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

In the matter of an Appeal in terms of section 331 (1) of the Code of 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 No: Democratic Socialist Republic of Sri Lanka

HCC-0028-036-2019

High Court of Chilaw

Case No: HC/89/2003

COMPLAINANT

Vs.

1. Warnakulasooriya Nimal Ajith Fernando
2. Poruthotage Chaminda Philip Milroy (Deceased)
3. W. Jerad Sugath Fernando
4. P. Patrick Oswald alias Fernando
5. W. Ajith Anton Peiris
6. M. Joseph Trony Wijendra Fernando
7. A. M Donald Samantha Peiris
8. A.L Konrad Ranil Peris
9. M. Liyange Chaminda Dikshan Thushara
10. I. Sanath Prasanna Fernando

ACCUSED

AND NOW BETWEEN

1. Warnakulasooriya Nimal Ajith Fernando
(1st accused appellant)

3. W. Jerad Sugath Fernando
(3rd accused appellant)

4. P. Patrick Oswald alias Fernando
(4th accused appellant)

5. W. Ajith Anton Peiris
(5th accused appellant)

6. M.Joseph Trony Wijendra Fernando
(6th accused appellant)

7. A.M Donald Samantha Peiris
(7th accused appellant)

8. A.L Konrad Ranil Peris
(8th accused appellant)

9. M. Liyange Chaminda Dikshan Thushara
(9th accused appellant)

10. I. Sanath Prasanna Fernando
(10th accused appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : K Priyantha Fernando, J. (P. /C.A.)

: Sampath B Abayakoon, J.

Counsel : Anil Silva, P.C. for the 1st and 3rd accused appellants

: Shavindra Fernando, P.C. with N. Wijesekara, for the 4th accused appellant

: Niranjan Jayasinghe, for the 5th, 7th and 8th accused appellants

: Palitha Fernando, P.C. for the 6th accused appellant

: Indika Mallawarachchi, for the 9th accused appellant

: Shehan De Silva, for the 10th accused appellant

: Janaka Bandara, S.S.C. for the Respondent.

Argued on : 07-10-202, 11-10-2021, 12-10-202, 14-10-2021, 15-10-2021, 21-10-2021, 22-10-2021 and 25-10-2021

Written Submissions : 26-03-2021 (By the 1st and 3rd the Accused-Appellant)

: 17-09-2019 (By the 10th the Accused-Appellant)

: 12-09-2019 (By the 9th the Accused-Appellant)

: 06-09-2019 (By the 5th, 7th and 8th the Accused-Appellant)

: 29-10-2021 (By the 4th the Accused-Appellant)

: 17-12-2019 (By the Respondent)

Decided on : 15-12-2021

Sampath B Abayakoon, J.

1. The 1st accused appellant and the 3rd to 10th accused appellants (hereinafter sometimes collectively referred to as the appellants) filed these appeals challenging the conviction and sentence of them by the learned High Court judge of Chilaw of the judgment dated 08-02-2019.
2. The accused persons including the appellants and the now deceased 2nd accused of the indictment were indicted before the High Court of Chilaw for one count of being members of an unlawful assembly on 24th June 2001, punishable under section 140 of the Penal Code, one count of causing the death of one Lional Ferando whilst being members of the said unlawful assembly, punishable under section 296 read with section 146 of the Penal Code, and another count of causing the death of the above-mentioned Lional Fernando, punishable under section 296 read with section 32 of the Penal Code.
3. The 2nd accused mentioned in the indictment died during the pendency of the action, and after a trial held without a jury, the appellants were found guilty as charged and sentenced to death accordingly.
4. At the hearing of the appeals, this Court had the benefit of listening to the erudite arguments of the learned President Counsel and the other Counsel on behalf of the appellants as well as the learned Senior State Counsel for the Attorney General.
5. As most of the grounds of appeal pursued by the learned Counsel are similar in nature, this Court would consider the main grounds of appeal cumulatively. Any individual grounds of appeal will be considered if and when necessary for the purposes of this appeal.

Grounds of Appeal: -

6. The main grounds of appeal urged by the learned counsel can be crystallized in the following manner.

(1) The learned High Court judge failed to follow the essential requisites of a judgment as envisaged in section 283 of the Penal Code by failing to analyze the evidence led by the prosecution in its correct perspective.

(2) The learned High Court judge was totally misdirected as to the relevant law when she concluded that it was the burden of the appellants who pleaded the defence of alibi to prove the same, thereby shifting the burden of proof.

(3) The proper procedure was not followed at the trial before allowing the leading of evidence as to the alleged recovery of a weapon used in the crime under section 27 of the Evidence Ordinance.

(4) The learned High Court judge failed to consider the prosecution evidence to decide whether it has established a *prima facie* strong case against the appellants before considering the evidence of the appellants led in their defence.

(5) The evidence given by some of the appellants and the dock statements of others has been considered against each other to disbelieve the evidence of the appellants, and the witnesses testified on behalf of them.

(6) The learned High Court judge has decided the case on the basis of the defence evidence rather than the evidence led by the prosecution to prove its case, and thereby misdirected herself as to the burden of proof in a criminal action.

(7) The learned High Court judge has failed to consider and analyze the evidence on the offence of unlawful assembly in the judgment, although the appellants were convicted based on being members of such an assembly.

(8) Evidence of bad character has been considered in the judgment as relevant, in contrary to the established principles of law.

(9) The prosecution failed to lead relevant evidence to satisfy the Court that PW-01 and PW-02 were not available to give evidence in Court before leading their depositions under section 33 of the Evidence Ordinance.

(10) The learned High Court judge has failed to address her mind to the inherent infirmities of depositions of PW-01 and PW-02 before considering them as evidence at the trial.

7. In this action, there had been three main eyewitnesses to the actual incident where the deceased suffered serious cut injuries, namely PW-01 Ravindra Fernando, PW-02 Myurin Kalista and PW-03 Lasantha Fernando. It was only Lasantha Fernando, who has given evidence in person at the High Court trial. On the basis that PW-01 and PW-02 cannot be found as they have left the country, the depositions made by them in the Magistrate Court Non-Summary Inquiry had been led in evidence under the provisions of section 33 of the Evidence Ordinance.

Evidence in brief: -

8. PW-03 Lasantha Fernando is the brother of the deceased Lional Fernando, and was living with him at No 25, Sinhagiri Mawatha, Mudukatuwa, Marawila. It was his evidence that on the day of the incident, namely 24-06-2001, when he came out of the house at about 3.30 p.m. to look for his brother who went out with Ravindra (PW-01) to look for his other brother, he saw him being chased by a crowd of about 10-12 persons. He has initially identified the 1st, 3rd, 5th, 7th, 9th and the 10th appellants as the persons who came after his brother and has stated that they carried swords, guns and knives without specifying who carried which weapon. He has only identified the 1st accused as Ajith and the 3rd accused as Jeyaraj at the trial. The learned State Counsel who led the evidence has then questioned the witness

specifically pointing to 4th , 6th and the 8th appellants whom the witness did not implicate in his evidence initially, as to what they were carrying when the attack took place. According to him, the deceased, who came running into the compound of his house ran towards the back of the compound where he was chased and attacked with swords. He has named Ajith, Chaminda, Patrik and another person who is not in Court as the assailants of his brother, but has not identified any of the accused who were in the dock as the persons named by him. He has also named a person called Jerrad, as the person who was holding a bomb and a pistol at that time. It was his evidence that before the attack on the deceased, the persons who came into the compound attacked the windows of the house. After the incident, the witness has taken steps to admit the injured to the hospital where he was pronounced dead within few minutes of admission. As to the reason for this attack it was his explanation that he is unable to think of a reason.

9. However, it has to be noted that under cross examination, the witness has identified the 1st, the then deceased 2nd, 3rd and the 4th accused in the High Court as the persons who came into the compound and 5th, 6th, 7th, 8th, 9th, and the 10th accused as the persons who stayed outside the gate and pelted stones towards the house.
10. In his deposition before the Magistrate at the Non-Summary Inquiry, PW-01 named in the indictment, namely, Ravindra Fernando has stated that all the eleven accused present were known to him.
11. At the inquiry, there had been 11 accused persons named and the 6th accused named in the charge sheet filed before the Magistrate, namely, Juse Maria Fernando had been discharged by the Magistrate. Therefore, any references made to the 7th, 8th,9th,10th and the 11th accused in the depositions by PW-01 and PW-02 need to be understood as references made about the 6th,7th,8th,9th and the 10th accused of the indictment before the High Court.
12. Ravindra Fernando was a person who lived in the house of the deceased. According to him, at about 3.45 in the evening, the deceased went out of the house to look for his brother Thushara as he was getting late, and he too went

along with him. Before they could reach the end of Sinhagiri Mawatha, they saw a crowd of about 10-15 persons shouting and threatening to kill Lional, and confronted once they saw them. PW-01 has identified the persons who were there by mentioning their names in the deposition. He and the deceased has then hurried back to the house in order to escape from the crowd who confronted them. He has described the actions of the accused and the weapons they were carrying and saying at that time. When the neighbour, Sudu Akka attempted to close the gate, she was also assaulted. PW-01 has identified the 1st, 2nd,3rd,4th, and the 9th accused as the persons who came into the compound and attacked the deceased and has identified the 5th to 8th and the 10th accused in the High Court by name as the persons who were among the others outside the gate and shouting. He has described in detail the part played by each of the accused who came into the compound in attacking the deceased and where PW-03 was at the time of the attack.

13. In her deposition at the Non-Summary Inquiry, PW-02 who was identified as Sudu Akka by PW-01 has described what happened. She has stated that when Lional entered the compound through the gate, it was she who attempted to close the gate. She has identified the 1st,3rd and the 4th accused before the Magistrate as the persons who were among the five or six persons who came into the compound and chased after the deceased towards the back of the house. She has seen the 1st and the 3rd accused carrying swords and some other persons also outside of the gate.
14. Both the witnesses have been cross examined on behalf of the accused by the counsel who represented them at the Non-Summary Inquiry.
15. Apart from the eye witnesses, several other witnesses, the investigating Police officers and the Judicial Medical Officer (JMO) who conducted the post mortem on the deceased have given evidence at the trial.
16. The JMO has observed 12 injuries in all on the body of the deceased, out of which injuries 1,2,4,7 were cut injuries. He has described the injury number 1,2,4,5, and 8 as defensive injuries, meaning that they are injuries suffered while attempting to shield himself from the attack. He has described the

injury number 07 as an essentially fatal cut injury caused to part of the head and the neck. PW-04 and PW-05 are persons who came to the scene after the incident. PW-09 Police officer Obris was the officer who came to the place of the incident after receiving the first information and commenced the investigations into the incident. He has recorded the statements of witnesses Darmasena Fernando and Myurin Kalista and also has recorded his observations.

17. PW-12 was the Police officer who gave evidence and marked as 'Y', the extract of the statement given to then Officer in Charge (OIC) of Dankotuwa Police (PW-08) by the 1st appellant which led to the discovery the sword marked P-03, allegedly used in the crime. This extract has been marked under the provisions of section 27 of the Evidence Ordinance. The witness has testified that the then OIC of the Dankotuwa Police, Chief Inspector Roshan Perera is now domiciled in Canada. He has also testified as to the arrest of the 1st appellant by PW-08.
18. After PW-12 was cross examined and concluded by the defence, the State Counsel who led the evidence, apparently after realizing the failure to take the necessary steps he should have taken before evidence of this nature being led, has sought the permission of the Court to act under section 159(2) of the Evidence Ordinance, which has been granted. This is the provision where a witness can refresh his memory while being examined in giving evidence. Thereafter, in the pretext of re-examination of the witness, evidence has been led to the effect that PW-08, the then OIC is not in the country. His investigation notes have been used to lead evidence again as to the alleged discovery of the sword based on the statement made by the 1st appellant. There is nothing in the case record to indicate that the defence was allowed to cross examine the witness on the new evidence led, or an application was made in that regard by the defence.
19. It has to be noted that I am in no position to agree with the procedure adopted by the prosecution in this regard as this was not the proper procedure to adopt in such a scenario.

20. At the conclusion of the prosecution evidence, the learned trial judge has decided to call for a defence on the basis that sufficient evidence have been adduced by the prosecution against the appellants.
21. In their defence, the 1st, 5th, 6th, 7th, 9th, and the 10th appellants have made dock statements, while 3rd, 4th, and the 8th appellants have given evidence under oath. Out of the two witnesses testified on behalf of the appellants, Witness Juse Maria Fernando appears to have given evidence on behalf of all the appellants and witness Leelawathi has given evidence on behalf of the 1st appellant in support of his defence of alibi.
22. The common feature in the defence of the appellants is that all of them denying that they were at the scene of the crime at the time it was committed. They have taken up the position that they were at various other places at that time and was unaware how the deceased received the fatal injuries. In other words, they have taken up the defence of alibi.
23. Defence witness Juse Maria Fernado was originally an accused named in the Magistrate Court Non-Summary Inquiry, where he was subsequently discharged from the proceedings. He is a close relative of the deceased. According to his evidence, he has seen a crowd on the main road in front of the Marawila Hospital and the deceased and his brother whom he identified as Mahaththaya (PW-03) among them. He has also seen them carrying weapons. After stopping his vehicle near them and after pacifying them, he has escorted them to their house. When he was about to get onto his vehicle, he has heard another commotion and when he reached the place which was at Harold Herath Mawatha, he has seen the deceased with injuries. It was in his vehicle the deceased had been taken to the hospital. It was his evidence that when he went towards the commotion, earlier mentioned Mahaththaya (PW-03) came and informed him that "මගේ අයියා කවුදෝ කපලා වාහනයක් අරගෙන එන්න", which was one of the main contentions of the learned President's Counsel for the 1st and the 3rd appellants to argue that in fact PW-03 never saw the incident and his evidence was a fabrication.

24. Witness Leelawathi has testified in support of the alibi of the 1st appellant claiming that he was at her home in Dankotuwa on the alleged day of the incident, recovering from the injuries he suffered from a vehicle accident.
25. It is also necessary to bear in mind that the learned High Court judge who wrote the judgment only had the benefit of listening to the evidence of the defence as all the other evidence had been led before her predecessors.

Submissions on behalf of the Attorney General: -

26. In his submissions to this Court, the learned Senior State Counsel (SSC) conceded that there was a clear misdirection in the judgment as to the applicable law when the learned High Court judge shifted the burden of proving the alibi to the appellants. He accepted that the procedure adopted in leading section 27 evidence was wrong. Commenting on the consideration of the evidence of bad character in the judgment, it was his view that what is necessary to consider is that whether it had caused any prejudice to the relevant appellant.
27. However, it was his contention that although the defence has taken up the position that all the defendants pleaded the defence of alibi at the trial, in fact, only the plea of the 1st appellant can be considered a valid plea of an alibi. Pointing to the evidence and the dock statements of the appellants themselves, it was his argument that all the other appellants admittedly had been in the vicinity of the incident and somewhat connected to it. It was his view that their denial of any involvement in the incident where the deceased suffered his injuries, would not amount to a plea of alibi.
28. It was also his argument that even though the learned High Court judge had not followed the conventional approach in analyzing the evidence of the prosecution, the prosecution evidence, in fact had been analyzed by the learned High Court judge while summarizing the evidence, contrary to the argument that the prosecution evidence had not been analyzed. He went on to point out several instances in the judgment to support his contention.

29. The learned SSC admitted that PW-03 has only identified the 1st and the 3rd appellants who were present and the deceased 2nd accused, and the 4th appellant who was absconding at the time, as the persons known to him in his evidence. PW-03 was a person who returned to the country few months before, after a long spell overseas. It was agreed by the learned SSC that his identification of the other accused would amount to a dock identification in the absence of an identification parade. However, it was also his argument that the cross examination of the witness by the defence has established the identities of the accused and the evidence of the other witnesses have sufficiently established the identity.

30. Commenting on the argument that the prosecution has failed to lead relevant evidence before leading in evidence the depositions of PW-01 and PW-02, it was his position that the prosecution had duly satisfied the Court in that regard. He brought to the notice of the Court the relevant evidence led before the High Court.

31. Making legal submissions as to why the Court should allow the judgment to stand despite the admitted weakness of the judgment, it was his contention that the judgment should stand against the 1st, 3rd, and the 4th appellants, and against all the others.

32. Relying on the proviso of Article 138 of the Constitution of the Republic where it states:

> **"That no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

It was his view that the misdirection as to the law and the facts by the learned High Court judge had not prejudiced the rights of the above-mentioned appellants or occasioned a failure of justice, in view of the proven facts against them at the trial.

33. He cited the judgment in the case of **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280** and several other judgments in support of his contention.
34. The learned SSC also agreed that this is not a fit and proper case, where sending the case back to the original court for a retrial be considered, given the fact that this was an incident happened more than twenty years ago and as all the parties have gone through enough.

Reply submissions: -

35. In reply to the submissions of the learned SSC, it was the contention of the learned counsel for the appellants that the proviso to Article 138 of the Constitution can be considered applicable only in a situation where there is a proper judgment. Elaborating further, it was contended that the learned trial judge had failed to consider and analyze the evidence of the prosecution *inter say* and *per say* and the contradictions and the omissions pointed out. It was argued that the proviso can be considered in a situation where there was a fair trial, whereas, there had been no fair trial in this action. The learned counsel brought to the notice of the Court that there was not only misdirection as to the law, but also misperception of evidence. It was also contended that the appellate Courts should not be a forum to rewrite judgments, which would amount to playing the role of a Court of first instance.

Comments on finger print reports: -

36. As the practice of calling for the finger print reports of an accused person and filing of record before an accused is found guilty, which is a common practice in our High Courts was also given consideration during the arguments, I would like to set the record straight as to the relevant provisions and the law for the benefit of the judges of the High Courts and Magistrates.

37. The relevant section 195 (e) of the Code of Criminal Procedure Act No 15 of 1979 which provides for the calling of the finger prints reports reads as follows:

> **195**. Upon the indictment being received in the High Court, the judge of the High Court presiding in the sessions in the High Court holden in the judicial zone where at the trial is to be held shall:
>
> …
>
> (e) Caused the accused to be finger-printed and forward the prints to the Registrar of Finger Prints for examination and ***report to the prosecuting State Counsel.*** (The emphasis is mine)…

38. The plain reading of the section is, in itself very much clear which needs no further clarification. Therefore, it is expected that it is the prosecuting State Counsel who should be in possession of the finger print report and not the case record for obvious reasons.
39. It is a basic principle of law that every accused person is presumed innocent until proven guilty. As such, a trial judge's mind should not be allowed to be tainted either way by having a finger print report of an accused person in the case record before a person is found guilty or not guilty for that matter.
40. Therefore, it is the considered view of this Court that every High Court should be mindful to direct the Registrar of Finger Prints to furnish his report to the prosecuting Sate Counsel for his reference and not to the Registrar of the High Court as per the current practice. It is the duty of the prosecuting State Counsel of the High Court to bring to the notice of the presiding High Court judge of any previous convictions of an accused person when it is considered at the appropriate stage for the purposes of sentencing.

Consideration of Grounds of Appeal: -

41. Admittedly, the learned High Court judge has clearly misdirected herself as to the applicable law when it was stated that the appellants have failed to prove their alibi by calling sufficient evidence to prove the same.
42. In the case of **Banda and Others Vs. The Attorney General (1999) 3 SLR 168**, it was held:

> There is no burden whatsoever on an accused who puts forward a plea of alibi and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence.

43. The learned SSC relied on the judgment in the case of **Jayatissaa Vs. The Hon. Attorney General (2010) 1 SLR 279** to contend that even if a proper evaluation was carried out by the trial judge, she could have rejected the defence of alibi and still convicted the appellants. Giving the reasons at length by making use of the evidence of the defence, it was his argument that the mentioned misdirection by the learned trial judge has not caused prejudice to the appellants.
44. However, I am not in a position to agree with the submission of the learned SSC, as the learned High Court judge has failed to consider the prosecution evidence to come to a finding that whether the prosecution evidence establish the presence of the appellants at the crime scene in contrary to the plea of alibi. I find that the learned High Court judge has evaluated the defence evidence against each other in order to reject the alibi rather than considering the evidence of the prosecution in relation to the plea of alibi. I am of the view that the conclusions reached by their Lordships of the Supreme Court in **Jayatissa Vs. Hon. Attorney General (Supra)** have been reached based on the facts and the evaluation of the prosecution evidence by the learned trial judge in that case. Therefore, I am of the view that substantial prejudice has

been caused to the appellants due the failure to analyze the evidence as to the plea of alibi in its correct perspective in the instant action.

45. Under the provisions of section 27 of the Evidence Ordinance, when any fact deposed to as discovered in consequence to information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered may be proved against that person.

46. According to the Evidence led in this action it was OIC Roshan Perera, PW-08 who has recovered the production marked P-03 based on the statement of the 1st appellant. The relevant extract of the statement has been marked 'Y' at the trial. However, the said OIC has not given evidence, but it was PW-12 IP Priyantha who has given evidence and marked the relevant extract. He was not the person who recorded the statement of the suspect and has not seen the recovery, but has only driven the vehicle of the OIC. It was his evidence that the then OIC is now domiciled in Canada.

47. As agreed by the learned SSC, this was not the proper procedure if the prosecution intended to make use of the section 27 statement as evidence against the 1st appellant. The prosecution should have taken steps under section 33 of the Evidence Ordinance before seeking the permission of Court to admit the said statement as evidence, which has not happened in this action.

48. I am of the view that using of the statement as evidence against the 1st appellant by the learned High Court judge was a clear misdirection of law which has caused prejudice to the 1st appellant and to other appellants in general.

49. When it comes to an offence committed of being a member of an unlawful assembly (Section 146 of the Penal Code), and with common intention (Section 32 of the Penal Code) it clearly appears that the learned High Court judge has discussed the relevant law in the judgment. However, I find that discussing the law in itself is not sufficient in a judgment but it is the duty of a trial judge to consider the evidence in that regard. I find that the learned

High Court judge has considered the evidence taken as a whole with regard to the above offences in finding the appellants guilty on that basis.

50. Although the learned High Court judge had decided that the evidence of bad character would not be considered in the judgment, it appears that in fact, such evidence had been considered in relation to the 3rd appellant.

51. In the case of **P.M.Peter Singho Vs. M.B.Werapitiya 55 NLR 155** it was held:

> *"Where a trial judge has permitted himself, through an improper appreciation of the law, to allow evidence to be led which is of such a character as to prejudice the chances of a fair trial on the real issues in the case, the improper reception of the evidence is fatal in the conviction of the accused, although the accused has been tried not by lay jurors but by a Magistrate trained in the law."*

52. I am in no position to agree with the contention that the prosecution failed to satisfy the Court that the prosecution witnesses 02 and 03 cannot be found to give evidence before the High Court. In fact, the prosecution has led sufficient evidence in that regard and it was only after satisfying that the said witnesses cannot be called to testify before the High Court, their depositions made at the Non-Summary Inquiry has been allowed to be led under the provisions of section 33 of the Evidence Ordinance. However, the misdirection is the learned High Court judge's failure to consider the inherent weakness and infirmities of accepting such evidence before deciding to act upon such evidence.

53. It was brought to the notice of the Court that the learned High Court judge in the judgment has decided to disregard the contradictions marked and omissions brought to the notice of the Court on the basis that there was no order on record as to whether the Court allowed the marking of the Contradictions and the omissions. However, at the same time, the learned High Court judge has considered as relevant the omissions brought to the notice of the Court when the appellants gave evidence in their defence. I find

that the failure of the learned High Court judge to consider whether the marked contradictions and omissions have any relevancy to the evidence of the prosecution witnesses amounts to a denial of a fair trial. The learned trial judge should have considered them in the same way as it was done with regard to the appellants' evidence.

54. The relevant section 283 of the Code of Criminal Procedure Act No 15 of 1979 which deals with the judgments of Courts other than the Supreme Court and the Court of Appeal reads as follows;

> **283. The following provisions shall apply to the judgments of courts other than the Supreme Court or Court of Appeal: -**
>
> > **(1) The judgment shall be written by the judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points of determination, the decision thereon, and the reasons for the decision.**
> >
> > **(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.**
> >
> > **(3) .....**

55. In the judgment under consideration, it can be clearly observed that the learned High Court judge has failed to analyze the evidence led by the prosecution in order to prove its case and come to a firm finding that the prosecution has established a strong prima facie proof against the appellants before considering whether the appellants have created a reasonable doubt on the evidence or at least, has offered a reasonable explanation on the incriminating evidence against them.

56. In order to do so, the trial judge needs to consider the evidence of the prosecution *inter say* and *per say* by analyzing the prosecution evidence against each other and in relation to the matters elicited in the process of cross examination of the witnesses. The probability of the evidence and the credibility of the witnesses in relation to the proven facts needs to be considered too. When it comes to the present action, where the PW-01 and PW-03 were at the time of the attack, and whether it was possible for them to see the attack on the deceased and what was happening around them, needs to be carefully considered before placing any reliance on their evidence, which has not happened.

57. The investigating officer's failure to observe the alleged damages caused to the house as mentioned by the witnesses as well as the contradictions with regard to the 9th appellants role in the evidence of the PW-03 and the depositions of PW-01 and 02 has not drawn the attention of the learned High Court Judge in the judgment. Discrepancies with regard to the deposition of PW-02 and the evidence of PW-03 has not been considered.

58. In the case of **Karunadasa Vs. Officer-in-Charge, Motor Traffic Division, Police Station Nittambuwa (1887) 1 SLR 155** it was stated by Perera, J. that;

> *"It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defence is, before the Court is entitled to convict on it. It is necessary to borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed."*

59. The issue in the appeal under consideration is not that it was a weak case for the prosecution, but the learned trial judge's failure to consider the

prosecution evidence in its correct perspective and the consideration of the defence evidence in order to convict the appellants.

60. It was the contention of the learned SSC that although the learned High Court judge has not followed the conventional approach of writing a judgment, in fact, the learned High Court judge has analyzed the evidence of the prosecution witnesses while their evidence was summarized. However, I am in no position to agree. It appears that while summarizing the prosecution evidence the learned High Court judge has considered the version of the defence in comparison to the prosecution evidence in order to consider whether the defence evidence can be believed. This approach of the learned High Court judge can in no way considered correct when it comes to the requirement of analyzing of the evidence of the prosecution.

61. In the case of **Chandrasena and others V. Munaweera (1998) 3 S.L.R. 94 at 96,** Jayasuriya, J. with reference to several other decided cases of our Superior Courts stated as follows;

> *"In the decision in Thusaiya Vs. Pathaimany 15 CLW 119 by Nihill J- According to the presently applicable section 283(1) of the Code of Criminal Procedure Act No 15 of 1979. The judgment shall contain the point or points for determination, the decision thereon, and the reasons for the decision. In Verupandian Vs. Sollamuttu 1901, 1 Brown's Report 384 the Supreme Court stressed that the object of the statutory provision is to enable the Supreme Court to ascertain whether the finding is correct or not. The weight of authority is to the effect that the failure to observe the imperative provisions of the section is a fatal irregularity and even in a simple case that the provisions of the statute must be complied with."*

62. In the case of **M. Ibrahim Vs. Inspector of Police Ratnapura 59 NLR 235**, it was stated thus;

> *"The learned Magistrate's omission to state the reasons for his decision has deprived the appellant of his fundamental right to have his conviction*

reviewed by this Court and has thus occasioned a failure of justice. Without such reasons, it is impossible for this Court to judge whether the finding is right or wrong. I therefore, set aside the conviction and sentence and order a new trial."

63. For the aforementioned reasons, I am of the view that this is not a fit and proper case where the proviso of Article 138 of the Constitution can be applied in order to affirm the findings of the learned High Court judge. I find that the learned High Court judge's failure to give due consideration to the evidence in accordance with the accepted principles of law would amount to a failure of justice and a denial of a fair trial. Therefore, I have no option but to allow the appeal of the appellants.
64. The only consideration that can be given at this juncture is whether this is a fit and proper case to send for a retrial.

65. In the case of **Nandana Vs. Attorney General (2008) 1 SLR 51,** it was held:

A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration since the date of the appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered.

66. The learned SSC at the very commencement of the hearing of the appeal rightly admitted that this is not a case where retrial should be considered given the fact that this was an incident that took place in the year 2001. Given the time period and other attendant circumstances as established during the arguments of this appeal, I hold that this is not a fit and proper case to order a retrial.

67. Therefore, allowing the appeals as the judgment cannot be allowed to stand, I set aside the conviction and the sentence of the learned High Court judge. All the appellants are acquitted of the charges preferred against them.

Appeals allowed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P.C./A.)

I agree.

President of the Court of Appeal