IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

Attorney General

Attorney General's Department

Colombo 12

Complainant

CA/HCC/0177/2015 **VS**

High Court of Kandy

Case No: 137/2006

Abeykoon Mudiyanselage Mahinda Abeykoon

Accused

And now between

Abeykoon Mudiyanselage Mahinda Abeykoon

Accused– Appellants

VS

Attorney General

Attorney General's Department

Colombo 12

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Palitha Fernando, PC

with Kaushalya Abeyratne Dias

for the accused-appellant

Dilan Ratnayake, DSG

for the Attorney General

ARGUED ON : 13/07/2021 and 26/10/2021

DECIDED ON : 02/12/2021

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted together with thirteen others in the High Court of Kandy with others unknown to the prosecution on the 5th of December 2001 for;

a) being members of an unlawful assembly having a common object of using criminal force against those employed at the polling station of the Superintendent's office, in Galaha Estate, an offence punishable under section 140 of the Penal Code;

b) during the course of the same transaction, inserting unauthorized ballot papers into a ballot box and thus committing an offence punishable under section 66 of the Parliamentary Elections Act No. 1 of 1980 read with section 146 of the Penal Code and;

c) causing mischief while being members of the said unlawful assembly, an offence punishable under section 410 read with section 146 of the Penal Code.

There were two other counts of which the appellant was discharged.

At the closure of the prosecution case, the Trial Judge acting in terms of section 200 of the Criminal Procedure Code, acquitted all other accused persons, other than the appellant, on the basis that identification of the others was in doubt.

The appellant made a dock statement and called two witnesses. Then the appellant was convicted for counts one, two, and three and discharged of counts four and five, and sentenced to six months for the first charge and one year each for the second and third charges.

Being aggrieved by the said judgment and sentence, the appellant preferred this appeal.

The grounds of appeal are as follows:

1) The conviction on count two of the indictment is illegal as the charge is contrary to law.

2) The Learned Trial Judge has made use of the evidence rejected in acquitting the second to the fourteenth accused in order to convict the first accused-appellant.

3) There has been no adequate analysis of the evidence of the prosecution and the infirmities. The evidence of the defense witnesses has not been considered before acting upon them, causing prejudice to the appellant.

4) The Learned Trial Judge has not considered the ingredients necessary to establish the offence of unlawful assembly and the basis of imposition of liability on membership of the unlawful assembly.

5) The Learned Trial Judge has proceeded in the misconception that the accused owed an explanation in the light of the evidence led by the prosecution and that the dock statement of the appellant strengthens the case for the prosecution.

Counsel for the appellant argued that membership of an unlawful assembly could only be made on the basis of imposing vicarious liability in respect of an offence punishable under the Penal Code. Further, it was argued that in section 38 of the Penal Code, the term 'offence' denotes a thing punishable under the Penal Code. The appellant was convicted for an offence under section 66 of the Parliamentary Elections Act No. 01 of 1981(Parliamentary Elections Act), read with section 146 of the Penal Code. Counsel further submitted that section 146 of the Penal Code does not refer to sub-sections 2 and 3 of section 38.

Sub-section 3 of section 38 of the Penal Code expressly refers to section 138, which is the definitive section with regard to an unlawful assembly.

Section 38 of the Penal Code provides that;

'38. (1) Except in the Chapter and sections mentioned in subsections (2) and (3), the word 'offence' denotes a thing made punishable by this Code.

(2) In Chapter IV, and in the following sections, namely, sections 67, 100, 101, 101A, 102, 103, 105, 107, 108, 109, 110, 111, 112, 113, 113A 113B, 184, 191, 192, 200, 208, 210, 211, 216, 217, 218, 219, 220, 318, 319, 320, 321, 322, 338, 339, 377, 378, and 431, the word " offence " denotes a thing punishable in Sri Lanka under this Code, or under any law other than this Code.

(3) And in sections 138, 174, 175, 198, 199, 209, 213, and 427, the word "offence" has the same meaning as in subsection (2) when the thing punishable under any law other than this Code is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.'

The provision in section 38 is plain and unambiguous. The general rule of interpretation is that when the meaning of a provision is plain and literal, its ordinary and grammatical meaning must be given to it.

In *M/s. Hiralal Ratanlal vs. STO*, AIR 1973 SC 1034, the Supreme Court of India observed that;

"In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."

The following well-known passage from the speech of Lord Atkinson in *Vuchet & Sons Ltd. v. London Society of Compositors* [I913] A.C. 107 is formally consistent with a restricted form of the golden rule.

Lord Atkinson stated that;

"If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous."

Maxwell, on the Interpretation of Statutes twelfth edition page 36, states;

'A construction which would leave without effect any part of the language of a statute will normally be rejected.'

In *Khan vs. Ariyadasa 65 NLR 29,* it was held that;

"Section 146 of the Penal Code creates an offence, but the punishment must depend on the offence which the offender is made guilty by that section. Therefore, then appropriate punishment sections must be read with it."

The word 'offence' used in sub-section 3 of section 38 is committed if the thing is punishable only under the law, other than the Penal Code, with imprisonment of a term of six months or upward with or without a fine. Although sub-section 3 of section 38 does not explicitly refer to section 146 of the Penal Code, by referring to the definitive section 138, it encompasses all sections up to section 155. Sections 138 and 427 are not penal sections. As the provisions in section

38 of the Penal Code are plain and unambiguous, the literal meaning of the provision should be given effect.

Accordingly, the offences described in section 66 of the Parliamentary Elections Act are within the meaning of 'offence' envisaged in subsection 3 of section 38 of the Penal Code. Thus, if the argument of the appellant is accepted, then a substantial part of section 38 would become redundant. That is against the aforementioned rules of interpretation.

Therefore, the prescribed sentence in section 66 of the Parliamentary Elections Act, that is, imprisonment of either description up to two years on a conviction of offences, falls under the ambit of sub-section 3 of section 38 of the Penal Code and the argument of the counsel for the appellant cannot be sustained.

As such, the first ground of appeal is rejected.

The next argument is that the Learned Trial Judge made use of the evidence rejected in acquitting the second to fourteenth accused to convict the first accused-appellant. It was the contention for the appellant that PW3 had identified most of the acquitted accused as persons who actively participated in the incident upon which unlawful assembly charges were based. It was further argued that this witness identified the ninth accused as the person who took the sealed ballot box out of the station and dashed it on the ground.

Citing the case of *Queen vs. Wellasamy 63 NLR 265,* counsel for the appellant argued that the evidence rejected in respect of one accused could not be relied upon to convict another.

Several witnesses established the identity of the appellant. As argued for the appellant, even if the evidence of PW3 is considered unreliable, there still exists sufficient evidence to support the conviction.

PW5 was the station polling officer. He had identified the appellant and described the illegal acts done by the appellant. PW5 is a public officer and had no resentment towards the appellant. There is no reason to disbelieve the evidence of PW5. Some omissions that are not significant were marked, but there were no contradictions at all.

In the judgment of *Wickremasuriya vs. Dedoleena and Others* 1996 2 Sri LR 95., Jayasuriya J. cited the Indian authority, *State of Uttar Pradesh v. Anthony 1985 AIR 48 (SC),* which states that;

"The important principle and rule of caution was laid down that a witness should not be disbelieved on account of trifling discrepancies and omissions."

Considering the above, the evidence of PW5 cannot be rejected. If the evidence of PW5 is not rejected, there is no option but to convict the appellant to the offences the Learned High Court Judge found him guilty of. The evidence made to discharge the second to the fourteenth accused was not used to convict the appellant. The evidence disbelieved in respect of one offence was not made used to convict the appellant. Therefore, the second ground of appeal cannot be sustained.

In the course of her judgment, the Learned Trial Judge considered the effect of a contradiction and omission regarding the testimonial trustworthiness of each witness. The judgment expresses that the Learned Trial Judge has applied the relevant test of demeanour consistency and probability in analyzing the evidence of the witnesses.

In the case of *Munasinghe vs. Vidanage 69 NLR 97,* the Privy Council observed as follows;

"In reviewing such findings of fact, the proper approach of an appellate tribunal is as stated in the speeches of the House of Lords in Watt or Thomas v. Thomas [1947] A.C. 484 (H.L.). Viscount Simon said at pp. 485-6.

"Apart from the class of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts), an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.""

In the case of *Bhagwati and Ors. vs. The State of Uttar Pradesh* on 8 April, 1976 AIR 1976 SC 1449, the Supreme Court of India stated as follows regarding decisions reached by the Trial Judge on facts;

"6. It is well-settled by the decisions of this Court including *Mathai Mathews v. State of Maharashtra* that the power of an appellate court to review evidence in appeals against acquittals is as extensive as its power in appeals against convictions, and that before an appellate court can set aside an order of acquittal it must carefully consider the reasons given by the trial Court in support of its decision and give its own reasons for rejecting them. Thus, if the finding reached

by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record. This has been held to be so because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court therefore should be slow in disturbing the finding of fact of the trial Court, and if two views are reasonably possible of the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it. Mr. Anthony has made a reference in this connection to the decision in *Labh Singh v. State of Punjab* also. The question therefore is whether it could be said that the finding reached by trial Judge was unreasonable, or whether the view taken by him was a reasonably possible view of the evidence on the record."

In the case of *Attorney General vs. Sandanam Pitchai Mary Theresa, [*2011] 2 Sri LR 292, the Supreme Court stated that;

"There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A court of appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that state is not obliged to disprove every speculative scenario consistent with the innocence of an accused– *R v. Paul* [1977]1 SCR 181."

When considering the evidence of this case, we find that there is sufficient evidence to support the conviction. Therefore, the argument that the evidence was not adequately analysed and weighed cannot be accepted.

The Learned Trial Judge has had at the commencement of her judgment given her attention to the applicable laws and the ingredients of each offence alleged to have been committed by the appellant (page 56 of the judgment).

The appellant's involvement in committing the offences was considered on pages 32 and 33 of the judgment. There is clear evidence that the appellant entered the polling station and, through intimidation of the officials, obtained the ballot papers forcibly and ordered the other members of that unlawful assembly to stuff the ballot boxes with the unauthorized ballot papers. He was there until the others completed that task.

Although the rest of the accused persons, except for the appellant, were acquitted, their acquittal was due to doubt as to their identification. Nevertheless, the evidence shows that there were sufficient number of people to form an unlawful assembly. The appellant was an active participant and the leader of that unlawful assembly. The evidence also shows that there were more than five people using criminal force to carry out illegal activities under the direction of the appellant. Under these circumstances, the fourth ground of appeal raised by the appellant cannot be accepted. The fourth ground of appeal is rejected.

The Learned Trial Judge has evaluated the dock statement made by the appellant and the evidence called by the defense. The appellant's position is that he came to the Galaha polling station alone and spoke to the officer at the polling station, and left the place peacefully. The appellant states that there was no incident as alleged by the prosecution.

The Trial Judge observed that this is a mere total denial. The Trial Judge stated that the appellant had no burden to prove his innocence. However, in the light of overwhelming evidence against the appellant, the appellant chose only to admit his presence and deny every other incident that had taken place.

When considering the totality of the evidence, the Trial Judge has rejected the defense evidence. There is sufficient evidence to support the conviction of the appellant. We see no reason to interfere with the findings of the Trial Judge in this regard.

For the reasons stated above, the conviction of the appellant is affirmed, and the appeal is dismissed.

However, the incident in this case had happened twenty years ago. The appellant had to bear the torment of this case for the last twenty years. The appellant has no previous convictions and is in an advanced age. Taking these reasons into consideration, the sentence of two and a half years is reduced to two years and suspended for five years with effect from the date of this judgement, that is 02nd of December, 2021.

High Court Judge of Kandy is directed to implement this judgment as provided in section 303 of the Criminal Procedure Code.Registrar is directed to send a copy of this Judgemnt to the High Court Kandy along with the main case record forthwith.

Appeal dismissed; sentence varied

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal