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

In the matter of an appeal under section 15 of the Judicature Act No. 02 of 1978 and section 331 of the Code of Criminal Procedure Act No. 15 of 1979

The Attorney General

Attorney General's Department

Colombo 12.

CA/HCC/219-222/14 **Complainant**

HC Colombo No : HC/6929/13

Vs.

1. Oboda Arachchige Lahiru Kelum alias Ravindra.
2. Uduwanage Saman Deshappriya.
3. Sampath Chandra Pushpa Vidanapathirana.
4. Weerappulige Praneeth Chathuranga.
5. Mohottige Sarath alias Sahan
6. Sarana Arachchi Patadendige Chanuka

Accused

And now Between

1. Oboda Arachchige Lahiru Kelum alias Ravindra.
2. Uduwanage Saman Deshappriya.
3. Sampath Chandra Pushpa Vidanapathirana.
4. Weerappulige Praneeth Chathuranga.

Accused-Appellants

Vs

The Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Darshana Kuruppu AAL with Aruna Gamage AAL for the 01st accused-appellant

Manjula Makumbura AAL with Koshali Welikanna AAL for the 02nd accused-appellant

Kalinga Indatissa PC with K. Nelson AAL, Sandeepani Wijesooriya AAL, Rashmini Indatissa AAL and S. Premachandra AAL for the 03rd accused-appellant

Amila Palliyage AAL with Nihara Randeniya Aal, Duminada De Alwis for the 04th accused-appellant

Ayesha Jinasena ASG with Chathurangi Mahawaduge SC and Nimesha de Alwis SC for the Complainant-Respondent

Written Submissions: By the 02nd accused-appellant on 06.12.2016, 31.07.2020 and 12.05.2021

By the Complainant-Respondent on 30.04.2021

Argued on : 10.03.2021, 19.03.2021, 22.03.2021, 25.03.2021 and 28.07.2021

Decided on : 23.11.2021

N. Bandula Karunarathna J.

The accused-appellants (hereinafter referred to as the appellants) were indicted before the High Court of Colombo for unlawful assembly, attempted murder, gang rape, robbery and causing the death of Khuram Samaan Shaikh, on or about 25.12.2011 at Tangalle, an offence punishable under section 140, 146, 300, 317,383, 410, 345, 364(2) (c) and 296 of the Penal Code.

Altogether there were 17 charges in the indictment. Charge number 16 was under the Firearms Ordinance number 33 of 1916 and amended act number 22 of 1996.

The trial against the appellants was commenced before the High Court Judge of Colombo without a jury and at the conclusion of the said trial, the learned High Court Judge had convicted the appellants and sentenced them to jail on 18.07.2014. Being dissatisfied with the said conviction and sentence, the 01st, 02nd, 03rd and 04th accused-appellants had preferred this appeal to the Court of Appeal seeking to set aside the conviction and sentence imposed upon them.

Hon. Attorney General preferred an appeal number CA/HCC/223/2014 against the judgement of the learned High Court Judge of Colombo dated 18.07.2014 on the following grounds;

(i) acquittal of all accused-appellants regarding counts 3 and 6 of murder.

(ii) The sentence of 10 years RI imposed on the 04th accused on count 16.

(iii) The failure of the learned trial judge to comply with section 203 of the Criminal Procedure Code in respect of the 01st, 02nd and 03rd accused-appellants on count 16.

Appeal filed by the Hon. Attorney General was withdrawn on 10.03.2020.

The appeals filed by the 01st, 03rd and 04th accused-appellants were withdrawn on 13.03.2019.

The remaining appeal of the 02nd accused-appellant was argued before us and it is now due for the judgement.

The grounds of appeal submitted by the 02nd accused-appellant are as follows;

(i) The learned High Court Judge has failed to consider the dock statement made by the 02nd accused, in its correct perspective.

(ii) The learned High Court Judge has failed to give reasons as to why she has refused the dock statement.

(iii) The learned High Court Judge has misdirected herself in regard to the evidence of Basil, one of the witnesses called by the prosecution.

(iv) The learned High Court Judge has misinterpreted sections 140, 146 and section 32 of the penal code.

(v) The learned High Court Judge has failed to consider that there is no evidence to convict the second accused of the offences averred in the charge sheet.

The place where this unfortunate incident took place was the hotel "The Nature" is situated about 1.5 km away from the Tangalle - Hambantota main Road. On Christmas Eve of 2011, the hotel management organized a Christmas party. The participants included the in-house guests as well as guests from outside, as tickets were sold. The decorations were done during the daytime and "Khuram" the deceased and "Victoria" who was injured too helped in this work.

The party was to start at 7.30 p.m. Victoria wore a frock, whilst Khuram was clad in a black pair of pants and a black T-shirt. A bonfire was seen in front of the restaurant. The group of accused persons had arrived in vehicle number 58-4413. There were about 6-7 persons in that group. After midnight, early hours of the 25th of December between 12.05 a.m. and 12.45 a.m. several incidents had taken place at this venue.

The series of incidents started with the accidental collision of Rayan Akalanka with a guest on the dance floor which resulted in him receiving a blow on the face. The number of attackers on Rayan Akalanka gradually increased. For the said attack, bare hands and feet, chairs, flowerpots and a T 56 gun had been used.

Dr Priyantha who examined Rayan Akalanka after the incident had observed 29 injuries on him. The Doctor was also of the opinion that the age of the injuries was consistent with the history given by Rayan Akalanka. Several numbers of weapons had been used in the attack.

The intervention of a British national Shaikh Khuram facilitated the escape of Rayan Akalanka. The said Shaikh Khuram succumbed to his injuries whilst his girlfriend Victoria, a Russian, was subjected

to assault and gang rape. The police investigations and medical evidence revealed the use of a firearm within the premises.

The 25 witnesses who testified on behalf of the prosecution can be categorized as lay witnesses, formal witnesses, official witnesses and expert witnesses. There were 4 eyewitnesses, namely Victoria, Rayan Akalanka, Dilrukshi and Basil Prasanna Samarasinghe (Basil) who unfolded the narrative, revealed their respective experiences and observations during the sordid incident in the issue. It is noteworthy that the Sri Lankan eyewitnesses had come across the injured and the deceased at different times on this day, and seen the incidents from different angles.

They had no special relationship with the injured and the deceased. Therefore, there was no reason for the said witnesses to be biased the same principle applies to the formal, official and expert witnesses who had performed their official duties in this case. The prosecution witnesses had not been biased towards the injured and the deceased and were independent within their respective realm of activity.

All the prosecution witnesses had duly and promptly informed the police of what they were privy to. So much so that within 10 days of the incident, the eyewitness Basil identified the 2nd accused-appellant at the Identification Parade held by the learned Magistrate.

The case against the 2nd accused-appellant is based and established on direct evidence and circumstantial evidence. The direct evidence is provided by the eyewitnesses referred to above. The identity of the 2nd accused-appellant and his presence at the scene has been established through the eyewitness Basil and appellant's Fingerprint and DNA reports in passing the test of probability.

Annexure D for the list of admissions by the accused marked and produced as X 38, which become admissible in terms of section 420 of the Code of Criminal Procedure Code Act No. 15 of 1979. The 02nd accused-appellant has admitted the Fingerprint Report. The presence of the appellant at the time of the incident at the scene of the crime was admitted. Thus, the admission of his fingerprint found on a glass at the crime scene together with his admission in the course of his dock statement firmly establishes the presence of the 02nd accused-appellant at the scene of the crime.

Even though this witness Basil had identified the appellant at the Identification Parade held within 10 days from the incident, but when he testified in court two years and four months after the incident, he had failed to identify the accused-appellant. It is the contention of the learned counsel for the respondent that both the statutory provisions and the jurisprudence support the admissibility of the identification of the accused-appellant by witness Basil.

The Identification Parade was held before the Magistrate who assisted the investigation of the police. The Parade was held "about the time" the incident took place. Basil verbally informed the Magistrate of the reason for the identification of the 2nd suspect (accused-appellant) at the Parade. Witness Basil's evidence becomes admissible in terms of section 157 of the Evidence Ordinance, as it establishes the consistency of the eyewitness. This enhances credibility of Basil.

Section 157 of the Evidence Ordinance;

> "In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the

fact took place or before any authority legally competent to investigate the fact, maybe proved"

In the case of Keerthi Bandara v. AG 2000 (2) SLR 245 Court held that;

"Evidence of a witness that he identified the suspect at the parade is substantive evidence in terms of section 9 of the Evidence Ordinance".

In the case of Attorney General v. Joseph Aloysius and others 1992 (2) SLR 264 it was held that;

"The identity of the accused, as a person who committed the offence, is a fact in issue at a criminal trial and evidence as to the identification of the accused by a witness is relevant and admissible."

In the case of Bartholomeuz v. Kularatne 37 NLR 317 Macdonell, C.J. was of the view that;

"Section 124 of the Code of Criminal Procedure Act, which requires a Magistrate to hold all Identification Parade, provides for the means by which such evidence is obtained. It is certainly not the only means by which it could be established that a witness identified the accused as the person who committed the offence. Identification can take place, depending on the circumstances, even where in the course of an investigation the witness points out the person who committed the offence, to the police. That evidence too would be relevant and admissible subject however to any statutory provision that may specifically exclude it at the trial."

The prosecution led the evidence of the learned Magistrate corroborating the identification of the Appellant at the Identification Parade by witness Basil.

Bartholemeusz v Kularathne *(supra)* was a case against a jailor suspected of introducing a packet of cigars to the prison. It was settled in law that where the cigar seller identified the suspect at an earlier occasion and testified of such identification in court, and another witness who was present at the Identification Parade corroborated the identification, such identification is valid even though no dock identification was made.

In the instant case, the learned Magistrate who conducted the Parade was privy to the identification of the Appellant by witness Basil at the Parade. Thus, her evidence supported by Identification Parade notes, corroborate the identification of the accused-appellant by Basil. Thus, the identification of the appellant at the parade was corroborated by the learned Magistrate during the High Court Trial.

The respondent, admitted that the witness was unable to identify the accused-appellant in the dock during the trial. In the course of his evidence on the identification of the accused-appellant he had said;

ප්‍ර - ඔබ සඳහන් කලා සුදු ජාතික කාන්තාවට ගිනිපෙනෙල්ලකින් පුද්ගලයෙක් පහර දුන්නා කියලා?

උ - එහෙමයි

ප්‍ර - ඒ පුද්ගලයා ඔබට හඳුනා ගන්න පුළුවන්ද?

උ - මට ටිකක් අපහසුයි වගේ

ප්‍ර - ඒ කියන්නේ ගිනි පෙනෙල්ලෙන් පහර දුන් පුද්ගලයාව ඔබට මතකයක් තියෙනවාද හඳුනා ගැනීමේ පෙරට්ටුවේදී හඳුනා ගත්තාද නැද්ද කියලා?

උ - මම පුද්ගලයෙක් පෙන්නුවා ඔහු හරිද වැරදිද කියන්න මම දන්නේ නැහැ.

It is important to note that after a witness identifies a suspect at the Parade, he is not informed of the accuracy of his identification. There is a simultaneous record of the witness's conduct maintained by the person who holds the Parade. The witness is not informed of the accuracy of his identification of the suspect for the maintenance of confidentiality of the proceedings. If the witness had identified, he is called upon to set out the reasons for such identification. This fact goes on the record. At the end of the Parade, the conductor of the Parade makes a note, whether any of the suspects had been identified. These notes are admissible at the trial regarding identification in addition to the human testimony. The Parade notes marked as X 29 satisfy the above requirements in the present case.

A similar situation had arisen in the case of Wanasinghe vs AG 2011 (1) SLR 1. In that case presented a situation where the witness remembered that on a previous occasion, he had identified the relevant person but could not remember at the time of the trial the exact person whom he identified. In such a situation for the other evidence to be admissible, it should be shown that the witness had identified a particular person. This legal position has been recognized both in Sri Lanka as well as in English Law.

It is noteworthy that at the Parade, the Magistrate had become an eyewitness to the identification of the accused-appellant by witness Basil. Thus, this fact corroborates and strengthens the identification of the Appellant by the said witness.

In the case of R vs Virtue 1973 (1) AER 649, out of the two witnesses who had identified the Appellants at the Identification Parade, one could not remember picking out anyone and the other, who was in a highly nervous and emotional condition, first stated that she picked out an Appellant at the Parade and later denied the same. Subsequently, the Officer-In-Charge of the Parade had been called to give evidence and had been questioned by the prosecuting counsel as to whom the two witnesses had pointed out at the Parade. Counsel defending the Appellant Osborne objected to the leading of such evidence, which had been over-ruled at the trial.

The same objection was taken up in appeal. It was held that the officer conducting the Identification Parade had been duly admitted and that evidence of identification other than identification in the witness box was admissible.

> "One asks oneself as a matter of common sense why, when a witness has forgotten what she did; evidence should not be given by another witness with a better memory to establish what she did when the events were fresh in her mind".
>
> It was further held "all that the Crown was seeking to do was to establish the fact of identification at the Identity parade held on 20th November. This court can see no reason why that the evidence should not have been admitted.'"

In view of the foregoing statutory provisions and the jurisprudence the identification made by Basil of the Appellant on 05.01.2012, is legally admissible and cannot be challenged.

As pointed out earlier, 4 eyewitnesses had been presented by the prosecution to unfold the narrative as they had seen different aspects of the several crimes committed by the accused persons on the said date at the hotel. According to section 134 of the Evidence Ordinance, no particular number of witnesses should, in any case, be required for the proof of any fact.

It is evident that the assault on Rayan Akalanka started by one person but gradually the number of assaulters increased up to about 5, thereby satisfying the required number for an unlawful assembly.

According to the explanation provided in section 138 of the Penal Code, any lawful assembly can become unlawful;

section 138; Explanation is as follows;

> "An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly".

When the first person slapped Rayan Akalanka if the rest of the members of the group were law-abiding, they had the opportunity to take that first-person away. Instead, more persons joined the first in committing unlawful acts and thereby formed an unlawful assembly, when the number of perpetrators completed was five. Thus, each one of them becomes liable for the action of another.

It was revealed in evidence that the intervention by Khuram turned the attention of the group to the deceased. The attack on the deceased started with bare hands and feet extended to the use of broken bottles and a firearm. The recovery of broken bottles and empty cartridges at the scene, the expert opinion on the injuries of the deceased and the injured, corroborated the verbal testimony of the eyewitnesses on this aspect.

The girlfriend of the deceased Khuram, Victoria was prevented from rescuing the deceased. She also had been subjected to assault initially with bare hands and feet that developed to an attack with a broken bottle, chairs and burning firewood. The continuous assault by the 01st accused on Victoria had resulted in her ending up in the swimming pool. Her exit from the shallow end of the swimming pool was prevented. However, she finally managed to jump out from the side of the deep end and go in search of her boyfriend Khuram. He was found in the green stretch between the pool and the cabanas.

According to witness Dilrukshi, the deceased who went to prevent the attack on Rayan Akalanka moved back into the hotel from outside. His attackers pursued him by coming forward. At the Jacuzzi witness, Dilrukshi had seen the deceased being subjected to attack. When the attention of the attackers turned towards Victoria, she went to the telephone at reception to phone the Tangalle police using the landline.

At this point, the 4th Accused armed with a firearm came and threatened her pointing the gun saying, “උඹ කෝල් ගන්න එපා උඹව මරණවා" Thus, she had to abandon her efforts. Thereafter it was within less than 30 seconds that she had gone towards the pool to see what was happening. At this point, she had seen Khuram drifting down from the pool level to the grass level.

It was the opinion of witness Dr Wijeweera that within the first few seconds, Khuram could have moved after sustaining the injury. This medical opinion, therefore, corroborates the possibility of

what witness Dilrukshi had seen. It might therefore be a possibility for Khuram to have moved away from the poolside to the grass level and this corroborates the observation by witness Dilrukshi.

Witness Basil observed Victoria wailing over her boyfriend fallen on the ground face downwards. At that point, she was subjected to assault by one of the accused persons in a beastly manner. The Appellant had joined within seconds with a burning piece of firewood and attacked the back of the chest of Victoria until the piece of firewood burnt out completely. The eyewitnesses Dilrukshi, Victoria and Basil had testified, there had been a bonfire in the front area. The drag mark of the firewood from the point of the bonfire up to the place where Victoria had been with Khuram, was observed by the SOCO officer. It was above 35 meters.

There had been a large patch of blood on the grass in the area where the chalets were situated. From the same point, the SOCO officer also recovered the remnants of burnt firewood. The testimony of witness Basil that the appellant used a burning piece of firewood to assault Victoria mercilessly is corroborated by the drag mark observed by SOCO officer and by witness SI Jayasinghe who took charge of a burnt piece of firewood, a little away from the entrance to the hotel. This burnt piece of firewood had been 15.5 inches long and 8.5 inches wide, marked as 'X 16'.

It is evident that the gruesome acts of the accused persons could no longer be watched by Basil and he, therefore, moved away from the location to his room. Basil had been shocked by what he had seen, according to his testimony. It was also the position of Basil that with the state of mind he had, he could not stay in the room for long and therefore he went towards the car park which was about 50 -60 meters away from his room. At that moment he became a witness to the vandalism of hotel property including the vehicles in the car park.

A waiter who came up to Basil had pleaded saying “බුදු මහත්තයෝ සුද්ද ඉවරයි. සුදු මහත්තයා ඉවරයි. අපි එයාව ඉක්මනට හොස්පිටල් එකට අරන් යමු.”

As Basil did not have the vehicle key, he had gone to his room to collect it. He had taken about 2 -3 minutes to return with the key.

However, he had been unable to take the vehicle out as a van with its engine running was parked in front of the entrance to the lobby area had blocked the way. He had seen some of the members of the unlawful assembly damaging a trishaw parked near that van. A man clads in a white sarong and a shirt standing near the van, had ordered those accused to “සුද්දිව ඇදල ගනින්. ඕක නතර කරල.” At the Identification Parade when Basil’s memory was fresh, he had given a descriptive account of the reason to have identified the accused person.

> “මෙම සැකකරු ස්ටාෆ් කරල තිබුණු හයි එස් වෑන් එකේ ඩ්‍රයිවින් සීට් එක පැත්තෙ නෙවෙයි අනෙක් පැත්තෙ දොර ඇරල බැහැල මෙහෙම කිව්වා. ඒ අවස්ථාවේදී ඒ තැනැත්තා සුදු සර්ට් එකකුයි සුදු සරමකුයි ඇදගෙන සිටියේ. සුදු සර්ට් එක උඩින් දාල හිටියේ. සරම උස්සලා කිව්වා ඕක නතරකරල සුද්දිව ඇදල ගනින්. සුද්දිව ඇදල ගනින් මට ඉවසන්න බැරුව ඉන්නේ..... පරුෂවචනයක් කියල කිව්වා. මට යකෝ ඉවසන්න බැරිව ඉන්නේ.... කියල කිවුවා,”

This item of evidence that proves the consistency of the witness is admissible in terms of section 157 of the Evidence Ordinance.

Witness Basil explained to the court that due to these sordid happenings, he had some unpleasantness in his mind which seems to have made him uneasy. The good lighting condition in the hotel is spoken to by the witnesses Victoria, Dilrukshi, Basil & the SOCO officer. Basil also had observed that sequel to the commission of the several offences the accused persons, a group consisting of 7-8 persons leaving in the van of which the engine was running. Witness Lalithananda, the security officer, corroborating the departure of the accused person's vehicle, stated that when the patients were dispatched to the hospital, van bearing No. 58-4413 was not within the hotel premises.

It is also noteworthy that three pieces of a female's underwear had been found a few feet away from the pool of blood or the blood patch on the grass. Victoria identified these pieces to be from her under pant she wore that night. It is significant to note that the Appellant who arrived with the rest of the accused persons, remained in the hotel with the same accused persons and did not leave until the unlawful assembly was over. The vehicle bearing registration number 58-4413 used in their departure, had the DNA of the Appellant.

Witness Nirosh Dhammika confirmed the return of the van in the early hours of 25.12.2011. The van was driven by the 03rd accused person whilst the 01st accused person and 04th accused person had also been in the vehicle. It was only after going to Janaka's place, where a T 56 was taken out of the van. Then the vehicle had been returned to the witness.

The learned counsel for the respondent argued that it is the principle of Locard that “every contact leaves a trace”. Locard's exchange principle is an important part of forensic science investigation. It states that any criminal leaves behind a trace when committing a violent crime. The investigator must find this trace evidence and reconstruct the events of the crime. If this is to be simplified, there is an exchange between two items in every contact. Therefore, in forensic science, the perpetrator of a crime brings something into the scene of the crime whilst leaving with something from it.

Paul L. Kirk the Author of Crime Investigation, offers a vivid interpretation of this principle in the following manner;

> “Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen lie deposits or collects. All of these and more, bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence Cannot be wrong, it cannot perjure itself; it cannot be wholly absent."

On the very same day at 2.45 a.m., the SOCO officer arrived at the scene of the crime. In the course of his investigation, he collected several samples from different places. These samples were later referred to for scientific and forensic analysis to the Molecular Medicine Unit of the University of Kelaniya to identify DNA. As scientifically and forensically proven, the deceased, the 02nd accused-appellant, 03rd accused-appellant, and 04th accused-appellant had been at the crime scene. According to the eyewitnesses, it was the accused persons who inflicted injuries on the deceased and his girlfriend Victoria on that fateful day.

It is important to note that at an unexpected moment that the eyewitnesses observed different aspects of several incidents at the scene of the crime.

As the Indian Supreme Court had observed in the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 AIR 753, 1983 SCR (3) 280, they were not observing the happenings around them with any intention of testifying in court. As observed in the said judgment, any confusion regarding the sequence of events, absence of 100% accuracy in the testimony of the witnesses are not reasons to reject their testimony as they do not possess a photographic memory.

There was no way for the eyewitnesses to prevent the harm that was befalling the victims and the property. The witnesses who attempted either to stop it or to seek the assistance of outsiders were also threatened and scared away. What happened was beyond their control. The accused persons of the 03rd accused's team, broke bottles and glasses, launched attacks, destroyed the property of the hotel, damaged the vehicles in the car park and robbed bottles of liquor. In the course of the same transaction, at the behest of the 03rd accused, the injured Victoria was sexually harassed.

The eyewitnesses sometimes had been unable to remember the sequence of the unlawful conduct of the accused persons, witnesses did remember most of the things that happened. Their verbal testimony was corroborated through circumstantial evidence, thus making the eyewitnesses credible.

In the case of Bhojraj v. Seetha Ram (1936) 38 BOMLR 344 it was held that "real test for either accepting or rejecting evidence is how consistent the story is with itself, how it stands the test of cross-examination, how far it fits with the rest of the evidence and the circumstances of the case."

It is significant to note that when contradictions are marked and omissions are highlighted, the proper procedure should be followed consequent to which such contradictions and omissions should be proved. Even if proved, no purpose would be served unless these contradictions and omissions go into the root of the case of the prosecution.

Section 145 of the Evidence Ordinance is as follows;

> Cross-examination as to previous statements in writing;
>
> 145. (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used to contradict him.
>
> As to proof of the previous statement;
>
> (2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistency with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did, make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.

In the case of Gamini Sugathasena & the Others v. The State 1998 (1) SLR 405 whilst discussing the procedure in marking contradictions, the court held that;

> "when a witness is to be contradicted the proper procedure is set out in section 145 of the Evidence Ordinance. This section contemplates that when a witness is to be contradicted, his attention must be first drawn to the fact of having made a previous statement and thereafter, more specifically, to the parts of the statement which are to be used for the purpose of contradicting him. It is only after that the actual writing from which the witness was contradicted, can be proved"

It is clear that as manifest from the proceedings, there is a blatant violation of these rules. The contradictions and omissions have not been proved by the defence by calling the relevant police officer who had recorded the relevant statements. In view of this failure, the necessity did not arise for the learned trial judge to consider the said contradictions and omissions.

In Aadam Kasam Shaikh vs. The State of Maharashtra, 2006 Cr LJ 4585 (4589), the Court held that;

> "the evidence of a witness cannot be discarded merely because he has made improvements over his police statements by stating some of the facts for the first time in his deposition before the court, if the facts stated for the first time before the court is in the nature of elaboration, do not amount to a contradiction, and the evidence of witness does not militate against his earlier version".

The learned trial judge has taken into consideration and has arrived at a conclusive finding that the contradictions and the omissions highlighted does not create any doubt about the prosecution case.

In the case of Mohamed Niyas Naufer and others v. Attorney General (Sc. 01/2006 decided on 08/12/2006), the Court observed that;

> "when faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness."

In Banda and Others vs Attorney General 1999 (3) SLR 168, it was held that;

> "The right to mark omissions and proof of omissions is related to the right of the Judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. The rule regarding consistency and inconsistency is not strictly applicable to omissions. The judge who has the care of the information ought to use this Book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his Police statement in the discharge of his judicial duty and function."

Under section 145 of the Evidence Ordinance, a witness of the opposing party is permitted to be cross-examined to impeach his credibility. The prosecution had tendered all its witnesses for cross-examination without any reservation. The 02nd accused-appellant did not take the maximum use of this opportunity. He failed to take this advantage from 18 prosecution witnesses.

Once the trial commenced, the first opportunity available for the Appellant to place his case before the trial court was 'through cross examination' of the prosecution witnesses. As per the jurisprudence in Sri Lanka and abroad, the failure of an accused to cross-examine the prosecution witnesses is to the detriment of an accused.

In the case of Seetin v. The Queen 68 NLR 316 where the judgement of Commonwealth v. Webster 59 Mass. 295 (1850) was cited with approval, Court made the following observation of an accused person's such failure;

> "Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight because the burden of proof lies on the accuser to make out the whole case by substantive evidence."
>
> "But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof the natural conclusion is that the proof if produced instead of rebutting would tend to sustain the charge"

In the case of Wannaku Arachchilage Gunapala v. AG 2007 (1) SLR 273 Court held the view that;

> " Absence of cross-examination of a prosecution witness of certain facts leads to the inference of admission of that fact "

In the case of Himachal Pradesh -v- Thakuar Dass (1993) 2 Cri 1694 at 1983 it was held that;

> "Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed"

A similar view was expressed in the case of Motilala v. State of Madhya Pradesh AIR 1994 SC 1544, 1994 CriLJ 2184 to the effect that;

> " Absence of cross-examination of prosecution witness of certain facts leads to the inference of admission of that fact "

The eyewitness Basil vividly described the conduct of the 02nd accused-appellant. Although he failed to identify the Appellant in the dock, the defence had been notified at the commencement of the trial of the possibility of marking the ID Parade notes and leading the evidence of the learned Magistrate since it was so listed in the Indictment. It was up to the Appellant therefore to challenge the credibility of these two vital witnesses who were fatal to his defence. But he challenged none.

In Edrick de Silva v. Chandradasa de Silva 70 NLR 170 it has been held that;

> "Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination that is a special fact and feature in the case. It is a matter falling within the definition of the word 'prove' in section 3 of the Evidence Ordinance. A trial judge or a court must necessarily consider that fact in adjudicating the issue before it"

Thus, when the Appellant had foregone his opportunity to assail the credibility of the important prosecution witnesses several times, there was no contradictory version that was left for the consideration of the learned trial judge.

Gamage Prabath Janaka Nayana Priyantha Perera vs AG, CA - 107/2012 decided on 27.05.2016; it was held that a witness is normally considered an independent witness unless he springs from the sources which are likely to be tainted such as enmity or relationship and which make him inclined to implicate the accused falsely.

Nothing has been shown or established before the trial court as to why eyewitness Basil should be inimical towards the Appellant. As per the evidence more fully described above, the direct and circumstantial evidence including scientific evidence made the version of the prosecution probable. The foregoing reasons demanded the learned trial judge to accept the probability of the prosecution case. What the prosecution had established was not a mere prima facie case but, a strong prima facie case demanding an explanation from all the accused persons, including the Appellant, of their conduct.

As described in the 'Bench Book,' Circumstantial evidence is any fact from which the fact in dispute may be inferred.' Such items of evidence in the instant case stood firm throughout the case. According to the cogent evidence of the prosecution, the only irresistible inference relating to the circumstantial evidence presented was the guilt of the Appellant.

In the case of Ajith Samarakoon vs The Republic 2004 (2) SLR 209, the above-mentioned legal principle was re-confirmed. In view of the foregoing, the grounds of appeal raised in relation to the prosecution should necessarily fail.

No person accused of a crime is bound to offer any explanation either of his conduct or the suspicious circumstances attached to him. But it is now trite law that when the prosecution establishes a strong *prima facie* case against an accused, he or she should offer a reasonable explanation.

Upon conclusion of the case for the prosecution, when the learned trial judge called for defence, the appellant decided not to exercise his right to silence but to make a dock statement.

In the case of Gamage Prabhath Janaka Nayana Priyantha Perera v. AG *(supra)* the Court of Appeal held that a dock statement needs to be evaluated.

The 02nd accused-appellant admitted his presence at the scene of the crime at the time of the horrific incident. His position was that he was serving himself food from the buffet table when the fight started. This establishes his presence in the restaurant. His alleged immediate reaction had been to leave his served plate and get to a corner. It is contended that a person has the conduct of that of the Appellant, for several reasons.

Firstly, to promptly ensure his safety. Secondly, a person decides to move to a corner when the perpetrators are not stationary but move about in action. Thirdly, a person tries to get to a corner for safety when he understands the conduct of the perpetrators to be unlawful. This version of the Appellant comes to the attention of the learned trial judge for the first time through his unsworn dock statement. The Appellant, therefore, has failed the tests of "promptness" and "consistency". It is argued that the non-submission of this version to the attention of the Court before the defence

case amounts to a vital omission in the 02nd accused-appellant's case thereby severely affecting his credibility.

He further alleged in his dock statement that after some time he got the opportunity to get into the van in which he had come. But he also revealed that before that, he had taken a look at the injured who had fallen. It was also his position, that when he was near this fallen person, another man had come and inquired in a threatening manner as to what the appellant was looking at and dealt a blow on his hand, injuring him. Such a position had never been suggested to the Manageress, witness Dilrukshi and especially to Basil when they testified.

The DNA expert had identified the DNA of the appellant at 5 places including the left side of the door of the van in which he had travelled. The rest were found inside the hotel premises at the following places;

(i) A scattered stain like blood (P 27 - ඊ) - Photo Number 20
(ii) Bloodstain near the step (P 27 - ඉ) - Photo Number 21
(iii) Blood Scattered on the cement floor (P 27 - ඉ) - Photo Number 08
(iv) Bloodstain has fallen on the left side of the pool (P 27 - ඒ) - Photo Number 14

When the above photographs are lined up, the movement of the Appellant in the opposite direction is obvious.

It is manifest from the above photos that the appellant had moved along the area where the deceased Khuram had been when he was subjected to attack. When the Appellant had the opportunity to have an easy exit out of the restaurant, why did he go in the opposite direction? The only answer supported by evidence could be that "the Appellant was a member of the unlawful assembly and was committing several offences in furtherance of a common intention".

The Appellant attempted to present himself as an innocent individual to the learned trial judge during his dock statement. But evidence presented by the prosecution is inconsistent with the innocence of the appellant. It is consistent with his guilt. It looks like the appellant had lied in the dock. His lies started when he told witness Dr Priyadarshana that the injury on his right hand was “due to a fall”. The doctor had doubted such explanation thus he had put a question mark before writing the explanation. Was the Appellant not deliberately lying? Did not his false utterances relate to a material issue in this case? Was not the motive for the lie the realization of guilt and fear of truth?

It was held in Karunanayake v. Karunasiri Perera 1986 (2) SLR 27, For a lie to be capable of amounting to corroboration firstly it must be deliberate, secondly, it must relate to a material issue, thirdly the motive for the lie must be a realisation of guilt and a fear of the truth and not merely an attempt to bolster up a just cause or out of shame or a wish to conceal disgraceful behaviour from the family and fourthly the statement must be clearly shown to be a lie by evidence other than that of the person who is to be corroborated.

It is evident that when the Appellant was subjected to medical examination on 26.12.2011 at 4.35 a.m. he had been smelling of liquor.

As held in the case of Don Shamantha Jude Antony Jayamaha v. AG, CA-303/2006;

"one cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt, provided it is so obvious that the dock statement is only a bare denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution".

In the above background, there were no reasons for the learned trial judge to have believed the version of the 02nd accused-appellant and to act upon it. The dock statement was not capable of creating reasonable doubt in the mind of the learned trial judge.

Submissions were made by the learned Counsel for the 02nd accused-appellant as regards the statement made by the 02nd accused-appellant from the dock. Counsel contended that the learned Judge of the High Court had failed in evaluating the said statement and had failed to give reasons for rejecting the same.

A dock statement, though considered as evidence, is subject to the infirmity that it was not given under oath and thus cannot be subject to cross-examination. In the present case, there is nothing in substance in the dock statements of the 02nd accused-appellant that is worthy of being considered as creating a doubt in the prosecution version. They are all merely exculpatory.

In The Queen Vs. Buddharakkitha Thera and 2 Others 63 NLR 433**,** it had been held that;

"the right of an accused person to make an unsworn statement from the dock is recognized by our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination."

The manner in which such a statement should be evaluated was analysed in The Queen v. Kularatne 71 NLR 529 as follows;

"We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) If they believe the unsworn statement, it must be acted upon,

(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and
(c) That it should not be used against another accused."

The Supreme Court in Karunanayake v. Karunasiri Perera 1986 (2) SLR 27 held thus concerning the facts that should be taken into account in rejecting a dock statement.

"These principles must be satisfied in order to reject a dock statement and can be summarized as follows:

1. It must be deliberate;
2. It must relate to a material issue;
3. The motive for the lie must be a realization of guilt and fear of truth;

4. The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated."

The case Sarath Vs. Attorney General 2006 (3) SLR 96 too had shed light on the issue of how a dock-statement must be evaluated, wherein, it had been held that;

> "one must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?"

Keeping in mind the case established by the prosecution in this matter, the dock statements made by the 02nd accused-appellant were mere blanket denials of involvement. No specific plea of defence had been raised by the 02nd accused-appellant neither had any fresh material or evidence been introduced into the case formulating novel issues. In this regard, the learned Judge of the High Court had not occasioned any failure of justice by rejecting the dock statement.

The appellant had not been able to at least create a situation where the learned trial judge could neither have believed nor disbelieved the dock statement. The only option available for the learned trial judge, therefore, was to reject the dock statement if it is not creating reasonable doubt. In this backdrop, there was no benefit of the doubt that could have been given by the learned trial judge to the 02nd accused-appellant. Therefore, the grounds of appeal raised relating to the non-consideration of the defence case should be rejected.

The 03rd category of the grounds of appeal raised by the Appellant is that the findings of the learned trial judge were against the evidence and the legal principles. It is my view that considering the above-mentioned evaluation this ground of appeal should also be rejected as there is no merit.

The Appellant had been indicted along with others for committing many offences in the course of the same transaction. Those joinders are permitted under sections 175 and 180 of the Code of Criminal Procedure Act No. 15 of 1979. Thus, the said argument should also be rejected.

When accused-appellants were arraigned on 22.11.2013 the attention of each accused was drawn by Court to the fact that they were vicariously liable for the actions of another accused who had been charged along with him. It is noteworthy that all accused persons including the Appellant had been legally represented throughout the trial. By framing the charges and joining the accused together, the Attorney General had notified all the accused persons that they were vicariously liable in respect of charges framed under the "unlawful assembly".

The group that had attacked Rayan Akalanka satisfied the minimum number of members required for an unlawful assembly as required by section 138 of the Penal Code. This shows that after one person started the attack on Rayan Akalanka, the number of attackers increased gradually. This continued further when Khuram intervened to rescue Rayan Akalanka. Hands, feet, chairs, broken bottles and a T 56 were also used in the attacks on Rayan Akalanka and Khuram. None of the convicted Accused persons, including the 02nd accused-appellant had left the unlawful assembly. Instead, being aware of the assembly becoming unlawful, either they intentionally joined it or

continued in it, and thereby became members of the said unlawful assembly under section 139 of the penal code.

Therefore, when offences were committed by any member of this unlawful assembly in prosecuting a common object of that assembly or if any of the members knew that an offence would be committed to prosecuting the common object, by operation of the vicarious liability principle, all the convicted accused including the Appellant became liable for the offences they were charged with.

In the case of Vithanaralage Anura Thushara De Mel & 3 Others vs. AG SC TAB 2A - D/2017, decided on 11.10.2018, "whilst quoting from the book 'Offences under the Penal Code of Ceylon"' Court held that in considering whether an assembly is unlawful, the incidents must be considered cumulatively and not in isolation".

In the case of Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Pateo & Ors (2018) 7 SCC 743' Court held it was not necessary for each accused to inflict the fatal injury or any injury at all; the mere presence of an accused in such an assembly is sufficient to render him vicariously liable under section 149 of the Indian Penal Code, for causing the death of the victim of the attack, provided that the accused are told that they are to face the charge, rendering them so vicariously liable.

When things happened in the manner it has been vividly described and narrated by the witnesses, the 02nd accused-appellant at least had the awareness that the offences in question could be committed by the others before the assembly dispersed. According to his own words from the dock, he had seen the fight. As per the eyewitness Basil, the 2nd accused-appellant had continuously stayed back performing as a member of the unlawful assembly. Therefore, the 2nd accused-appellant was responsible both for his conduct as well as for the unlawful conduct of the other members of the assembly.

Common Intention is described in section 32 of the Penal Code as follows;

> "When a criminal act was 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 was done by him alone".

Considering criminal liability that arises out of common intention, the Court held in Ajith Fernando alias Konda Ajith and Others v. AG 2004 (1) SLR 288,

> "formulated the view that" whether a particular set of circumstances establish that the accused acted in furtherance of a common intention, is a question of fact and if the view of the trial court cannot say to be unreasonable, it is not the function of an appellate court to interfere".

In the case of Richard v. State 76 NLR 534 it was the view of the Court that;

> "the cumulative effect of all the items of circumstantial evidence against one of the appellants was sufficient in the absence of evidence to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other accused to kill the deceased".

According to the evidence of the eyewitness Basil it is manifest that the accused persons who have been convicted by the learned trial judge, in this case, had committed the criminal acts together. They had committed those in furtherance of the common intention of all. Unlike the rest, the 05th accused who stood the trial had tried to stop and prevent the others from committing further crimes.

Thus, he had said "නවත්තපල්ල නවත්තපල්ල. දැන් ඕක ඇති. යං යං යං".

This conduct secured his acquittal. But what did the rest of the accused, 01st to 04th, do with persons unknown to the prosecution? They continued to commit offences one after the other without acceding to the request of the 05th Accused and, acted in furtherance of their common intention.

As held in King v. Assappu 50 NLR 324, prior concert is now not necessary for common intention and could be formed on the spur of the moment. The instant case undoubtedly is an example of such formation. The eyewitnesses had provided a vivid description of the active participatory presence of all the convicted accused persons that night.

In Wasalamuni D. Richard and 2 Others vs The State 76 NLR 534, it was held that whether the group was actuated by a common intention is a question of fact.

It was revealed that in the present case their common intention had been to harm people and also to rob liquor from the hotel. There was no evidence to say that in attacking Rayan Akalanka, Khuram and Victoria they had made any utterances expressing their common intention.

As the Indian Court observed in Mahbub Shah v. Emperor (1945) 47 BOMLR 941 If it is difficult and if not possible 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. The common intention was explicit on the part of the accused persons when they joined the commission of several crimes in their way.

When a similar situation arose in the case of R v. Mahatun 61 NLR 540, the Court held that;

> "where one offender chased the victim with a bomb in his hand and another offender joined him, the common intention arose at the moment in which the offender joined in the chase and thus, the common intention could arise on the spur of the moment".

This decision guides the instant case. The eyewitnesses provided ample evidence for the learned trial judge to accept that the conduct of the 01st to 04th accused had been actuated by a common criminal intent. According to the medical evidence injuries on Khuram were necessarily fatal. The witnesses have collectively said that Khuram had been attacked with hands, feet, broken bottles and also with a chair but not descriptive as to who had dealt the fatal blow.

It was held in Gunasiri and two others v. The Republic 2009 (1) SLR 39 that;

> "In case of a murder when two or more accused persons are charged based on common intention, the prosecution case will not fail, if the prosecution fails to establish the identity of the person who struck the fatal blow".

Thus, what is required is that the accused persons including the 02nd accused-appellant to have acted in furtherance of a common intention, which fact the prosecution has proved. Although the defendants in this case, who were found to have been intoxicated before arriving in the same vehicle

and leaving in the same vehicle, argued separately at trial that they had acted from the same point of view and without the same intent after entering the hotel where the dispute had taken place. This Court believes that each defendant has the responsibility of convincing the court that there was no common intention within the provisions of Section 103 of the Evidence Ordinance.

When Rayan Akalanka was attacked acting in furtherance of a common intention, the accused had used a firearm and also broken bottles. He sustained injuries due to these attacks. It was the medical opinion that a number of weapons had been used in attacking this injured & that he had been subjected to the assault of many. Hence, when the 1st to 4th accused with persons unknown to the prosecution attacked the victim Rayan Akalanka in the described manner, they became liable to be punished for causing grievous hurt as the learned trial judge was satisfied that the prosecution had satisfied the necessary ingredients.

When considering the charge of attempted murder, there are two limbs to section 300 of the Penal Code. If the action of the accused falls into any one of those, he is liable to be punished for committing the offence of 'attempted murder'. In the instant case, Victoria's death did not occur. According to the medical evidence Victoria had encountered serious breathing difficulties. Oxygen was given to her. The compound comminuted, depressed fracture in the left side of the skull with underlying dural tear and air in the brain had brought on a life-threatening situation to Victoria. Unless there was an immediate medical intervention, the patient would have died. Accordingly, as hurt had been caused in the instant case, the accused persons including the 02nd accused-appellant were liable for punishment under the 02nd limb for a maximum period of 20 years and also to a fine. When the case of each accused is considered separately, verbal testimony and scientific evidence is incriminating the 02nd accused-appellant.

According to eyewitness testimony the accused persons had used a firearm, a chair and broken bottles to inflict injuries on Khuram. Therefore, he had five types of injuries namely gunshot, abrasions, cuts, stabs & contusions. Altogether Khuram has had 42 injuries. There had been patches of blood at several places near the swimming pool.

When the first cut injury started bleeding, the accused and others unknown to the prosecution obviously would have understood that Khuram was injured. The evidence of the eyewitnesses was that the accused persons continued their attack on the deceased. It was the evidence of the doctor that injury number 7 on the neck identified to be a stab, was necessarily fatal. It had gone downward and inward into the neck cutting down the skin, neck muscles, right carotid artery and right internal jugular vein leading to a massive haemorrhage. It was the medical opinion that if such an injury had been caused inside the hospital, the patient's death could still have been imminently dangerous. Within a short time from the infliction of his injuries, Khuram had succumbed to the injuries.

These facts satisfy the requirements under limb 2 of section 294 of the Penal Code which says that if it was done to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, the accused is guilty of the offence of murder. There was overwhelming evidence for the learned trial judge to convict the accused persons of murder. This court has no jurisdiction now, as the AG has decided to withdraw the appeal filed against the acquittal of the murder charge. The learned trial judge had formed the opinion that there had been a sudden fight.

It is my view that for the accused to have benefited from the special exception of "sudden fight", it should be without premeditation and in the heat of passion without taking undue advantage or acting cruelly. In the instant case, the deceased was unarmed. Accused were pitted against a single individual. Several objects were used to inflict injuries on the deceased. The attack had been unmerciful. It is to be noted that the action of the deceased was lawful as he had exercised the right of private defence which extends to the protection of another.

If it was not for the timely intervention of the deceased, the same fate could have been fallen Rayan Akalanka. It was a withdrawing deceased that the accused persons pursued and pounced upon. The accused attacked the deceased at a time the deceased was no longer a threat to the accused persons. They chased away Victoria, the girlfriend of the deceased when she came to his rescue. The attack on Victoria further delayed any probable timely medical intervention on the deceased.

Because of these facts and circumstances, it is evident that the special exception of "sudden fight" was not available for the accused in the instant case.

It was the testimony of Basil that when he was at the car park, the 03rd accused had ordered the others to stop vandalism and to bring Victoria. The narrative unfolded by the eyewitnesses, where there is a reference to the utterances of 03rd accused-appellant and the attack by the 02nd accused-appellant on Victoria and finding of the pieces of her underpants.

Witness SI Jayasinghe had taken charge of a burnt piece of firewood found a little away from the entrance. It had been 15.5 inches in length, 8.5 inches in width which was marked as X 16.

The injured Victoria was examined by Dr Louis Hewa at the ICU of Karapitiya hospital. When Dr Louis Hewa examined Victoria, she was not wearing underpants. SI Jayasinghe found three pieces of underwear which were marked and produced as Y 48. Dr. started her medical examination on the 25th at 9.30 a.m. but had to stop by 10.15 a.m. as Victoria was to be taken for serious and urgent brain surgery.

Amongst several other injuries, the doctor's observations included;

(i) injury number 6 - which was identified to be a human bite which injury was 2.5 cm away from the right nipple. The doctor identified the bite to be a "ද්වේශ සහගත සපා කෑමක්"

(ii) Injury number 7 - identified to be a contusion was on the left nipple. The explanation offered by the doctor was that by squeezing this could have happened

(iii) Injury number 8 - was a contusion near the vagina which injury was categorized as a blunt trauma caused when hit with a hand or squeezed.

(iv) Injury Number 9 - was a contusion on the right thigh situated towards the right side which the doctor opined to have been caused as a result of using blunt force, assault on the thigh or "කකුල් බලෙන් ඇද ගැනීමක් නිසා විය හැකියි."

(v) Injury Number 10 - had been observed to be in the private parts and was completely covered with sand and grass. It was the observation of the doctor that when the private parts were examined, the victim had been in pain. He further observed tenderness to be there as the result of blunt force being used.

Victoria could not remember anything that happened to her after she was captured by the group. According to witness Dilrukshi and witness Basil, Victoria initially had been moving about. But, Basil explained that when Victoria started wailing over the fallen lover, she was mercilessly hammered by one of the accused and the 02nd accused-appellant who hit Victoria with burning firewood did so until the fire had extinguished. It is to be noted that Victoria does not speak in detail of the manner she was subjected to attack after she found Khuram. She explained that after being captured by the group, she had not remembered anything.

The doctor opines that Injuries to Victoria had been caused less than 24 hours ago from the time of her medical examination. It is very likely therefore that after her captivity Victoria had fallen unconscious.

It was argued by the learned counsel for the respondent that the parasexual injuries at numbers 6, 7, 8 and other injuries observed by the doctor had been a result of Victoria being ravished. This argument is fortified by the opinion of the doctor, that the victim had been subjected to sexual abuse. "මෙම රෝගියා මෙම අවස්ථාවේ ලිංගික අතවරයකට ලක් වූ බවයි."

Basil who had been standing about 42 feet away had very clearly heard the orders of the accused to his goons to "සුද්දිව ඇදල ගනින්" by stopping all other things. There is no admissible evidence for the learned trial judge to satisfy that none of the accused persons, including the appellant, had either prevented 03rd accused conduct thereafter or that they left the scene of the crime without complying with the orders of the 03rd accused.

The dock statement of the 02nd accused-appellant did not contain the truth. Thus, the evidence of Basil regarding the orders of the 03rd accused expressing his sexual desire stands uncontradicted and unchallenged. The medical evidence corroborates that Victoria had been sexually abused.

In the case of Wickremasuriya v. Dedoleena and others, 1996 (2) SLR 95 It was held that;

> "… a judge, in applying the test of probability and improbability relies heavily on his knowledge of men and matters …"

Therefore, the learned counsel for the respondent says the fact that the injuries on Victoria are generally caused by sexual intercourse. The foregoing items of evidence prove that Victoria had been raped. One out of the many in a group, if commits the act of rape and if the others had not prevented but facilitated such act, as the law stands today all of them are guilty of the offence of "gang rape".

As held in the case of Promod Mahto & Others v. The State of Bihar (1989) Air SC 1475, the explanation to section 376 (g) of the Indian Penal Code is as follows;

> "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section"
>
> "This explanation has been introduced by the legislature to effectively deal with the growing menace of gang rape. In such circumstances, the prosecution doesn't need to adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one to find the accused guilty of gang rape and convict them under section 376 Indian Penal Code."

In the case of Sajeewa alias Ukkuwa and others v. AG 2004 (2) SLR 263, which cited the above case held that the Issue was whether the conviction of 04th accused could be justified in gang rape as argued by the appellant as there was no evidence either he committed rape or aided or abetted any of the Appellants to commit it. Section 364(2)(g) and explanation 1 was considered by the Supreme Court and paid attention to the fact that the amendment to section 363 had been taken from the Indian Penal Code.

Considering the case of Promod Mahto & Others v. The State of Bihar *(supra)* observed that once it is established that the accused had acted in concert and raped the prosecutrix then all of them would be guilty under section 367 in terms of explanation 1 to clause (g) of sub-section (2) of sec 367 of the Indian Penal Code, irrespective of whether she had been raped by one or more of them.

Supreme Court in Sri Lanka observed that unlike in the Indian Code, our amendment does not require the accused to act in furtherance of a common intention. As per the evidence discussed above and the legal principles, the convicted accused including the 02nd accused-appellant were guilty of the offence of "gang rape".

The hotel had both local and foreign liquor arranged for the Christmas party and these bottles were packed in a rattan basket. After the incident when they checked the bottles of liquor worth Rs. 41,526.80 which had been left on the table were not there.

In the course of the investigation, ASP Jagath Rohana had recovered foreign liquor from House Number 70/B, where one Janaka was staying. It is important to note that before the returning of the van, 03rd accused and the others went into Janaka's place to leave the firearm. The accused must have left those foreign liquor bottles at Janaka's Place during that visit. There was no other explanation from Janaka or other accused persons regarding those foreign liquor bottles as from where they have received them. The List of bottles of liquor that had been robbed in the incident and its value was marked and produced as "X 49".

In the case of Goswami BC v. Delhi Administration 1973 AIR 1457, 1974 SCR (1) 222 the Supreme Court of India observed;

> "... the main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his future, both as an individual and as a member of the society. Punishment is designed to protect the society by deterring potential offenders as also by preventing the guilty party from repeating the offence."

The learned President's Counsel and Additional Solicitor General who appeared for the respondent argued that notwithstanding the overwhelming evidence, the 02nd accused-appellant has chosen to contest his conviction and sentence, utilizing precious judicial time. It was further submitted that this is an appropriate case for the Appellant's sentence to run from the date of affirmation of the conviction and the sentence by this Court. Because of Appellant committing heinous crimes, this is not a fit case for any discretion to be used relating to the operation of the sentence.

It is my view that even though the discretion is vested in the Trial Judge to award a legal and appropriate sentence there cannot be such a serious disparity in the sentencing of different accused persons for the same offence.

It was held in The Police Officer, Dondra, v. Baban 25 NLR 156 that, an accused, who pleads not guilty and claims to be tried, is not to be punished when found guilty more severely on that account, than a co-accused who has pleaded guilty.

In the above-mentioned case, those who pleaded guilty to the offence in 1923 were fined Rs. 3/-. The appellant who pleaded not guilty and went for trial had been found guilty and fined Rs. 6/- for the same offence, because he pleaded not guilty and claimed to be tried. The learned Magistrate gave reason for the conviction and the sentence has indicated as follows;

> " Counsel for the defence, however, questions my right to impose varying sentences in the case of the same offence. My only answer to that is that it is a practice universally followed, and I think, very rightly followed for a judge to regard a frank and open plea of guilt, when not made boastfully as a justification for treating the accused with somewhat less severity. A man who aggravates his original offence by putting forward a vexatious and frivolous defence cannot, I think, claim as a right from the Court the same sentence as has been imposed on those who admitted their guilt."

There is a great deal of truth and force in what the Magistrate says, but the practice has often been condemned, and, if I may say so, rightly condemned by this Court. It holds out a strong temptation to innocent persons to plead guilty.

In the case of Beliatta vs Don Lewis (1907) 1 Aserwatham's Report page 2, Wendt J made the following observation;

> "Again, it is not an offence to plead not guilty when one is guilty, and a person doing so cannot be punished more heavily than one who fully admits the charge or *vice versa*."

Thus, a person who appealed against the conviction cannot be punished more heavily than one who has not appealed or one who has withdrawn his appeal.

In Sumanasena v. AG 1999 (3) SLR 137 Court held that the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of Law. Evidence should not be counted but weighed.

It is the view of the learned ASG who appeared for the respondent that in the instant case evidence was forthcoming not only from the circumstantial evidence but also from direct evidence. A judge does not preside over a criminal trial merely to see that no innocent man is punished.

A judge also presides to see that a guilty man does not escape. One is as important as the other and both are public duties which the judge has to perform.

There is no reason for me to ignore the said argument raised by the learned ASG. Because of the overwhelming evidence, the conviction entered and the sentences pronounced on the 02nd accused-appellant should necessarily be affirmed.

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.

Thus, we affirm the convictions and the sentences pronounced on the 02nd accused-appellant.

The 01st, 03rd and 04th accused-appellants, appeals were withdrawn on 13.03.2019 and thereafter, the sentences were backdated to 18.07.2014 to run concurrently.

Considering the circumstances of the case we decide that the imprisonment against the 02nd accused-appellant should also be backdated to 18.07.2014 to run concurrently.

Appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal