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:
HCC-0490-17
HCC-0246-0249-17

High Court of Kegalle
Case No:
HC-1660-2001

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. *Menik Pedige Sunil Wickramasinghe*
2. *Ranhawadige Jayaweera alias Pollekaththe Jayaweera*
3. *Karunage Nimal Ranatunga alias Samantha*
4. *Jayasinghage Chandrarathna Gunasiri*
5. *Ranhawadige Jayatunga alias Seetha*

ACCUSED

AND NOW BETWEEN

Menik Pedige Sunil Wickramasinghe

(1st Accused-Appellant)

Ranhawadige Jayaweera alias Pollekaththe Jayaweera

(2nd Accused Appellant)

Karunage Nimal Ranatunga alias Samantha

(3rd Accused Appellant)

Jayasinghage Chandrarathna Gunasiri

(4th Accused Appellant)

Ranhawadige Jayatunga alias Seetha

(5th Accused Appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Duminda De Alwis, for the 1st Accused-Appellant

: Anil Silva, P.C. for the 2nd Accused-Appellant

: Sheron Wanigasooriya for the 3rd and 5th Accused-Appellants

: Nayantha Wijesundera for the 4th Accused-Appellant

: Madhawa Tennakoon, DSG for the Respondent.

Argued on : 07-02-2022

Written Submissions : 06-07-2020 (By the 1st Accused- Appellant)

: 11-05-2018 (By the 2nd Accused-Appellant)

: 16-05-2018 and 28-08-2018 (By the 3rd and 5th Accused-Appellants)

: 28-08-2018 (By the 4th Accused-Appellant)

: 17-03-2021 (By the Respondent)

Decided on : 24-03-2022

Sampath B Abayakoon, J.

The five accused appellants (hereinafter sometimes referred to as the appellants) were indicted before the High Court of Kegalle on the following counts.

(1) For being members of an unlawful assembly along with one Marasinghage Gunaratna, who is dead, with the common object of causing injuries to Alfred Sirimal Bandara on 29th September 1995 an offence punishable in terms of section 140 of the Penal Code.

(2) At the same time and at the same transaction for causing the death of the above mentioned Bandara, an offence punishable in terms of section 296 read with section 146 of the Penal Code.

(3) At the same time and at the same transaction for causing the death of the above mentioned Bandara, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

The 1st accused appellant has absconded the Court throughout the trial, and the trial has been proceeded against him in his absentia after taking due steps under the provisions of section 241 of the Code of Criminal Procedure Act.

After trial without a jury, all the appellants were found guilty as charged and were sentenced to six months rigorous imprisonment and a fine of rupees 5000/- on count one, and the death sentence on counts two and three.

Subsequently, when the 1st accused appellant was arrested and produced on the open warrant issued against him, he was given an opportunity under section 241(3) of the Code of Criminal Procedure Act, enabling him to establish that his absence from the Court was due to *bona fide* reasons. After a due inquiry in that regard, the learned High Court Judge rejected his reasoning by his order dated 10-05-2019.

As all the appeals are appeals challenging the judgment dated 14-09-2017 by the learned High Court Judge of Kegalle, the parties agreed that the appeal should be considered together.

Facts in brief: -

The deceased Sirimal Bandara was the brother of Swarnalatha (PW-02) and was at her home on the day of the incident namely, 29-09-1995. He has come there to help her with the ongoing repairs to the roof of her house. On the day of the incident at around 7.30-8.00 p.m. in the night, her brother had been rolling some electrical cables along with her son Bandara. The roof of the house had been removed at that time for the ongoing repairs and

there was no electricity. The house had three lamps lit at that time, one in the living room, another in the kitchen and the remaining one in a room.

While the members of the household were engaged in their work, someone had knocked the main door. When questioned, they have stated "it's us", and upon the opening of the door by PW-02, persons she has identified as Sunil (the 1st appellant who was absconding at the time), Jayaweera, the 2nd appellant and Seetha, the 5th appellant has come into the house. She has also identified the 4th appellant Gunasiri and 3rd appellant Samantha as the other persons who were present and came inside the house. As all of them were well known to her, she has had no difficulty in identifying them. It was her evidence that Jayaweera had a sword in his hand, and the 5th appellant Seetha had a sharp pointed knife and the 3rd appellant took the ketti knife which was in the kitchen. According to her, Gunasiri the 4th appellant had a curved knife and others had ropes with them. Apart from the above-mentioned persons there had been some others also present outside of the house.

When they came into the house, the deceased had intervened and informed them that if they have any issues, come in the morning and resolve them. At that point, those who came in have pushed and dragged the deceased to the nearby room and assaulted him and the 5th appellant has assaulted the PW-02 as well. After the initial assault, the deceased had been dragged out of the room and to the front garden of the house about 16 to 20 feet away from the main front door, and had closed the front door. Thereafter, looking outside through an opening in the upper part of the window she has witnessed all the appellants attacking the deceased by cutting and stabbing him, who was by then fallen near a clove tree. She has specially mentioned the appellant Seetha as the person who climbed onto the stomach of the deceased and stabbed him.

After they left the scene, she has come out of the house and had seen her brother dead. It has been her other son who has informed the police of the incident.

It has been her evidence that after the appellants came into the house, they extinguished two lamps that were lit at that time. She has explained that as her house roof was removed at that time for repairs, through moon light and the remaining lamp she was able to see what happened inside the house as well as outside.

She has been the only eyewitness who has given evidence. PW-06 was the District Medical Officer (DMO) who has conducted the postmortem (P-06 postmortem report) on the deceased. He has conducted the postmortem at the scene of the crime on 30-09-1995. When he arrived at the scene, the body of the deceased had been in a face down position. He has observed 48 cut and stab wounds on the body. Apart from the injuries he has observed on the face and the hands, the majority of the injuries had been on the back side of the deceased. Out of the 48 injuries, 30 had been cut injuries, and the stab injuries had been on the back side of the body. He has opined that these injuries have been caused within a short span of time and the death had been due to the excessive bleeding from the injuries within a short span of time.

At the conclusion of the prosecution case and when the appellants were called for their defence, they have chosen only to make dock statements. All of them have denied any involvement in the crime and has claimed that due to an animosity they have been implicated in the crime.

At the hearing of the appeal, the learned Counsel for the appellants urged the following common ground of appeal.

(1) The conviction was bad in law in view of the fact that there is a doubt as to the identification.

Apart from the above, the rest of the grounds of appeal were as follows.

On behalf of the 1st appellant;

(2) The learned High Court Judge wrongly convicted the appellants on all the counts against them, although the 3rd count should have been considered as an alternative count.

On behalf of the 2nd appellant;

(3) Section 27 statement should not have been allowed to be led in evidence and it has caused prejudice to the appellant.

(4) The learned trial judge has failed to evaluate the part played by the 2nd appellant in the judgment, hence, no basis to sustain a conviction on the basis of section 32 or 146 of the Penal Code.

On behalf of the 3rd and the 5th appellants;

(5) The credibility of the main witness PW-02 has not been considered in the judgment.

On behalf of the 4th appellant;

(6) There was no evidence as to the common object for murder, nor was there any evidence as to the participatory presence of the 4th appellant.

(7) PW-02 did not witness the murder, as such she is an unreliable witness.

Consideration of the Grounds of Appeal

1st Ground of Appeal: -

The 5th and the 7th grounds of appeal will also be considered together with the 1st ground of appeal as they are also interrelated to the 1st ground of appeal raised based on the credibility of the witness PW-02 who was the only eye witness gave evidence at the trial.

It was the strenuous argument of the learned Counsel that there was no possibility for the PW-02 to identify the persons who came into the house and what was happening outside. It was contended that according to the evidence of PW-02, the persons who came into the house has extinguished two lamps that were lit and her claim that she could observe what was happening because of the moonlight was highly unreliable to depend on. It was contended further, her evidence that once her brother was taken out of

the house, she looked outside through an opening of the window louver was also highly unreliable as she has failed to adequately explain how she was able to see in that manner, given the height of the window louver from the floor of the house. It was the position that even if she was able to look outside of the house, she could not have seen what was happening as stated by her, since it is not possible to believe that there was sufficient light. Her evidence that she saw the 5th appellant stabbing the deceased by climbing onto his stomach also cannot be accepted in view of the medical evidence, as all the stab wounds have been on the back side of the deceased.

It is correct to argue that the positive identity of the persons who came and attacked the deceased is a must to sustain a conviction against the appellants given the facts and the circumstances of the case under appeal.

It was held in the case of **Regina V. Turnbull and Another (1997) QB 224,** that in a case of this nature, where the identity is relevant;

> *"That the judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of those circumstances may include:*
>
> 1. *How long did the witness have the accused under observation?*
> 2. *At what light*
> 3. *At what distance*
> 4. *Was the observation impeded in any way*
> 5. *Have the witness ever seen the accused before*
> 6. *How often and any special reason for remembering the accused, etc."*

I find that in the judgment, the learned High Court Judge has well considered whether the evidence of the PW-02 that she was able to identify the persons who came into the house and whether she was in a position to

see what was happening outside of it, given the light conditions available at the time of the incident.

It is evident that the persons who came into the house were well known to her as a long-standing resident of the village, and they being her neighbours and fellow villages. She has been very clear in her evidence that when they initially came in, the house had three lamps lit and only after they came inside the house two lamps were extinguished by the persons who came. It would have been no difficulty for the PW-02 to identify the appellants the moment they came in as they were known persons. It was her evidence that apart from the lamps that were lit, as part of the roof of the house had been removed at that time for repairs, sufficient moon light was also available which enabled her to observe what was happening even after two lamps were extinguished. I find that as a person who was well familiar with the house and its surroundings and as a person well adapted to live with the help of the light provided by lamps during the night, PW-02 was not lying.

As considered rightly by the learned High Court Judge, if there was no light at all as claimed by the appellants there would have been no possibility for those who came inside the house to find the person who was in the house and assault him when he attempted to intervene and push him to a room. And also, to drag him to the outside of the house after assaulting him further.

It was the evidence of PW-02 that after her brother was dragged out of the house by the appellants and closed the main door, she saw what was happening by looking outside through a window louver. Under cross examination, she has explained that it was about 8 feet from the floor and that she may have climbed onto a chair or a stool to look outside.

I find that in her evidence PW-02 has not claimed that it was due to the full moon she was able to see what was happening outside. What she has stated was that the available moon light was sufficient for her to see what was happening. Under cross examination, she has stated that she could see a torch light too, and it was switched off while the attack was taking place.

The argument that as to how PW-02 was able to reach the window louver which was beyond her reach were sketchy and unreliable has no basis. The witness under cross examination, when she was confronted with this position, has correctly stated that she is not in a position to remember all the details after 21 years.

It is well settled law that one cannot be expected to remember all the details of an incident some long years after the event. What is important is that whether the witness was speaking the truth about what happened and whether the evidence was reliable enough as to the involvement of an accused person or persons with regard to the crime.

At this stage it is appropriate to refer to the Indian case of **Bhoginbhai Hitijibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** where it was held:

> *1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen.*
>
> *2) Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

It is very much believable that PW-02 could see what was happening outside just 15-20 feet away, with the available light from where she was. It was the contention that she was lying when she said that the 5th appellant climbed onto the stomach of the deceased and stabbed him as there were no stab wounds on the frontal area of the deceased according to the DMO's evidence. It is correct that there had been no stab wounds observed in the frontal area of the body of the deceased. All the stab wounds have been in the back of the body. That does not mean that PW-02 did not see what was happening outside of her house. It would be the any reasonably prudent person's instinct to find out in any manner possible when a loved one is dragged out of a house after being assaulted.

Although it was the contention that PW-02 could not have reached the window louver which was about 8 feet from the floor, the evidence of PW-09 who was the police officer investigated the crime scene and observed the scene of the crime, that it was only about 6 feet from the floor. This goes on to establish that the PW-02 was telling the truth when she said that she was able to look outside, but she is unable to remember how she reached the window louver.

Her evidence is trustworthy and credible that she identified the appellants when they came into the house and that they are the persons who dragged the deceased out. I find that her evidence is credible that she saw what was happening outside, and that it was the same persons who dragged her brother out, who inflicted the fatal injuries to him. Given the fact that the deceased had 48 cut and stab wounds on his body, it can be safely presumed that it was not the work of a single individual, but by several as the medical evidence has clearly established.

For the reasons adduced as above, I find no merit in the considered grounds of appeal.

As the 2nd ground of appeal is a ground that needs to be considered last, I would now proceed to consider the rest of the grounds of appeal.

3rd Ground of Appeal: -

The 3rd ground of appeal raised by the 2nd appellant was based on the argument that the recovery made under the section 27 statement by the 2nd appellant to the police was wrongly led and it has resulted in a prejudice to him.

PW-08 who has recovered a torch based on the statement made by the 2nd appellant to the police after his arrest has been marked through PW-07 as the relevant PW-08 was dead. The fact that he was dead has not been disputed at any stage of the trial. PW-07 has marked the extract of the relevant portion of the statement made to PW-08 by the 2nd appellant under the provisions of the Evidence Ordinance, which is legally permissible.

Although the torch had been marked as a production, it has had no impact on the evidence as the only eyewitness has clearly stated that she did not see who carried a torch. It was her evidence that she only saw a torch light outside of the house while her brother was cut and stabbed by the appellants. The learned High Court Judge has clearly mentioned that in his judgment and has not considered the evidence relating to the discovery of a torch as relevant.

I am of the view that this has not in any way prejudiced the substantial rights of any of the appellants for that matter, hence, no basis for the contention.

4th and the 6th Grounds of Appeal: -

As the above grounds of appeal are grounds based on the proof of common object under section 146 and the common intention under section 32 of the Penal Code, the said grounds will be considered together.

It is settled law that once the common object of an unlawful assembly is established, every member of the unlawful assembly is vicariously liable for the actions of the members of that unlawful assembly.

In the case of **Kulanthunga V. Mudalyhami 42 NLR 331**, it was held that the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concerned, it has to prove that he was a member of the assembly which he intentionally joined and that he knew the common object of the assembly.

Dr. Gour in his book 'Penal Law of India' discusses the law in respect of unlawful assembly as follows; (Volume II page 1296 11th edition):

> *"All persons who convened or who take part in proceedings of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or by curiosity alone without taking any part in the proceedings are not guilty of the offence, even though those persons possess the power of stopping the assembly and failed to exercise it. Mere presence in an assembly does not make*

such a person a member of an unlawful assembly, unless it is shown that he has done something or omitted to do something which would make him a member of an unlawful assembly"

On the other hand, in order to prove common intention under section 32 of the Penal Code, the proof of every individual's part in the crime needs to be established.

The evidence placed before the High Court has clearly established that the 2nd appellant was a member of the unlawful assembly that committed the murder of the deceased from the very outset. PW-02 has clearly identified him as one of the persons who entered the house, assaulted the deceased and dragged him away. I do not find a basis to the argument that the learned High Court Judge has failed to consider the part played by him since the Learned High Court Judge has clearly considered what he was doing and his part in the unlawful assembly. When it comes to the fourth accused appellant, he was also a member of the group that came into the house and attacked the deceased and he was one of the persons who pushed the deceased into a room and later dragged him outside of the house. It is the evidence that he also carried with him a curved knife at the time of the incident. This amply establishes that the second and fourth appellants were also an integral part of the unlawful assembly formed with the common object of attacking the deceased.

In the case of **The Queen V N.K.A. Appuhamy 62 NLR, 484** it was held that:

(i) That a common object in an unlawful assembly is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves.

(ii) That a person can become a member of an unlawful assembly not only by the doing of a criminal act but also by lending the weight of his presence and associating with a group of persons who are acting in a criminal fashion.

(iii) That the common objects of an unlawful assembly may come in succession and need not necessarily exist together at the beginning."

However, when it is coming to an offence committed with the common intention (Section 32 of the Penal Code) it is the duty of the trial Judge to see the part played by each of the accused in committing the offence. Vicarious liability is not applicable for an offence committed with common intention.

In the case of **King Vs. Assappu 50 NLR 324** it was held that:

In a case where the question of common intention arises the Jury must be directed that—

(i) The case of each accused must be considered separately.
(ii) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(iii) Common intention must not be confused with the same or similar intention entertained independently of each other.
(iv) There must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention.
(v) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

In the judgement it clearly appears that the Learned High Court Judge has well considered the actions of each of the appellants to come to his findings in determining that the offence committed by them also falls under Section 32 of the Penal Code.

For the reasons stated above, I find no merit in the considered grounds of appeal.

2nd Ground of Appeal: -

In the indictment against the appellants, apart from the first two counts, which are counts based on unlawful assembly, the third count was based on the premise that the appellants committed the murder of the deceased with a common intention, punishable in terms of Section 296 read with Section 32 of the Penal Code.

I am in agreement with the contention of the Learned Counsel for the first appellant that although it has not been mentioned in the indictment, the third count should have been considered as an alternative count to the first two counts. Although the learned High Court Judge has found sufficient evidence to prove beyond reasonable doubt all three counts preferred against the appellants, I am of the view that the learned High Court Judge should have considered the third count as an alternative to count two, which was the count based on unlawful assembly punishable in terms of 296 read with Section 146 of the Penal Code.

Hence, it is my view that as there was sufficient evidence proven beyond reasonable doubt to convict the appellants on the first and the second count, there was no necessity for the learned High Court Judge to convict the appellants on the third count after finding them guilty on the first and the second count preferred against them.

Even if it was the determination that the third count was also proved beyond reasonable doubt, there was no necessity to impose a punishment on the third count as it may amount to punishing the appellants twice over for the same offence of murder.

However, it needs to be noted that the Learned High Court Judge was mindful of this fact since he has imposed the death sentence on the basis that the appellants were found guilty for the second and third counts and not on the basis of that they are two separate counts.

Therefore, I set aside the conviction of the accused appellants on the third count which should have been considered as an alternate count to the

second count preferred against them, and since they have been duly convicted on the first and the second count.

Subject to the above variation to the conviction and the sentence, the appeal is dismissed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal