he knew the lorry before as owned by the 5th accused. He has seen the 1st accused also coming towards the scene. He knew all the accused persons before, other than the 1st accused. He again said that other than the driver (7th accused) the other accused carried *manna* knives and later he said he saw the 7th accused also carried a kris-knife. The 4th and 7th accused have shouted "කපපන්, කපපන්" and all other accused have assaulted the deceased with their knives. When he saw the accused getting down from the lorry he has turned and looked at the scene. He had taken cover behind a wall, where there is a small bench, while watching the accused persons cutting the deceased. Then the accused persons have started chasing him where he ran to a nearby temple and informed the priest. After calling the police he had come back to the crime scene and the deceased was taken to the hospital where he succumbed to his injuries.

7. The contention of the counsel for the appellants is that the learned trial Judge has convicted the three accused appellants on counts one and two on the basis of forming and taking part in prosecuting the object of the unlawful assembly, when in fact there has to be five or more persons to form an unlawful assembly.

8. The learned Deputy Solicitor General (DSG) submitted that the learned trial Judge has rightly concluded that the 2nd, 6th and the 7th appellants have been part of the unlawful assembly as in terms of the

evidence adduced in the trial Court there had been five or more persons involved in the assault although only three appellants were convicted. The learned DSG relied on the case of ***The Queen v Appuhamy 68 NLR 437*** where the Court of Criminal Appeal held that a person can become a member of an unlawful assembly not only by doing of a criminal act but also by lending the weight of his presence and associating with a group of persons who were acting in a criminal fashion. It is the contention of the learned DSG that although three persons were found guilty and the other appellants were acquitted due to the lack of evidence on identity, it is evident that there had been five or more persons involved in the attack who formed an unlawful assembly.

9. In terms of section 138 of the Penal Code, for an offence to be constituted based on being members of an unlawful assembly, at least five persons should be there sharing the common object. As per the count 1 of the indictment it refers to unknown persons other than the seven accused who were charged. ("යුෂ්මතුන් පැමිනිල්ල නොදත් අන් අය සමග "). The sole eye witness to the incident is PW1 *Sumudu Kumara Pieris*. It is his evidence that all 7 accused persons participated in committing the crime. Other than the 1st accused he knew all the accused before. Some of them he knew from school days. In his evidence PW1 does not speak about any other person at least being present at the crime scene other than the accused persons in the case. Although the indictment in all counts speak about *'together with other persons unknown to the prosecution',* PW1 speaks only about the seven accused persons. Thus, prosecution can only count on the seven accused persons to establish an unlawful assembly.

10. Out of the seven accused persons, the learned High Court Judge has found only the three appellants guilty. Other four accused were acquitted on the basis that the evidence of the PW1 was doubtful on the identity of those who were acquitted. The learned DSG invited this Court to take into consideration the position taken by their Lordships in *Appuhamy* (*supra*). However, in *Appuhamy* there has been ample evidence to establish that a big crowd of clearly more than 5 persons were involved in the crime. Even though some of the accused were

acquitted on the basis of doubtful identity, there was ample evidence to show that there were five or more people involved to form an unlawful assembly. Hence, the facts in *Appuhamy* would not be relevant to this case in deciding on the constituency of unlawful assembly.

11. In the instant case, out of the seven accused, four of them were acquitted and only three appellants were convicted. Therefore, it is important to consider whether although the rest of the accused were acquitted, whether there were at least two more persons involved in committing the crime other than the three appellants to form an unlawful assembly. Evidence of PW 1 has to be analyzed carefully in this regard.

12. In his statement to the police, the PW1 has clearly stated that out of the persons who assaulted the deceased, he identified only three (page 211 of the brief). He has said further, that he could not identify the others (page 212 of the brief). As the witness denied stating these to police, contradictions were marked as V7 and V8 respectively. Out of the accused whom the witness failed to name in his statement to police but identified in Court at the trial, most of them other than the 1st accused were known to the witness since his school days. Therefore, there is a clear doubt as to whether PW1 identified those accused in court because they were in the dock, or whether he falsely implicates them. Those are vital contradictions that go to the root of the case and affects the testimonial trustworthiness of PW1.

13. Admittedly PW1 has testified at the Magisterial inquest that before the accused got down from the vehicle, he told the deceased to run and he also had run (Page 206 of the brief). In cross examination he has said that he told the deceased so very softly, so that the accused would not hear. Further he has said that before he ran, he stopped and watched the assault while taking cover. The position taken by the defence that PW1 may not have seen the assault as he ran and that is why he contradicts himself on identifying the accused.

14. As stated before, the PW1 is the sole eye witness to the incident. In terms of section 134 of the Evidence Ordinance, no particular number

of witnesses shall in any case be required for the proof of any fact. In the case of ***Sumanasena V. Attorney General [1999] 3 Sri LR 137*** at 139 it was held;

> *'In our law of evidence, the salutary principle is enunciated that evidence must not be counted, but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.'*

15. In the case of ***Wijepala V. Attorney General SC Appeal 104/99, SC/Spl/LA 238/99*** it was held;

> *'The evidence of a single witness, if cogent and impressive can be acted upon by a Court, but whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, and then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial.'*

16. In the instant case, the credibility of the sole eye witness PW1 was challenged by the defence. He has clearly contradicted himself on the identity of accused persons as specified in paragraph 12 of this judgment. Therefore, PW1 cannot be considered a credible witness for the Court to act upon on his sole testimony.

17. The learned High Court Judge has acted in favour of the witness PW1 based on the divisibility of credibility principle. I bear in mind that the credibility of a witness can be treated as divisible and accepted against one accused and rejected against another. I also bear in mind that when the evidence of a witness is analyzed, his power of memory, faulty observation and exaggeration in some points must be distinguished from deliberate falsehood. However, in the instant case, PW1 has clearly stated to the police that he could identify only three persons. In Court at the trial, he has identified all seven accused as persons who assaulted the deceased. It is important to note that he knew all the accused other that the 1st accused since his childhood. If

he saw and identified all accused at the crime scene, he could have told the police in his first statement about the accused he knew from childhood. Instead, he has clearly said that he could identify only 3 persons. Thus, it cannot be considered as a mistake when he told the police that he could identify only three persons and to identify all accused at the trial. His evidence is tainted and should not be acted upon. As he is the sole eye witness it is unsafe to convict the appellants on his sole testimony.

18. Hence, prosecution has failed to establish that five or more persons were involved to form an unlawful assembly. Therefore, the learned High Court Judge has erred when he found the three accused appellants guilty of counts 1 and 2 on the basis that they were members of an unlawful assembly and that they acted in prosecution of the common object of that assembly, when in fact the prosecution has failed to prove beyond reasonable doubt that there were five or more persons involved. It is unsafe to conclude that there were five or more persons involved based on the evidence of the sole eye witness who is not credible.

19. Hence, I find that it is unsafe allow the convictions of the appellants to stand. Accordingly, convictions of the appellants are set aside.

Appeals allowed.

PRESIDENT OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL