IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

In the matter of an appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Appeal No: CA/HCC/67-69/20
HC Ratnapura : HC/71/2016

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Jayakodi Arachchilage Aruna Nilantha Jayasinghe
2. Mannakkuwaduge Wajira Darshana de Silva
3. Halkadaliya Lekamlage Premlal Jayasekara alias Choka Malli
4. Palawattage Pathum Dananjaya alias Pala
5. Udahadasilige Asanka Namal alias Sajan too
6. Ukkandage Nilanka Pradeep
7. Uoorupalawi Gamathi Ralalage Ajith Malawi Goonaratne alias Amila

Accused

And Now

1. Jayakodi Arachchilage Aruna Nilantha Jayasinghe
2. Manikwaduge Wajira Darshana de Silva
3. Halkadaliya Lekamlage Premlal Jayasekara alias Choka Malli

Accused-Appellants

Vs

Hon. The Attorney General,
Attorney Generals' Department,
Colombo 12.

Complainant-Respondent

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

&

R. Gurusinghe J.

Counsel: Anuja Premaratna PC with Iromie Jayarathna AAL, Naushalya Rajapaksha AAL, Imasha Senadheera AAL and Nayana Dissanayaka AAL for the 01st accused-appellant

U.R. de Silva PC with Harshana Wijenayaka AAL, Kasun Liyanage AAL and Savithri Fernando AAL for the 02nd accused-appellant

Nalin Ladduwahetty PC with Niran Ankitel AAL, Hafeel Faris AAL, Amila Palliyage AAL, Vajira Ranasinghe AAL, Thusitha Ranasinghe AAL, Buddhika Chandrasekara AAL, Shalika Gunawardana AAL, Kavithri Ubeysekara AAL and Yasas Hewapathirana AAL for the 03rd accused-appellant

Saliya Pieris PC with Amila Egodamahawatta AAL for the aggrieved party

Dilan Rathnayaka SDSG with Shaminda Wickrema SC for the Complainant-Respondent

Written Submissions: By the 01st accused-appellant on 22.03.2021 and 25.02.2022

By the 02nd accused-appellant on 08.03.2021

By the 03rd accused-appellant on 08.04.2021 and 24.02.2022

By the aggrieved party on 26.10.2021

By the complainant-respondent 14.06.2021

Argued on : 08.11.2021, 25.11.2011, 26.11.2021 and 11.01.2022

Decided on : 31.03.2022

N. Bandula Karunarathna J.

The 1st, 2nd and 3rd accused-appellants along with the 4th to 7th accused persons were indicted in the High Court of Rathnapura under 9 charges contained in the indictment dated 22.07.2016 by the Attorney General, in respect of the commission of offences punishable under sections 140,296, 300 and 426 of the Penal Code.

The indictment is as follows;

(i) On or around 05.01.2015 at Kahawaththa within the jurisdiction of this Court, the accused together with persons, unknown to the prosecution formed an unlawful assembly whose common object was to cause mischief to the decorations of the United National Party in

support of the Common Candidate, Maithripala Sirisena and to cause injuries, punishable under section 140 of the Penal Code.

(ii) On the same date and place, and in the course of the same transaction, one or few of the said unlawful assembly with other persons, unknown to the prosecution did cause mischief to propaganda material put up at Kahawaththa Town in support of the Common Candidate, Maithripala Sirisena and thereby committed an offence punishable under section 426 read with section 146 of the Penal Code.

(iii) On the same date and place, and in the course of the same transaction, one or few of the said unlawful assembly with other persons, unknown to the prosecution, in the prosecution of the common object did cause the death of Dodamgodage Susil Perera alias Shantha Dodamgoda by shooting and thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(iv) On the same date and place, and in the course of the same transaction, one or few of the said unlawful assembly with other persons, unknown to the prosecution, in the prosecution of the common object did attempt to cause the death of Kaththiriwaththa Weerasinghege Karunadasa Weerasinghe by shooting and thereby committed an offence punishable under section 300 read with section 146 of the Penal Code.

(v) On the same date and place, and in the course of the same transaction, one or few of the said unlawful assembly with other persons, unknown to the prosecution, in the prosecution of the common object did attempt to cause the death of Mohamed Hussain Ilshan by shooting and thereby committed an offence punishable under section 300 read with section 146 of the Penal Code.

(vi) On the same date and place, and in the course of the same transaction, the accused with other persons, unknown to the prosecution, did cause the death of Dodamgodage Susil Perera alias Shantha Dodamgoda by shooting and thereby committed an offence punishable under section 296 read with section 32 of the Penal Code.

(vii) On the same date and place, and in the course of the same transaction, the accused with other persons, unknown to the prosecution, did attempt to cause the death of Kaththiriwaththa Weerasinghege Karunadasa Weerasinghe by shooting and thereby committed an offence punishable under section 300 read with section 32 of the Penal Code.

(viii) On the same date and place, and in the course of the same transaction, the accused with other persons, unknown to the prosecution, did attempt to cause the death of Mohamed Hussain Ilshan by shooting and thereby committed an offence punishable under section 300 read with section 32 of the Penal Code.

(ix) On the same date and place, and in the course of the same transaction, the accused with other persons, unknown to the prosecution did cause mischief to propaganda material put up at Kahawaththa Town in support of the Common Candidate Maithripala Sirisena and thereby committed an offence punishable under section 426 read with section 32 of the Penal Code.

The indictment was served on all 7 accused persons on 13.09.2016 and was read over to all the said accused persons on 07.11.2016. All the accused persons pleaded not guilty to all the counts against each of them. The case was then fixed for trial and all the accused persons opted to be tried by the Judge of the High Court without a jury. The prosecution led evidence of 23 witnesses and ඵ්. 01 to ඵ්. 37 documents and exhibits were marked. Upon the conclusion of the case of the prosecution, applications under section 200(1) of the Code of Criminal Procedure, Act No. 15 of 1979 were made by all the accused except the 1st accused person, on 08.02.2019.

Delivering the order dated 26.02.2019, the learned High Court Judge acquitted the 4th to 7th accused persons. The defences of the 1st to 3rd accused-appellants were called accordingly. They made dock statements and two defence witnesses were called by the 3rd accused-appellant. Thereupon, the accused closed their respective cases.

Oral submissions were made by all parties, and thereafter the learned High Court Judge delivered the judgment on 31.07.2020. The learned trial Judge convicted the 1st, 2nd and 3rd accused-appellants for counts (i), (ii), (iii), (iv) and (v) of the indictment. The convicted accused-appellants were sentenced as follows;

1. Count 1 - Six months' rigorous imprisonment and a fine of Rs. 10,000/- each for the 1st, 2nd and 3rd accused persons; in default, 3 months' simple imprisonment.
2. Count 2 - 3 years' rigorous imprisonment and a fine of Rs. 10,000/- each for the 1st, 2nd and 3rd accused persons; in default, 3 months' simple imprisonment.
3. Count 3 - Death sentence for the 1st, 2nd and 3rd accused persons.
4. Count 4 - 20 years' rigorous imprisonment and a fine of Rs. 10,000/- each for the 1st, 2nd and 3rd accused persons; in default, 3 months' simple imprisonment.
5. Count 5 - 20 years' rigorous imprisonment and a fine of Rs. 10,000/- each for the 1st, 2nd and 3rd accused persons; in default, 3 months' simple imprisonment.

Court ordered Rs. 200,000/- to be paid as compensation by each 1st, 2nd and 3rd accused persons to the wife and the children of the deceased person Dodamgodage Susil Perera alias Shantha Dodamgoda and in default 24 months' simple imprisonment was imposed.

Court further ordered Rs. 100,000/- to be paid as compensation by each 1st, 2nd and 3rd accused persons to the injured person Kaththiriwaththa Weerasinghege Karunadasa Weerasinghe and in default 12 months' simple imprisonment was imposed.

Court further ordered Rs. 100,000/- to be paid as compensation by each 1st, 2nd and 3rd accused persons to the injured person Mohamed Hussain Ilshan and in default 12 months' simple imprisonment was imposed.

The 6th, 7th, 8th and 9th charges in the indictment were not considered in the judgment by the learned trial Judge since they were alternative charges under section 32 of the Penal Code.

This appeal has been brought before this Court by the 1st, 2nd and 3rd accused-appellants against the aforementioned convictions and sentences.

Grounds of the appeal of the 1st accused-appellant are as follows;

(i) The learned trial Judge has failed to consider the inbuilt discrepancies in the evidence of Hathalawatta and Bodaragama.

(ii) The learned trial Judge has failed to consider that Hathalawatta was an interested witness and his evidence, therefore, should have been considered and acted upon with caution.

(iii) Although PW 5 Karunadasa Weerasinghe has said that the 1st accused's vehicle was parked in the vicinity, the learned trial Judge has failed to consider the discrepancies of such evidence.

(iv) The learned trial Judge has failed to consider the ingredients required to be proved by the prosecution, to secure a conviction under charge 2 of the indictment.

(v) Although the learned trial Judge admits that the shooting had occurred at 1.38 am and on the 30th second of the morning of 5th of January, the learned trial Judge has failed to consider the evidence which establishes that the 1st and the 3rd accused were not together at the said time.

(vi) The learned trial Judge has failed to consider the inbuilt discrepancies and the improbability of the evidence of PW 58 PC 77667 Sumith.

(vii) The learned trial Judge has failed to consider the evidence of PW 58 in the light of the fact that he was an investigator and as such, an interested witness.

(viii) The learned trial Judge has failed to consider the ingredients as required to be proved by the prosecution in a charge under the principle of the common object.

(ix) The learned trial Judge has failed to consider and evaluate the vicarious liability that can be imputed on the 1st accused.

(x) The learned trial Judge has wrongly rejected the evidence of the defence.

(xi) The learned trial Judge has misdirected himself on the common object of the alleged unlawful assembly.

(xii) The learned trial Judge has failed to consider that charge 2 has not been proved against the 1st accused.

Grounds of the appeal of the 2nd accused-appellant are as follows;

(i) The learned trial Judge erred in law in imputing vicarious liability upon the 2nd accused-appellant under section 146 of the Penal Code.

(ii) The learned trial Judge has improperly rejected the defence of the 2nd accused-appellant.

Grounds of the appeal of the 3rd accused-appellant are as follows;

(i) The conviction of the learned High Court Judge dated 31.07.2020 is bad in law.

(ii) The prosecution had failed to prove the case beyond a reasonable doubt.

(iii) The learned High Court Judge failed to address his judicial mind to evaluate the evidence of prosecution witness applying the relevant tests.

(iv) The learned High Court Judge failed to consider the absence of a conclusive identity of productions listed by the prosecution which goes to the root of the case.

(v) The learned High Court Judge had failed to consider the contradictions *inter se* and *per se* of the prosecution witnesses.

(vi) The learned High Court Judge had failed to consider the main elements of the charge on the offence of unlawful assembly.

(vii) The learned High Court Judge had misdirected himself in fact and law in arriving at the guilt of the appellant.

(viii) The learned High Court Judge had failed to address his judicial mind to the absence of the authenticity of the CCTV productions required in terms of the law.

(ix) The learned High Court Judge failed to address his judicial mind to the principles of evidence in a criminal trial by using impermissible evidence against co-accused in arriving after the guilt of the appellant causing grave miscarriage of justice.

(x) The learned High Court Judge relied on suspicious circumstances to arrive after the guilt of the appellant.

(xi) The learned High Court Judge failed to consider the procedural irregularities of the investigation conducted by the prosecution leading to a grave miscarriage of justice.

(xii) judgement of the learned High Court Judge is not in compliance with Section 283 of the Code of Criminal Procedure.

(xiii) The learned High Court Judge had misdirected himself in law by shifting the burden of proof to the defence.

(xiv) The learned High Court Judge had misdirected himself in analysing the dock statement and the defence of the appellant.

(xv) The learned High Court Judge had acted on surmise and conjecture in arriving at the finding of guilt.

(xvi) The presumption contained in section 114 (f) must be applied against the prosecution and the failure of the learned High Court Judge to do so had caused a grave miscarriage of Justice.

(xvii) The appellant was not afforded a fair trial.

The narrative of the prosecution unfolds thus; the incident that led to the above-mentioned charges being framed against the accused persons, were said to have occurred in the early hours of 05.01.2015.

This was in the run-up for the Presidential Election which was held on 08.01.2015 wherein two main candidates contested the said election. Hon. Mahinda Rajapakse the incumbent President

contested from one party whilst Hon. Maithreepala Sirisena was contested as the common candidate who was supported by the United National Party.

All election campaigns were to end on 05.01.2015 and the members of the United National Party were preparing for the last day's campaigning with a campaign meeting to be held in the morning of the 05.01.2015, where candidate Maithreeepala Sirisena was due to address such meeting, which was to be held in Kahawaththa Town within the Rathnapura District.

The evidence reveals that the supporters of the United National Party were decorating the stage on which the politicians were due to address the political meeting. Hon. Thalatha Athukorale, Member of Parliament was the organizer for the United National Party for the Kahawaththa area in specific, and the Rathnapura District, in general, was said to have come near the stage that was being erected and decorated, to witness and ensure that the stage and the decorations were up to the requisite standard.

There had been another group who were said to have been supporting the opposing candidate Hon. Mahinda Rajapakse, who had vandalized and destroyed the decorations made on the road leading to the stage and an altercation broke out between these two groups. That was the group supporting the candidature of Hon. Mahinda Rajapakse and the group supporting the candidature of Hon. Maithreepala Sirisena. The meeting of the two groups lasted for a short period, and the prosecution contended that a riffled gun was fired by an unknown person supporting the candidature of Hon. Mahinda Rajapakse, which resulted in, the death of a person and injuries being caused to two other persons purportedly supporting the candidature of Hon. Maithreepala Sirisena.

The charges as stated above, have been framed based on vicarious liability or both under the common object and common intention. The learned High Court Judge, after the trial convicted the 1st, 2nd and 3rd accused-appellants of charges 1, 2, 3, 4 and 5 contained in the indictment based on a common object, and proceeded to sentence the said accused-appellants accordingly. Upon convicting the accused based on a common object, the learned High Court Judge decided not to act on charges 6 to 9 which were based on the principle of common intention. The prosecution relied on 23 witnesses, out of which four witnesses were eyewitnesses to the incident. The other witnesses were police officers and other official witnesses that conducted and assisted the investigation in various capacities.

The prosecution led the evidence of the following witnesses;

(i) Hathalawatta Muhandiramlage Upali Hathalawatta (PW 1)

(ii) Susantha Saman Bodaragama, Inspector of Police- (PW 3)

(iii) Kattiriwatta Weerasinghage Karunadasa Weerasinghe (PW 5)

(iv) Mohommed Hussain Ilshan (PW 6)

(v) P. G. Madawala, Deputy Government Analyst (PW 64) - This witness was included in the list on 10.10.2017 in place of PW 31 and the evidence was led on the same day.

(vi) Dr K.N. T.B Gunathilake, Judicial Medical Officer (PW 29)- to produce post mortem and MLR of PW 6.

(vii) Dr S.M.D.P Senarath, Assistant Judicial Medical Officer (PW 30) - to produce the MLR of PW 5

(viii) Dasanayaka Mudiyanselage Manel (PW 50) - Secretary, Provincial Council, Sabaragamuwa

(ix) Midigaha Kongahawatte Pushpa Kumari (PW 51)- Secretary, Pradeshiya Sabha, Nivitigala

(x) Gammadda Arachchilage Buddhika Dayan Premarathna (PW 52) - Secretary, Pradeshiya Sabha, Kahawaththa

(xi) Chief Inspector Rajamantri, (PW 38) - OIC Kahawaththa

(xii) Nalaka Gunasekera (PW 54) - Inspector of Police

(xiii) Saman Palitha (PW 36) - Inspector of Police

(xiv) Police Sergeant Upali Balasuriya (PW 37)

(xv) Buddhika Chaminda Senadheera (PW 62) - OIC, Ministerial Security Division

(xvi) Chamani Janak Bandara (PW 63) - OIC, Nivitigala

(xvii) Sidath Mahendra Nagahawatte (PW 33) - from Mobitel Pvt. Ltd.

(xviii) Jeewaka Sampath Wijerathna (PW 34) - from Dialog Pvt. Ltd

(xix) Sub-Inspector Manatunga (PW 55) - from CID

(xx) Sub-Inspector Ayagamage (PW 57)

(xxi) Sub-Inspector Amarawansha (PW 56)

(xxii) Police Constable Sumith (PW 58) - from CID

(xxiii) Inspector Jayasekera (PW 59) - from CID

(xxiv) Court Mudliar of High Court Rathnapura

Evidence of PW 8,9 and 10 who identified the deceased was accepted about the identification under section 420 and these 3 witnesses were released by the trial court.

The cardinal witnesses who had narrated the chain of events that culminated in the main incident of the shooting were PW 1 and PW 3.

Eye witness Upali Hathalawatta (PW 1) was a Co-ordinating Secretary of Hon. Thalatha Athukorala, MP representing United National Party. He was a former member of Kahawaththa Pradeshiya Sabha. He had given two statements to the police, firstly to Kahawaththa police on 05.01.2015 and secondly to CID. The 3rd accused was a minister of the ruling party, running against Hon. Thalatha Athukorala for Nivithigala Electorate. The 2nd accused was then Chairman of Kahawaththa Pradeshiya Sabha and represented his opposing political fraction.

According to the evidence of PW 01, on 05.01.2015, an election rally in support of common candidate Hon. Maithreepala Sirisena was to be held and preparation thereof was continuing through the night of 04.01.2015. As per his evidence, this rally was being organized on a private land which belonged to a party supporter, located 30 meters into Lihiniya Lane, which was situated several hundred meters away from the Kahawaththa clock tower on Ratnapura-Embilipitiya main road. A group of people consisting of 200 - 300 participated in the making of arrangements and the road from the main stage to the Lihiniya Junction on either side had been decorated. The main road from Lihiniya Junction to the clock tower at Kahawaththa town had been adorned.

The witness PW 1 asserted that he arrived at the place where the main rally was being organized by 9.30 pm on 04.01.2015 and at 11.30 pm on the same night, Hon. Thalatha Athukorala, then a Member of Parliament representing UNP had also paid a brief inspection visit.

At around 1.30 - 2.00 am on 05.01.2015, PW 1 learnt that their decorations on the main road were being sabotaged. At being instigated by that news, everybody engaged in making arrangements at the place where the main rally was to be held, charged towards the main road. At Lihiniya Junction, towards Kahawaththa, at 60 meters off, he had seen a group of supporters of opposing political parties sabotaging their decorations. He asserted that he could observe the nuisance from the light illuminated from the light posts along the road and the nearby Buddha Shrine. He continued to charge towards Kahawaththa and at the Buddha Shrine, he had seen several members of the mob disrupting their propaganda materials swearing filthy words.

He has gone on to provide that, he saw two vehicles plying from Kahawaththa direction cutting across the main road and halting blocking the main road between Ratnapura Gold House and Buddha Shrine. One was a white-coloured Pajero and the other was a red-coloured double cab. He identified the Pajero as the official vehicle of 3rd accused (Premalal Jayasekara) and the red-coloured cab as belonging to the Kahawaththa Pradeshiya Sabha where he used to be a member. During the trial, out of 10 vehicles the police had seized in connection with this murder, he identified the white coloured Pajero which he claimed to have observed at the crime scene.

By the time PW 1 spotted the 3rd accused, he was preparing to either board the vehicle or alight from it. He has stated as follows;

> "ඒ පැජෙරෝ එක ගාව, නගින්න හෝ බහින්න දොර බාගෙට ඇරලා තිබුණා."

The passenger door of the Pajero had been left open ajar. The 3rd accused-appellant had not uttered anything at that time. It is evident that near the 3rd accused, he had identified the 2nd

accused who was the then Chairman of Kahawaththa Pradeshiya Sabha. The 2nd accused-appellant stood near the Pajero but neither did nor declared anything as inciting the mob. The 1st accused-appellant too was identified nearby, standing outside the vehicle but PW 1 did not see what he was doing.

PW 1 asserted that it was at that moment (time was around 2.00 am) the gunshots were fired. Immediately after the shooting, the 3rd accused boarded his vehicle and left the scene and the 1st and the 2nd accused too left the scene simultaneously. He recollected that the shots were fired and the lightening of the shots was spotted in the direction where the 3rd accused-appellant's vehicle had blocked the road. Immediately afterwards, he darted over a nearby parapet wall and sought refuge. In the cross-examination on behalf of the 1st accused-appellant, the fact that of the 1st accused person being outside the 3rd accused person's vehicle at the crime scene was contested by spotting three omissions in that regard as against his first statement to the police, statement to the CID and evidence in the inquest.

In the cross-examination on behalf of the 2nd accused-appellant, it was established that a political rivalry had existed between PW 1 and the 2nd accused person who was then the Chairman of Kahawaththa Pradeshiya Shaba of which PW 1 used to be a member, representing opposing political parties. It was suggested that he (PW 1) testified to the facts he did not witness.

Subjecting to cross-examination on behalf of the 3rd accused-appellant, a political rivalry between the 3rd accused and Hon. Thalatha Athukorala for whom PW 1 functioned as a coordinating secretary was suggested as both represented Nivithigala Electoral Seat. Three omissions on the facts of his (3rd accused) being partially outside the vehicle were spotted light as against the first statement of PW 1, statement to CID and evidence in the inquest. Also, an omission was brought to the notice of the Court that, he had failed to mention the direction from which the shooting was claimed to have emanated in his first statement to the police. Also, it was sought to establish that, PW 1 did not corroborate PW 3 although both alleged to have been present at the crime scene at the same time.

The next eye witness Susantha Saman Bodaragama, Inspector of Police (PW 3) was the OIC of Minor Offence Branch attached to Kahawaththa Police at the time of the incident. The OIC of Kahawaththa Police Station deployed him to patrol the Kahawaththa area from 6.00 pm on 04.01.2015 to 5.00 am on the following day. The timeline of the chain of events as had been narrated by him in his evidence is set out below;

04.01.2015; the events were as follows:

> 7.00 pm - He (PW 3) paid a brief visit to the place where the main stage of the rally in support of a common candidate was being put up.
>
> 10.00 pm - Again he dropped by the same place and observed around 100 people engaged in making arrangements.

05.01.2015; the events were as follows:

> 12.00 - 12.30 am — Hon. Thalatha Athukorala visited where the main stage was being put up.

1.00 am - There was propaganda material depicting the image of the then President Hon. Mahinda Rajapakse was erected on the ground adjacent to where the UNP rally was due to be held. When UNP supporters tried to remove this, he prevented it and got it removed to Kahawaththa Pradeshiya Sabha (PS) by two labourers who accompanied him to assist him with removing unauthorized propaganda materials.

1.30 pm - 1.40 am - While PW 3 returned to the place where the UNP rally was being arranged from Kahawaththa PS, Hon. Thalatha Athukorala informed him about a group of people sabotaging their propaganda materials in Kahawaththa Junction and asked to inquire into it.

PW 3, swiftly charged towards Lihiniya Junction with UNP supporters starting to throng at Lihiniya Junction where he observed a group of people charging from the direction of Kahawaththa sabotaging decorations. He instructed Police Officer Sampath to control UNP supporters at Lihiniya Junction and began walking towards Kahawaththa to prevent what he feared was a possible clash between the two fractions.

1.45 am - 2.15 am - His observations, thereafter, was claimed to have been made under the lights of the lamp posts along the road and moving vehicles. He confronted the unruly mob at Ratanapura Gold House, where he first identified the 3rd accused and the 2nd accused as he had previously dealt with both of them officially. He could further make out 10 - 15 people on the right side of the road disrupting decorations and several others were also on the left side of the main road.

Then the 3rd accused person came forward and inquired him about the OIC of the Kahawaththa Police Station using filthy words. When PW 3 answered that the OIC was not there, the 3rd accused person has said that he had instructed OIC not to allow decorations to be put up but he had not heeded. PW 3 had replied that no prejudice had been caused to the 3rd accused's decorations. There were more than 100 people near and PW 3 pleaded with him not to proceed. The 2nd accused person remained near the 3rd accused. However, PW 3 did not observe any gun or any other weapon in the hands of either the 2nd accused or the 3rd accused or their supporters.

As a result of his (PW 3) persistent request, the 3rd accused eventually gave it up, turned around and boarded the Jeep at the passenger seat. He also noticed at that time a cab facing the direction towards Embilitiya. Then PW 3 too turned around and stepped onto the pavement. He saw 100 odd UNP supporters thronged at that place. UNP supporters began hooting from Lihiniya Junction at that moment. Suddenly he heard 3-gun shots. Though he did not see properly which direction it was fired from, he claimed that he perceived it in the direction of the Jeep on to which the 3rd accused boarded. Immediately, he swung towards Kahawaththa.

At this moment, UNP supporters at being provoked by these gunshots began charging towards Kahawaththa and attacking the vehicles with stones and other debris. Then the Jeep and the double cab had a U-turn and raced off.

Page 1257 and 1258 of the appeal brief is as follows; (evidence of PW 1)

ප්‍ර - වාහන ඔරලෝසු කණුව පැත්තෙන් ඇවිත් නතරකරල පාර හරස් කලා. තමා ඒ අවස්ථාවේ දැක්කේ වාහනය ආවේ ඔරලෝසු කණුව පැත්තෙන්. මේ වාහනය හැරෙව්වා. ඊට පසුව මොනවද උනේ?

උ - කට්ටියක් බැහැලා කොඩි කැඩුවා. වාහන හෙමින් ආවේ. පරුෂ වචන කියලා බැන්නා. ඒ අතර තමයි වෙඩි තැබීම සිදු උණේ?

ප්‍ර - ඒ, වාහනය කොඩි කඩලා පරුෂ වචන කියලා කොපමන වේලාවක් ගියාද?

උ - වාහන ටිකක් එක්කම තමයි කොඩි කඩාගෙන ආවේ?

ප්‍ර - ඒ කොඩි කඩාගෙන කොපමණ වේලාවක් තිබුණාද?

උ - පණිවිඩය ආරංචි වෙලා අපි පාරට යන විට ඒ අය කොඩි කඩාගෙන ආවා.

ප්‍ර - ඒ අවස්ථාවේදී තමා කියන ආකාරයට ආවේ කොඩි කඩාගෙන. කට්ටියක් ආවා. වාහනය හරවාගෙන සුළු වේලාවකින් ගියාද?

උ - වෙඩි තැබීමෙන් පසුව ගියේ.

ප්‍ර - තමා කියන විදියට සුළු වෙලාවක් ගියා?

උ - ඔව්.

ප්‍ර - ඒ වෙලාවේ මේ 3 වන විත්තිකරු අර වාහනයෙන් බහින්න හෝ නගින්න වගේ ඉන්නවා දැක්කාද?

උ - ඔව්.

Page 1260 of the appeal brief is as follows; (evidence of PW 1)

ප්‍ර - මේ අවස්ථාවේදී තමන් සාක්ෂි දුන්නා තමන් එළියක් දැක්කා කියලා?

උ - ඔව්.

ප්‍ර - කොහෙන්ද ඒ එළිය ආවේ?

උ - සුදුපාට පැජෙරෝ එකෙන්.

ප්‍ර - දැන් පළවෙනියට කටඋත්තරය දෙනවිට කිව්වාද සුදුපාට පැජෙරෝ එකෙන් එළියක් ආවා කියලා?

උ - මම කිව්වා එළියක් ආවා කියලා.

ප්‍ර - එහෙම සඳහන් කළේ නැහැ කියලා කියා සිටිනවා?

උ - උත්තරයක් නැත.

එය ඌණතාවයක් ලෙස සටහන් කිරීමට අවසර ඉල්ලා සිටී.

Then he heard a burst. He asserted that he saw the lightening and the sound of the burst from the left side of the Jeep in which the 3rd accused travelled. Immediately, he jumped off the road and hid between two shops. He admitted that he did not see the person who fired or the manner in which the shots were fired.

Page 1261 and 1262 of the appeal briefs is as follows; (evidence of PW 1)

ප්‍ර - තමන් කියන්නේ මොන වාහනයෙන්ද මේ වෙඩි ශබ්දයක් ආවේ කියලා?

උ - පැජෙරෝ එක පැත්තෙන්.

At the trial, PW 1 identified the Jeep in which the 3rd accused was claimed to have left but not the double cab.

The 1st accused opted to spare PW 1 from cross-examination for want of his identification at the crime scene. On behalf of the 2nd accused, it was elicited that, the 2nd accused must travel past Lihiniya Junction across Kahawaththa to reach his home and decorations were permitted only within 100 m of the main rally. PW 1 further admitted that he did not have knowledge about the legibility of the decorations done by UNP supporters but only carried out the instructions of the OIC. He further admitted that, though he had been aware of the official vehicle of Kahawaththa Pradeshiya Sabha, he did not notice it on the crime scene. Both the 2nd accused and the 3rd accused came on foot.

During the cross-examinationof PW 1, on behalf of the 3rd accused, it was revealed that between 7.00 - 7.30 pm on 04.01.2015 he had met the 2nd accused at a ground 10 km away from the place of the incident when the 2nd accused travelled by cab. The 2nd accused asked him to remove cut-outs, which he did not accede to. lt was suggested that he had acted at the whim and pleasure of Hon. Thalatha Athukorala and that was why he had appeared blind to the illegal decorations that have been put up by UNP supporters under his very nose. He further admitted that he had mentioned to the CID that, the UNP supporters had carried with their clubs and stones and had charged towards the main road.

PW 1, had omitted to mention the 3rd accused enquiring of the presence of OIC using filthy words when he recorded his statement with CID. It was suggested that the 3rd accused had arrived at the crime scene to inquire into the illegal removal of their propaganda materials, which was his responsibility as Chief Organizer to Nivithigala Electorate. It was sought to be established that, the 3rd accused came in, by a red colour jeep as opposed to a white colour jeep as claimed by PW 3. In proof thereof, it was brought to the notice of Court that, PW 3 had not mentioned the colour of the vehicle in which the 3rd accused travelled in any of his previous statements, accordingly, he was varying his evidence to match with that of PW 1.

The learned counsel for the respondent submitted that both PW 1, and PW 3, narrated the incident consistently, independently, promptly and without any delay. Further, there is no suggestion in the least that PW 1 and PW 3 colluded and made their statement at the time they were made to the police. Thus, any allegation of fabrication motivated by political enmity by either of the witness, as suggested by the defence, is wholly untenable. It was the view of the Counsel for the respondent that the defence had attempted to elicit certain contradictions and highlighted certain omissions from the statements of PW 1 and PW 3.

In the case of Attorney General Vs. Sandanam Pitchy Mary Theresa SC Appeal No 79/2008 decided on 06-05-2010, it was held that: "Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance. Witnesses should not be

disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter"

Thus, discrepancies which do not go to the root of the matter or to the core of a case and shake the basic version of the witness cannot be given too much importance. Further, it has been held that a court must consider whether the discrepancy was due to dishonesty, or to defective memory or whether the witnesse's powers of observations were limited.

These views have been cited with approval in cases such as;

Attorney-General vs. Vishwalingam 47 NLR 286,

Jagathsena vs. Bandaranayake 1984 (2) SLR 397,

Samaraweera v. Republic 1990 (1) SLR 256,

Sunil vs. Attorney General 1999 (3) SLR 191.

It was argued by the learned counsel for the respondant that the learned Trial Judge was able to apply proper methods to ascertain the credibility of witnesses. Throughout the judgment the learned High Court Judge had paid special attention to evaluate in accordance with the recognized tests laid down.

On behalf of the accused-appellants, certain contradictions were marked and certain omissions were highlighted from the statements of PW 1 and PW 3. The learned High Court Judge in his judgment was unable to analyse the said contradictions and omissions individually. The learned trial Judge had deemed that they were not material and decided that they do not go to the root of the case. I do not agree with the learned High Court Judge on that comment in his 226-page judgement as all those contradictions and omissions were material and they directly go to the root of the case. The credibility of the prosecution witnesses has been affected by the test of consistency.

I do not agree with the contention of the learned High Court Judge that he is satisfied that the versions of PW 1 and PW 3 were being corroborated by the evidence of the PW 5 and PW 6. The CCTV evidence does not corroborate the versions of PW 1 and PW 3 and did not establish any violent conduct of the accused-appellants. The evidence of the investigating police officers and the scene of crime officers (SOCO) do not corroborate the prosecution version.

It was argued on behalf of the respondent that the learned trial Judge had, in fact, individually analysed the said contradictions and omissions and had deemed that they were neither material, nor did they go to the root of the testimony of the witness. Therefore, the learned trial judge had rightly disregarded the same being of the view that they have no value in assailing the credibility or the testimonial trustworthiness of the witness.

Furthermore, it was submitted that the versions of PW 1 and PW 3 are further corroborated by the evidence of the two victims (PW 5 and PW 6) with regard to the incidents prior to the act of shooting. The medical findings, the recovery of empty cartridges and the observations of the scene by investigating police officers and the Scene of Crime Officers (SOCO) clearly established the act of shooting and its precise location.

It was also stated on behalf of the respondent that the CCTV footages further corroborated the violent nature of the mob to which the accused-appellants were a part of and the manner in which the said mob engaged in destructive behaviour was unchallenged.

It is my view that to evaluate the credibility is to test probability. Analysis of the judgment indicate that the learned trial Judge has ignored the guidance laid down by Justice F.N.D. Jayasuriya, in Wickremasuriya vs Dedoleena and Others 1996 (2) SLR 95 wherein it was held that "A Judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

The contention for the respondent was that the telephone details clearly indicated the gathering of the accused-appellants to the location of the incident, whilst the CCTV footage confirmed the violent nature of the mob. The medical evidence, the recovery of empty cartridges, and the observations of the scene confirmed the acts of sabotage caused by the mob, the mischief caused to the decorations of the common candidate and the act of shooting that had taken place.

In Jagathsena vs. Bandaranayake (supra) Justice Collin Thome observed that "Deportment and demeanour is the all-important factor when it relates to the arriving at of findings in regard to credibility even in a case where there were contradictions inter se in the evidence of the prosecution witnesses"

In Mary Theresa case (Supra) the Court held that "Appellate Judges have repeatedly stressed the importance of trial Judges' observations of the demeanour of witnesses in deciding questions of fact. Demeanour represents the trial Judges' opportunity to observe the witness and his deportment.

In Ariyadasa vs. Attorney General (supra), highlighting the importance of the trial judge's opportunity in experiencing the demeanour of witnesses, it was observed that "The Court of Appeal will not lightly disturb a finding of a trial Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanour and the deportment of a witness. This is because the trial Judge has the priceless advantage to observe the demeanour and the deportment of the witness which the Court of Appeal does not have."

In the present case, the entirety of the evidence of the prosecution witnesses, including the police and expert witnesses, as well as the defence witnesses were heard before one and the same trial Judge, who proceeded to deliver the judgment and convict the appellants. In this backdrop, it was argued for the respondant that the observations made by the learned trial Judge as to the demeanour and deportment of all witnesses cannot be lightly treated. There is no adverse finding in respect of the demeanour or deportment of any prosecution witness.

The learned counsel for the respondent expressed that the challenge of interestedness was raised by the defence in respect of PW 1, on the basis of political rivalry. However, no such 'basis' was advanced in respect of PW 3, who was, admittedly, a police officer assigned to an official duty by the OIC of the police station that day. No rational 'basis' for interestedness had surfaced during the entirety of the trial in respect of PW 3. He further argued that the learned trial Judge had

correctly dismissed 'mere allegations' of interestedness, which are unfounded and unsupported by any evidence, and other material.

The respondent placed the following judicial observations before this Court, in this regard.

In Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L.J. 1694 at 1701, Chief Justice V.D. Misra 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".

In Motilal v. State of Madhya Pradesh (1990) Cri. L.J. NOC 125 MP, it was held that "Absence of cross-examination of prosecution witnesses of certain facts leads to the inference of admission of that fact".

In Ajith Samarakoon v. The State 2004 (2) SLR 209 at 230, Justice F.N.D. Jayasuriya held that "Evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused".

The same observations were made with approval by Justice Sisira De Abrew in the Phillippu Mandige Nalaka Krishantha Kumara Thisera v Attorney-General CA 87/2005 decided on 17.5.2007 and P.V. Hemalatha Kulasiri v. Republic of Sri Lanka CA Appeal 190/2005, decided on 2007.09.14. It was held in the same way by Justice Ranjith Silva in the case bearing No. CA Appeal 78-80/2001 decided on 2007.10.01. and Renuka Subasinghe v. Attorney General 2007 (1) SLR 224.

On behalf of the respondent, it was stated that the analysis of the judgment indicated that the learned trial Judge was privy to the legal principle enumerated in Section 146 of the Penal Code, and the manner in which liability in attributed to each member of the unlawful assembly.

In Upasena and 8 others v. AG [2006] 3 Sri L R 272 it was held that "If one becomes a member of an unlawful assembly and his association in the unlawful assembly is clearly established his participation in the commission of the offence by an overt act is not required to be proved if it could be known that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly".

These judicial observations were cited with approval in Ganeralalage Upali Gunaratne alias Mahathun v. Hon. AG CA 165/2007 decided on 14.03.2019.

In the case of Jayasinghege Wimalaratne alias Wimale Mudalali and others v. The AG (Shyama Dedigama case) 1997 (3) SLR 309 the principles relating to liability of persons by virtue of membership of an unlawful assembly is discussed.

In view of the conduct of the appellants, especially when what was narrated by PW 3 is considered, the learned Counsel for the respondent placed the following, in support of the imposition of liability, as enumerated in section 146 of the penal code.

(i) It is unchallenged that, the 3rd accused-appellant, being a Deputy Minister at the time, was leading the mob which were causing mischief to the decorations of the opposition political party.

(ii) The 2nd accused-appellant was seen accompanying the 3rd accused-appellant. The former admitted his presence with the latter when he spoke to PW 3 as well.

(iii) The CCTV footage clearly indicated the presence of firearms among this group of persons, clearly led by the 3rd accused-appellant. It would be obnoxious to common intelligence to suggest that appellants did not have knowledge of the possession of such a firearm by one of the members of the unlawful assembly, when such a firearm was carried openly.

(iv) The appellants and the members of the unlawful assembly very well knew the campaign meeting organised by the opposition party, wherein a number of political supporters were obviously present.

(v) It would once again be obnoxious to suggest that, a tense situation would not arise, when the group of persons led by the appellants were causing damage and removing the decorations adorned by the opposition party, and proceeding towards the premises wherein the meeting was being organised.

(vi) In light of the above, the appellants, especially the 3rd accused-appellant, as the leader of the said group clearly could have foreseen an imminent incident between the two fractions.

(vii) Even for the sake of argument, if it is deemed that such was not apparent at the inception, the likelihood of a clash was made plain to the 3rd accused-appellant by PW 3. Thus, the imminent threat to peace, and likelihood of injury was brought to the personal attention of the 3rd accused-appellant and the 2nd accused-appellant, who was accompanying him at the time.

(viii) The learned trial Judge has analysed the above in detail, and correctly reasoned as to why the failure of the 3rd accused-appellant to effectively direct the fellow members with regard to the unlawful assembly to disperse would entail liability under section 146.

The learned President's Counsel for the 3rd accused-appellant argued that it was sought to be established that PW 1 was biased towards the prosecution, as the then Government offered him convenience by reverting him to Ratnapura, which was his area of residence within just 8 months after he was transferred to Ampara, in violation of IGP Circular that required minimum service of 2 years once transferred to a remote area. He further admitted that he told the SSP that he could not recollect which vehicle the minister boarded. In nut and shell, what the defence strived to point out was that, after recording the statement with SSP soon after the incident, at the instance of the succeeding government, he had altered his version and proceeded to record a different statement with CID subsequently. In re-examination, PW 1 reaffirmed that the 2nd accused did not do anything incriminatory and he was not influenced by his superior officers before recording his first statement with the Senior Superintend of Police.

The evidence of IP Bodaragama (PW 3), Inspector of Police attached to Kahawaththa Police Station, who on the instructions of the OIC of the station was on mobile duty with several other officers and two labourers whose services had been obtained in connection with the special duties cast on the police due to the ongoing political campaign. He had received specific instructions to visit the construction area of the political stage and provide adequate security and ensure that peace prevailed.

IP Bodaragama's evidence reveals that he visited the construction and decoration site on several occasions, and on the last occasion, he had visited the site around midnight on 04.01.2015. Whilst he was at the site, his evidence reveals, that Hon. Thalatha Athukorale, MP visited the site and informed him of some persons vandalizing the decorations made for the meeting to be held on the next day. Immediately thereafter he had left the site around 1.30 am and had proceeded to the Rathnapura- Embilipitiya Main Road, which was a short distance away from the site, and after stationing one Sub Inspector Sampath to control the supporters of the UNP with instructions not to permit them to proceed towards Palmadulla, proceeded towards Palmadulla where he was said to have encountered the 2nd and 3rd accused who were coming towards Embilipitiya, that is, towards the direction where the stage was constructed. This witness further testified that he encountered the 2nd and 3rd accused-appellants in front of the Rathnapura Gold House approximately 75 meters away from the entrance to the road leading to the ground on which the stage is being constructed.

On encountering the 2nd and 3rd accused the witness PW 3 testified that he requested the 3rd accused not to proceed in the direction where the stage was being constructed, and he stated that although the 3rd accused-appellant was aggressive at first, later he adhered to his request and proceeded to get into his vehicle. As he was getting into a vehicle several shots were fired. Three separate shots were fired, the first was followed thereafter by a burst of shots fired by an unidentified person. Simultaneously or immediately thereafter, he maintained that the 2nd and 3rd accused left.

This witness stated that he had been attached to Kahawaththa Police Station for a considerable period; nearly 6 years, and that he was well acquainted with the local politicians of the area, in his official capacity.

Page 1277 of the appeal brief is as follows;

ප්‍ර - **2009** පෙබරවාරි මාසයේ කහවත්ත පොලීසියට අනියුක්තව සිටියා කිව්වා, **2015** වෙනකොටත් කහවත්ත පොලිසියට අනියුක්තවද සිටියේ?

උ - එහෙමයි ස්වාමීනි.

ප්‍ර - 2015 ජනවාරි වෙන කොට ඔබ සුලු පැමිණිළි අංශයේ ස්ථානාධිපති වශයෙන් සිටියේ?

උ - එහෙමයි උතුමාණෙනි.

ප්‍ර - ඒ කියන්නේ කහවත්ත ප්‍රදේශයේ දළ වශයෙන් අවුරුදු 06 ක් පමණ සේවය කර තිබෙනවා?

උ - එහෙමයි.

ප්‍ර - 2009 සිට 2015 වෙනකම්?

උ - එහෙමයි.

ප්‍ර - ප්‍රදේශයේ පුද්ගලයින් පිලිබඳව ඔබට කිසියම් දැණුමක් තිබුණාද රාජකාරි මට්ටමින්?

උ - ඔව්.

ප්‍ර - දේශපාලඥයන් සම්බන්ධ කටයුතුවලට ඔබ රාජකාරිමය වශයෙන් මැදිහත් වුණාද?

උ - එහෙමයි.

ප්‍ර - මොන වගේද?

උ - දේශපාලඥයන්ගේ සංචාරවලට පෙර ගමන් සහ ආරක්ෂාව ලබාදීම සම්බන්ධයෙන්, රාජකාරි කාලය තුළදී වරින් වර පැවති මැතිවරණ වලදී ආරක්ෂක රාජකාරි යෙදීම සම්බන්ධයෙන් විශේෂ උත්සව අවස්ථා වලදී ආරක්ෂාව ලබාදීම සම්බන්ධයෙන් කටයුතු කර තිබෙනවා.

ප්‍ර - ප්‍රාදේශීය දේශපාලඥයන් සමඟ රාජකාරි ගණුදෙනු තිබුණා කිව්වොත් හරිද?

උ - එහෙමයි ස්වාමීනි.

ප්‍ර - ප්‍රාදේශීය කියන වචනයෙන් මා අදහස් කලේ ප්‍රාදේශීය සභා නොවේ ප්‍රාදේශීයව ක්‍රියාකාරිව ඉන්න පාර්ලිමේන්තු මන්ත්‍රීලා, පළාත් සභා මන්ත්‍රීලා, ප්‍රාදේශිය සභා මන්ත්‍රීලා මැති ඇමතිවරු ආදි වශයෙන් සම්බන්ධවීමක් සිදුවුණාද?

උ - එහෙමයි ස්වාමීනි.

Although witness Bodaragama (PW 3) maintained this position very clearly and did testify as to the presence of the 1st accused, who was a well-known politician who had served in the Kahawaththa Pradeshiya Sabha, and the Sabaragamuwa Provincial Council, witness Hathalawatta (PW 1) stated that, he was informed by some persons that some decorations were being vandalized and that he came to the main road and after proceeding some distance on the main road, and at or around the Rathnapura Gold House witnessed the shooting. He maintained that upon the first gunshot being fired he took cover behind an area between two buildings. He maintained that he thereafter saw the 1st, 2nd and 3rd accused being present. Witness Hathalawatta's evidence was not specific as to where he first saw the 1st accused or what the 1st accused was engaged in doing.

For the accused-appellants it was argued that the learned High Court Judge had failed to consider the creditworthiness in the evidence of prosecution witnesses, especially of PW 1 and PW 3. It reflects from the evidence clearly, that PW 1 had spoken of only one shooting whereas PW 3 had spoken of three gunshots and then a burst. Moreover, PW 3 giving evidence stated that before the first firing, the UNP supporters had hooted at the appellants.

Then, after the first firing, the UNP organizers ran towards the vehicles pelting stones at them when there was a second burst. None of such evidence had been elicited in PW 1's version who affirmatively stated about his presence at the scene. It raises serious doubt as to the versions of PW 1 and PW 3, who according to their versions of evidence had taken cover from the gunfire at the same place which is a narrow plot after the Rathnapura Gold House but had not seen each other at all.

The learned High Court Judge had accepted the evidence of PW 1 stating that PW 1's evidence was credible because his evidence was not subject to any contradiction. It is important to note that the learned trial Judge had failed, in evaluating the evidence of the witnesses, to apply the tests of probability and improbability, consistency and inconsistency, interestedness and disinterestedness and spontaneity and belatedness. The learned Judge had evaluated the evidence of the prosecution separately and not as a whole, especially the evidence of PW 1 and PW 3 who were considered to be the two main witnesses and had shifted the burden of proof to the accused-appellants.

Witness Bodaragama (PW 3) had stated that on 04.01.2015, police protection was provided for the arranged meeting and officers were on duty. There was SI Sampath on location. When PW 3 was informed of the damages allegedly caused, he came with SI Sampath towards the junction. He had instructed SI Sampath to control the UNP supporters. SI Sampath had not been called as a witness nor had he been listed.

The trial Judge had stated in the judgment that there was no evidence from PW 1, to show that the 3rd accused had tried to control his supporters and calm them down. It explains that because of the 3rd accused's leadership and influence, his supporters were acting. The learned High Court Judge had acted on surmise in concluding that the 3rd accused-appellant was leading the unlawful assembly. There was no evidence to prove that. It was established when PW 64 had stated that the bullets handed over for analysis were not from the gun produced for analysis. It was also stated in the judgment that there had been illegal weapons at the back of the vehicle and that the injuries were caused by those illegal weapons which could be considered again as mere surmise**.**

At this stage, it is worth considering section 138 of the Penal Code dealing with unlawful assembly. It is a provision that enshrines a principle of vicarious liability. The guilty knowledge in each member of the unlawful assembly is the minimum requirement insisted upon by the law to justify a conviction under this section.

Section 138 of the Penal Code is as follows;

> 138. An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly -
>
> > Firstly - To overawe by criminal force, or show of criminal force, the State or Parliament or any public officer in the exercise of the lawful power of such public officer; or
> >
> > Secondly- To resist the execution of any law or any legal process; or
> >
> > Thirdly - To commit any mischief or criminal trespass or other offence; or
> >
> > Fourthly - By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person or the public of the enjoyment of a right of way or of the use of water or other incorporeal rights of which such person or public is in possession or enjoyment, or to enforce any right or supposed right; or
> >
> > Fifthly - By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do; or
> >
> > Sixthly-That the persons assembled, or any of them, may train or drill themselves, or be trained or drilled to the use of arms, or practising military movements or evolutions, without the consent of the President.
>
> Explanation - An assembly that was not unlawful when it assembled may subsequently become an unlawful assembly.

Section 138 declares that an assembly of five or more persons is designated as an "Unlawful Assembly" if the persons composing that assembly have one or more satisfying objects. Section 139 creates the offence of being a member of an unlawful assembly. Section 140 of the Penal Code prescribes punishment for being a member of an unlawful assembly. "Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both". Section 146 imposes liability on every member for offences committed in the prosecution of the common object. "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

In light of the above Penal Code sections, it is important to understand that the principle of vicarious liability is satisfied when, one member of an unlawful assembly may be criminally liable for the acts of another. There are two preconditions attached to vicarious liability:

(i) Each accused must have known of the object of the assembly and must have joined the assembly with such knowledge.

(ii) The offence for which a member of an unlawful assembly is sought to be made liable vicariously must be one which was either involved in the prosecution or the common object of the assembly or was one which, to the knowledge of the members, would probably be committed in the prosecution of the common object. (Penal Code Section 146.)

It was decided in Kulatunga vs. Mudalihamy 42 NLR 33, that in a charge of unlawful assembly under section 140 of the Penal Code, it must be established that each accused knew the common object of the assembly and that he was a member of the assembly which he intentionally joined.

The accused-appellants in the present case were convicted on the basis that they were members of an unlawful assembly. The 1st count of the indictment states that the accused-appellants were members of an unlawful assembly and thereby committed an offence punishable under section 140 of the Penal code. The 2nd count in the indictment states that accused-appellants being members of an unlawful assembly cause mischief and thereby committed an offence punishable under section 426 read with section 146 of the Penal Code.

Section 426 of the Penal code states that;

> "Whoever commits mischief having made preparation for causing to any person death or hurt or wrongful restraint, or fear of death or hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine."

The 3rd count in the indictment also states that the accused-appellants being a member of the unlawful assembly and committing murder punishable under section 296 read with 146 of the Penal Code. Additionally, counts 4 and 5 of the indictment are also based on the accused-appellants being members of an unlawful assembly and attempted to commit murder punishable under section 300 read with section 146 of the Penal Code. According to the above principle of

vicarious liability, the prosecution, in this case, must prove the following elements to secure a conviction of these accused-appellants for the offence of murder under count 3.

(i) The murder of Dodamgodage Susil Perera alias Shantha Dodamgoda was committed by a member of the unlawful assembly in prosecution of the common object of that assembly, or

(ii) The members of that assembly knew that the murder of Dodamgodage Susil Perera alias Shantha Dodamgoda was likely to be committed in prosecution of that object, and

(iii) These appellants, at the time of murdering Dodamgodage Susil Perera alias Shantha Dodamgoda, were members of the same assembly,

It is important to note that to impose liability under section 146 of the Penal Code, the prosecution must prove not only that the accused-appellants committed the offence in the prosecution of the common object, but also that it was committed during the prosecution of the common object. The vicarious liability arises merely from being a member of an unlawful assembly at the time of the commission of an offence. The liability will extend not only to the offence committed in prosecution of the common object but also to offences which the members of the assembly knew or knew likely to be committed in prosecution of that object.

In the case of Vithanalage Anura Thushara De Mel and three others Vs. Attorney General SC/TAB/2A - D/2017 Supreme Court held as follows:

> "While inference as to the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used and the behaviour of the assembly at or before the scene of occurrence, the prosecution will not succeed in discharging its burden by simply demonstrating circumstances which align with the common object. Conversely, it is their burden to not only establish the common object but also prove that the existence of the common object is the only conclusion consistent with the facts and circumstances existed at that point."

In this case, the Supreme Court discussed the nature of the burden of proof is required by the law to establish the common object. To achieve the required standard of burden of proof the prosecution called two witnesses in addition to the other witnesses. They were PW 1 and PW 3.

The learned President's Counsel for the 1st accused-appellant stated that the learned trial Judge has failed to consider the inbuilt discrepancies in the evidence of Hathahlawatta (PW 1) and Bodaragama (PW 3). Inspector Bodaragama (PW 3) received his first information about the vandalizing from Hon. Thalatha Athukorale who left the construction site of the stage at around 1.30-1.40 a.m.

This information was received whilst he was at the place where the stage was being constructed. The evidence reveals that the stage was constructed on privately owned premises some distance away from the main road, the approach to which was through a by-lane. Immediately upon the receipt of such information, IP Bodaragama (PW 3) had left to inspect the veracity of such information leaving SI Sampath to stop the crowd of UNP supporters from approaching the

supporters of the UPFA, who were said to have been approaching the construction site which might have led to an altercation.

IP Bodaragama (PW 3) clearly stated that he knew the politicians of the area, identified only the 2nd and 3rd accused-appellants accompanied by some others approaching the area where the decorations had already been placed and upon encountering the 2nd and 3rd accused, he had requested them not to proceed forward but to leave the area. Although his evidence in examination in chief was that the 3rd accused-appellant originally resisted, upon further persuasion, he testified that the 3rd accused was leaving the area when the shooting occurred. He testified that the shooting occurred within a very short period.

Page 1296-1297 of the appeal brief in volume 2 is as follows;

ප්‍ර - ඔබ බැලුවාද මේ වෙඩි හඬවල් එන්නේ මොන පැත්තෙන්ද කියලා?

උ - මම හැරුණා ඒ පැත්තට

ප්‍ර - ජීප් එක තිබුණ පැත්තටද?

උ - එහෙමයි. ඒ වන විට වෙඩි තැබීම නතර වෙලා තිබුණා. ක්ෂණිකව සිද්ධ වුණ දෙයක්. ඒ එක්කම පිටුපස සිටි පිරිස කැගහගෙන ඉදිරියට ආවා.

This witness's evidence is that Hon. Thalatha Athukorale, MP informed him and no one else, and the probability is that Hon. Thalatha Athukorale did not inform anyone else to ensure that there was no altercation and breach of the peace. Witness Hathalawatta (PW 1) on the other hand testified that he got to know of some person vandalizing the decorations from the people who were decorating and constructing the stage and it was thereafter that he had proceeded near the Rathnapura Gold House, the same place where witness IP Bodaragama (PW 3) is alleged to have met the 2nd and 3rd accused persons. Witness Hathalawatta never talked of him witnessing Inspector Bodaragama talking to the 2nd and 3rd accused-appellant.

Similarly, witness Bodaragama (PW 3) specifically has stated that he did not see Hathalawatta (PW 1) during the time of the shooting.

Page 1339 of the appeal brief in volume 2 is as follows;

ප්‍ර - මේ සියල්ලම සිදු වුණේ විනාඩි 02 ක් ඇතුලත කාලයේදි කියලා කිව්වා?

උ - එහෙමයි.

ප්‍ර - ඒ කියන කාලය ඇතුලත උපාලි හතලාවත්ත ඔබ දුටුවාද කියලා අහන්නේ?

උ - වෙඩි තැබීම සිදුවූ අවස්ථාවේ මම දුටුවේ නැහැ. එදා දවස තුළ හිටියා. ඒ අවස්ථාවේ මම දැක්කෙ නැහැ.

This discrepancy and the improbability should have been considered by the learned High Court Judge. He has not considered this material at all. It was the view of the Counsel for the accused-appellants that the trial Judge has failed to consider that Hathalawatta was an interested witness and his evidence, therefore, should be considered and acted upon with caution. The instant case has to be considered in light of the facts that the two sections involved in this altercation are divided by political affiliation, and that the said incident occurred during the campaign built up for

a Presidential Election as such each of the parties was aiming to win the election. This was a highly contested election. Witness Hathalawatta (PW 1) in his evidence admitted that he is a strong supporter of the UNP and had opted to give up his carrier as a teacher to become the coordinating secretary to Hon. Thalatha Athukorale, MP consequent to this incident.

Page 1200 of the appeal brief in volume 2 is as follows;

> ප්‍ර - සාක්ෂිකරු ඔබ දිවුරුම් දෙනකොට ප්‍රකාශ කලා ඔබ තලතා අතුකෝරල මහත්මියගේ සම්බන්ධීකරණ ලේකම් කියලා?
>
> උ - එහෙමයි ස්වාමීණි.
>
> ප්‍ර - කොයි දවස්වල ඉදලාද, ඔබ ඒ තනතුර දරන්නේ?
>
> උ - ඒ තනතුර දරන්නේ තලතා අතුකෝරළ ඇමතිතුමියට ඇමති පදවිය ලැබුණාට පස්සේ.
>
> ප්‍ර - සම්බන්ධීකරණ ලේකම් හැටියට ඔබගේ කියෙන රාජකාරි මොනවාද?
>
> උ - එතුමියගේ අමාත්‍යාංශයේ සහ දේශපාලන කටයුතු වලට සහයෝගය දීම.
>
> ප්‍ර - අතුකෝරළ මහත්මියට ඔය ඇමතිකම ලැබුණේ 2015 ජනවාරි මස 15 කිව්වොත් හරිද?
>
> උ - හරි.

For the accused-appellants, it was argued that this political appointment may be a reward for implicating the 1st, 2nd and 3rd accused-appellants who were identifiable political figures in the area and the elimination of such persons from a political platform would necessarily play a supportive role in the election which was to proceed sometime immediately thereafter. The learned trial Judge has failed to consider the evidence of Hathalawatta (PW 1) in the light of the fact that he is an interested witness and therefore, that his evidence should be acted upon with caution.

In the case of Attorney General Vs. Sandanam Pitchy Mary Theresa (*supra)* decided on 06-05-2010 as follows;

> "A key test of credibility is whether the witnesses are an interested or disinterested witness. Rajarathnam J. in Tudor Perera V. AG (SC 23/75 D.0 Colombo Bribery 190/B - Minutes of S.C dated 01.11.1975) observed that when considering the evidence of an interested witness, who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict."
>
> "Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (Vide, Hasker vs Summers (1884) 10 V.L.R (Eg.) 204 - Australia; Leefunteum vs Beaudoin (1897) 28 S.C.R 89)-Canada).

The position of the 1st accused-appellant is denial of presence. The 2nd and 3rd accused-appellants admit their presence at the time spoken with PW 3, but claim that the shooting did not occur at

that moment. Two witnesses called on behalf of the 3rd accused-appellant gave evidence in support of the defence version.

It was stated on behalf of the respondent that the learned trial Judge has analysed the credibility of the defence witnesses in light of the different tests highlighted earlier. The demeanour and deportment of defence witness Sirisena (driver of the 3rd accused-appellant) was adversely commented upon by the learned trial Judge. His interestedness was apparent and the learned trial Judge properly excluded his testimony due to lack of credibility. Defence witness Kelum Janaka, a personal security officer of the 3rd accused-appellant also gave evidence with regard to the lines of the defence. In the course of his evidence, it was admitted that he had not made notes during the preceding one and a half months and had made notes only from the date of the incident onwards.

Furthermore, the learned Counsel stated that the reliability of the said witness was manifestly in question and the learned trial Judge properly excluded his evidence as well. The evidence of the defence witnesses is inconsistent with the evidence led by the prosecution, and is not supported by any other evidence. In contrast, the evidence of the prosecution witnesses is supported by medical findings, recoveries and observations by other independent witnesses. Thus, the learned trial Judge had no difficulty in arriving at the proper conclusion that that evidence of the defence witnesses was of no merit.

It is pertinent to note that, the learned trial Judge had proceeded to disbelieve witness Saman Kumara Sirisena, the driver of the 3rd accused-appellant purely on the fact that, he is an interested witness.

Page 2739 of the appeal brief (page 217 of the judgement) in volume 2 is as follows;

> "3 වන විත්තිකරු වෙනුවෙන් විත්තියේ සාක්ෂි අංක 1 වන සමන් කුමාර නැමති පුද්ගලයා කැඳවා ඇති අතර, ඔහු මෙම 3 වන විත්තිකරුගේ සමීප පුද්ගලයෙකු වන අතර, ඒ අනුව 3 වන විත්තිකරු සහරා වර්ගයේ රතු පාට ජීප් රථයෙන් ගමන් කළ බවට ලබා දී ඇති සාක්ෂිය පැමිණිල්ලේ සාක්ෂි මගින් බරපතල බිඳ වැටීමකට සහ සැකයකට බඳුන්වී ඇති බවට සඳහන් කරමි."

It is my view that the evidence of Hathalawatta (PW 1) too should have been considered in the same manner. Justice must not only be done but seen to be done.

Although Karunadasa Weerasinghe (PW 5) has stated that the 1st accused's vehicle was parked in the vicinity, the learned trial Judge has failed to consider the discrepancies of such evidence. Witness Karunadasa Weerasinghe (PW 5) says that he also saw a double cab used by the 1st accused parked in the proximity. This witness did not say where this double cab was parked. He specifically said that this double cab was not only used by the 1st accused, but also by his father. Apart from a mere statement by witness Hathalwatta (PW 1) that he saw the 1st accused-appellant in the vicinity of the scene, whilst specifically stating that he did not see the 1st accused doing anything.

Karunadasa Weerasinghe (PW 5) says at Page 1422 of the appeal brief in volume 2 as follows;

> ප්‍ර - ඔබ කිව්වා ඔබ වාහන හතරක් හඳුනාගත්තා කියලා?
>
> උ - ඔව්.

ප්‍ර - එකක් සුදු පාටයි, අනෙක් එක රතු පාටට හුරු ජීප් එකක්. අනෙක් එක ඩබල් කැබ් රථයක්. අනික් එක ඔබ කිව්වා නිලන්ත කියන තැනැත්තාගේ තාත්තා පාවිච්චි කරන වාහනය කියලා?

උ - ඔව්.

This necessarily throws doubt as to the existence of the double cab itself at the vicinity and whether this evidence can be used against the 1st accused. The recognition of the double cab is further doubtful as this witness, when allowed to identify the double cab in the High Court premises, failed to identify the double cab but merely stated that it is a similar double cab. He also stated that he cannot even remember the colour of the double cab. The learned High Court Judge has failed to consider this part of the evidence.

Page 1429 of the appeal brief in volume 2 is as follows;

ප්‍ර - ඊලඟට ඔබ වෙනත් වාහනයක් හඳුනාගත්තා?

උ - අනෙක් වාහනයත් ගරු අධිකරණ භූමියේ රඳවා තිබෙනවා මම දැක්කා. ඒ හා සමානවම අලුපාට කැබ් රථයක් මම කලින් සඳහන් කළා. එම වාහනය වෙන්න ඇති කියලා මම අදහස් කලේ. පාටින් හා නොම්බරයකින් මට මතක නැහැ. ඒකේ නොම්බරය 58-9706. ටොයෝටා කැබ් රථයක්.

It is pertinent to note that the learned trial Judge has failed to consider the ingredients required to be proved by the prosecution to secure a conviction under charge 2 of the indictment. The conviction against the accused-appellants was based on vicarious liability under Section 146 of the Penal Code.

Section 146 of the Penal Code reads as follows;

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

The mere presence of a person in the vicinity of an unlawful assembly does not make him liable under the provisions of section 146 of the Penal Code. It should be established beyond reasonable doubt that the accused-appellants were conscious members of the unlawful assembly and that they knew that the offence would be committed in the prosecution of the common object or that such offence was likely to have been committed. It is settled law that it is not sufficient for the prosecution to secure a conviction under section 146 to merely prove that the accused-appellants were mere by-standers or members, but should prove that the accused-appellants did some overt act towards the prosecution of the common object.

The evidence of Hathalawatta (PW 1) about the accused-appellants should be considered in this regard. Witness Hathalawatta in his evidence states that he saw the accused-appellants standing outside the vehicle during the alleged shooting.

Page 1215 of the appeal brief in volume 2 is as follows;

ප්‍ර - වෙන කවුද තමන් හඳුනාගත්තේ 2,3 විත්තිකරුවන්ට අමතරව?

උ - නිලන්ත ජයකොඩි මහත්තයා හඳුනාගත්තා.

ප්‍ර - නිලන්ත ජයකොඩි කියලා කියන්නේ කවුද?

උ - මන්ත්‍රී කෙනෙක්.

.....

ප්‍ර - ඔහු කොතනද හිටියේ?

උ - ඔහුත් ඒ ආසන්නයේම හිටියා.

ප්‍ර - වාහනය ඇතුලේද ?

උ - එළියේ හිටියේ.

omissions were drawn to the attention of the Court that the witness in his statement to the police, in his statement to the Criminal Investigations Department and at the inquest had not stated that the 1st accused was seen outside this vehicle.

Page **1232** of the appeal brief in volume 2 is as follows;

ප්‍ර - මහත්මයා කිව්වා මේ සිද්ධිය වෙච්ච විගසම පොලිසියට කටඋත්තරය දෙන කොට මහත්මයාට දළ වශයෙන් මතක තිබුණේ කියලා පිලිගන්නවා නේද ?

උ - වාහන වල තොරතුරුද?

ප්‍ර - ඒ කියන්නේ 2015-01-05 වන දින උදේ 3.00 වෙනකොට හොඳ මතකයක් තිබුණා නේද? දළ වශයෙන් මතකයක් නොවේ?

උ - ඔව්.

ප්‍ර - ඒ ප්‍රකාශය කියවලා දීලා මහත්මයාගෙන් අත්සන් කර ගත්තාද?

උ - ඔව්.

ප්‍ර - ඒ අත්සන් කලේ මහත්මයා කිව්වාට පස්සේ මට කීමට ඇත්තේ මෙපමණයි කියලා. එහෙම කිව්වාට පස්සේ මහත්මයාගෙන් අත්සන් ගත්තේ?

උ - ඔව්.

ප්‍ර - මම මහත්මයාට යෝජනා කරනවා, 1 වන විත්තිකරු මේ සිද්ධිය වුණ ස්ථානයේ රත්නපුර ගෝල්ඩ් හවුස් එක ලඟ බැහැලා හිටියා කියලා මහත්මයා වචනයක්වත් සඳහන් කරලා නැහැ කියලා?

උ - බැහැලා හිටියා.

ප්‍ර - එය කටඋත්තරයේ ලියවී නැහැ කියලා යෝජනා කරන්නේ. 2015-01-09 වන දින 1 වන විත්තිකරු මේ ස්ථානයේ බැහැලා හිටියා කියලා කටඋත්තරයේ වචනයක්වත් කියලා නැහැ බවට යෝජනා කරනවා?

උ - රත්නපුර ගෝල්ඩ් හවුස් එක ලඟ බැහැලා හිටියා.

ප්‍ර - මහත්මයා මම කියන්නේ 1 වන විත්තිකරු රත්නපුර ගෝල්ඩ් හවුස් එක ලඟ තමුන්ගේ කටඋත්තරය අනුව බැහැලා හිටියා කියලා, 1 වන විත්තිකරු ඒ කියන්නේ නිලන්ත බැහැලා හිටියා කියලා, වචනයක්වත් කියලා නෑ කියලා යෝජනා කරනවා?

උ - : මම දීපු කටඋත්තරය මේ වෙලාවේ මතක නෑ.

ප්‍ර - එහෙම ලියවිලා නැතිනම් මහත්මයා පිලිගන්නවාද, මහත්තයා කිව්වෙ නැති නිසා ලියවී නැත්තේ කියලා

උ - මම කිව්වා කියලා මතකයේ තියෙනවා.

ප්‍ර - මහත්තයා ලියවී නැත්තේ, මම මහත්තයාට යෝජනා කරනවා මහත්තයා කිව්වෙ නැති නිසා ලියවී නැත්තේ කියලා?

උ - මට කියන්න බැරි වුණාද, දන්නේ නැහැ.

ප්‍ර - මහත්තයා කිව්වා වෙන්නත් පුලුවන් නැති වෙන්නත් පුලුවන්?

උ - ඔව්.

ප්‍ර - මහත්තයා කිව්වා වෙන්නත් පුලුවන් නැති වෙන්නත් පුලුවන්. මේකෙ ලියවී නැත්තේ මහත්තයා පිලිගන්නවාද, කුමක් හෝ හේතුවක් මත අමතක වීමක් නිසා හෝ මහත්තයා ඒ අවස්තාවේ කිව්වෙ නෑ කියලා, 1 වන විත්තිකරු ඔය ස්ථානයේ බැහැලා හිටියේ නැහැ කියලා පිලිගන්නවාද?

උ - මම කිව්වා ලියන්න බැරි වුණාද, දන්නෙ නැහැ.

2015-01-05 වන දින සාක්ෂිකරු විසින් පැය 3.00 ට කහවත්ත පොලිසියේ මැතිවරණ තොරතුරු පොතේ සඳහන් කර ඇති 01 වන විත්තිකරු බැස සිටි බව කියා නැති බවට කරන ප්‍රකාශය ඌනතාවයක් වශයෙන් ගරු අධිකරණයේ අවධානයට යොමු කරනවා.

Page **1232** of the appeal brief in volume 2 is as follows;

ප්‍ර - ඉන්පසුව සී.අයි.ඩී එකට මෙම විමර්ශනය භාර දුන්නාද?

උ - ඔව්.

ප්‍ර - ඒ විමර්ශනය භාරගන්න කොට මහත්තයාගෙන් කටඋත්තරයක් ලියා ගත්තා 2015-01-12 වන දින ?

උ - ලියාගත්තා.

ප්‍ර - ෘ 8.00 ට පනාපිටිය කහවත්තේදි?

උ - ඔව්.

ප්‍ර - ඒ ප්‍රකාශයේ, අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුවට දුන්න ප්‍රකාශයේ, 1 වන විත්තිකරු බැහැලා ඉන්නවා දැක්කා කියලා වචනයක්වත් කියලා නැහැ කියලා මම මහත්මයාට යෝජනා කරනවා.?

උ - මම ප්‍රකාශ කලා ස්වාමීණී.

ප්‍ර - මහත්තයාට කියවලා දුන්නා නේද? ඒ කියවලා දිලා මට කීමට ඇත්තේ එපමණයි කියලා තමයි මහත්තයා අත්සන් කලේ. වැරදි තැන් වල කෙටි අත්සනත් තිබ්බා?

උ - ඔව්.

ප්‍ර - ඒ අවස්ථාවේ 1 වන විත්තිකරු නිලන්ත, ඔය සිද්ධිය වෙන අවස්ථාවේ ඒ ආසන්නයේ බැහැලා හිටියා කියලා වචනයක්වත් ප්‍රකාශ කරලා නැහැ කියලා යෝජනා කරනවා?

උ - ප්‍රකාශ කලා.

එම ඌණතාවය, මේ සිද්ධිය වූ අවස්ථාවේ 01 වන විත්තිකරු එම ස්ථානයේ බැස සිටි බවට මෙම සාක්ෂිකරු 2015-01-12 වන දින පැය 20.00 ට අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුවේ කටඋත්තරයේ සඳහන් කර නොමැති බව ඌණතාවයක් වශයෙන් ගරු අධිකරණයේ අවධානය යොමුකර සිටිනවා.

Page **1235** of the appeal brief in volume 2 is as follows;

ප්‍ර - ඊට පස්සෙ මහත්මයා ගරු මහේස්ත්‍රාත්තුමා ඉදිරියේදි සාක්ෂි ලබා දුන්නා?

උ - ඔව්.

ප්‍ර - එතිදී මහේස්ත්‍රාත්තුමාට තමුන් කියන කොට ලඝු ලේඛකයෙක් හෝ ලඝු ලේඛිකාවක් මේක ටයිප් කරනවා?

උ - එහෙමයි.

ප්‍ර - ඒක තමුන් 2015-01-26 වන දින ලබාදුන්නේ?

උ - දිනය මට මතක නැහැ.

ප්‍ර - මහත්තයාට එදාත් කියවා දුන්නා නේද? කියවා දිමෙන් පසු තේරුම් ගෙන අත්සන් කරමි යනුවෙන් පැල්මඩුල්ල ගරු මහේස්ත්‍රාත්තුමා ඉදිරියේදී අත්සන් කලා නේද?

උ - ඔව්.

ප්‍ර - ඒකෙදී මහත්තයා ඇත්ත කියනවා කියලා දිවුරුම් පිට සාක්ෂි දුන්නා?

උ - ඔව්.

ප්‍ර - ඒ සාක්ෂියේදි මහත්තයා වචනයක්වත් ප්‍රකාශ කලේ නැහැ 01 වන විත්තිකාරයා ඔය ස්ථානයේ බැහැලා හිටියා කියලා?

උ - එතනදි අහපු ප්‍රශ්න වලට උත්තර දුන්නා. ඒ ගැන මතකයක් නැහැ.

ප්‍ර - ලියවී නැත්නම් මහත්තයා පිලිගන්නවාද, මහත්තයා එහෙම කිව්වෙ නැහැ කියලා පිලිගන්නවාද?

උ - කිව්වද නැද්ද කියලා මතක නැහැ.

ප්‍ර - ලියවී නැතිනම් පිළිගන්නවාද?

උ - පිළිගන්න බැහැ. කිව්වා කියලා මතකයි.

උතුමාණෙනි, මෙම සාක්ෂිකරු විසින් 2015-01-26 වන දින ගරු පැල්මඩුල්ල මහේස්ත්‍රාත්තුමා ඉදිරියේ මරණ පරීක්ෂණයේදී නඩුවට අදාල 01 වන විත්තිකරු එම ස්ථානයේ බැස සිටි බවට ප්‍රකාශයක් සිදු කර නොමැති බව ඌණතාවයක් වශයෙන් ගරු අධිකරණයේ අවධානයට යොමු කර සිටිනවා.

Witness SI Amarawansa (PW 56) of the CID testified that witness Hathalawatta (PW 1) in his statement to the CID had stated as follows:

"නිලන්ත ජයකොඩි යන අය සිටි අතර, ඔහු කළ ක්‍රියාවක් මම දුටුවේ නැහැ"

In the circumstances, the prosecution had failed to establish that the 1st accused was a conscious member of the unlawful assembly at the time of the commission of the alleged act and as such the prosecution has failed to prove its case against the 1st accused beyond reasonable doubt.

Although, witness Hathalawatta (PW 1) in his evidence did not state any act done by the accused-appellants other than that they were present. Upon this evidence being revealed in cross-examination, if it had any inclination as to an act done by the accused-appellants the prosecution should have cleared the position in re-examination, which the prosecution had failed to make even an endeavour.

The prosecution rested its case on the basis that the shooting occurred at 01:38:30 on the morning of the 05.01.2015. The learned trial Judge too accepted this position in his judgement and at Page 210 of the judgement states as follows:

> **.....ඒ අනුව එම දර්ශන වල පාන්දර 1.38 යි තප්පර 30 ට වයර් එකක සිටින කුරුල්ලෝ විශාල ප්‍රමාණයක් ඉගිල්ලෙන දර්ශනයක් පෙනෙන අතර, එය වෙඩි ශබ්දයක් හේතු කොට ගෙන එම කුරුල්ලන් කලබලයට පත්ව ඇති බවට පැමිණිල්ලේ නිගමනය බැහැර කළ නොහැකි බව සඳහන් කරමි.**

The learned trial Judge stated that the shooting occurred at 01:38:30 of the morning of 05.01.2015 the learned trial Judge had failed to consider the evidence which established that the 1st and 3rd accused persons were not together at the said time. The prosecution relied its case on certain timings contained both in the CCTV footage and call details of several mobile service providers. Counsel for the accused-appellants argued that the 1st and the 3rd accused-appellants during that pertinent time, had exchanged several calls. Such calls were evident that the 1st and 3rd accused were not nearby where they could have spoken to each other.

It is important to note that the document marked P 23 at page 578 of volume 01 of the appeal brief, which is the detailed call record of the 3rd accused demonstrating several calls which were exchanged between the 3rd accused and the 1st accused at 01:27:15 a.m., 01:31:15 a.m., 0 1:33:15 a.m., and at 01:36:20 a.m. goes to show that the 1st and the 3rd accused persons were at different places at the alleged time of the shooting.

This evidence had also been elicited from the investigating officer from CID, IP Jayasekara (PW 59). His evidence is reproduced as follows;

Page 2067- 2068 of the appeal brief in volume 2 is as follows;

> **ප්‍ර - (පැ 22 ලේඛනය සාක්ෂිකරුට පෙන්වයි) මහත්මයා ප්‍රකාශ කළා මහත්මයාගේ විමර්ශන වලින් අනාවරණය වුණා කියලා මේ 1 වන විත්තිකාරයාගේ, 07778020730 කියන නොම්මරය ඔහුගේම නොම්මරය කියලා?**
>
> **උ - එහෙමයි.**
>
> **ප්‍ර - ඒ එක්කම මහත්තයා 3 වන විත්තිකරුගේ ජංගම දුරකතනය 0772238927 නේද?**
>
> **උ - එහෙමයි.**
>
> **ප්‍ර - ඒ දුරකතන දෙක අතර 1:31:15 ට දුරකතන ඇමතුමක් අරගෙන තියෙනවා නේද?**
>
> **උ - එහෙමයි.**

ප්‍ර - මේ දර්ශන වල හැටියට 1:33: තප්පර 36 ට මේ පේන්නේ (33 ට හා 34 ට අදාල ස්ථාන රූප රාමුවේ පෙන්වා සිටි) පිරිසක් ඉන්නවා එකට?

උ - එහෙමයි.

ප්‍ර - ඒ අවස්ථාවේදිත් මේ අංක දෙක අතරේ, මේ 3 වන විත්තිකරු පාවිච්චි කලා කියන අංකයයි 1 වන විත්තිකරුගේ අංකයයි අතර දුරකතන හුවමාරුවක් වෙලා තියෙනවා නේද?

උ - එහෙමයි.

ප්‍ර - කීයද වෙලාව? 1:33 තප්පර 53 ට හා 1:31 තප්පර 15 ට හා 1:36 තප්පර 20 ට හා 1:36 තප්පර 56 ට?

උ - එහෙමයි. නිවැරදියි.

The prosecution relied on the timings of certain instances in presenting its case and invited the learned High Court Judge to consider such timings. This is a vital piece of evidence that is demonstrative of the 1st accused being at a different place at the time of the shooting, as contended by the prosecution. It has never been the consideration of the learned High Court Judge and had been omitted in coming to a finding of guilt of the accused-appellants.

PC 77667 Sumith (PW 58) was an investigating officer who investigated this incident, based on which investigation charges were filled by the Attorney General. The learned trial Judge had failed to consider the inbuilt discrepancies and the improbability of PC 77667 Sumith (PW 58) and had failed to consider the evidence of PW 58 in the light of the fact that he was an investigator and as such an interested witness. It is pertinent to note that witness Sumith accepted in his evidence that, he is the person who recorded the statement of the 1st accused-appellant. He also claimed that he was involved with an investigation commonly known as the "Kotakethana murder case" and he was on the surveillance team in the area during such investigation and that, during this period of an investigation that he got to know the 1st accused. It is pertinent to note, however, upon cross-examination that his evidence was shaken and he was unable to even identify correctly the names of the accused in the said case.

Page 1965 - 1966 of the appeal brief in volume 2 is as follows;

ප්‍ර - 2008 ඉඳලා 2015 වෙනකම් කොටකෙතන ඉඳලා එක්කෙනෙක් අත්අඩංගුවට අරන් තියෙනවා. ආවේක්ෂණ රාජකාරිත් කරලා තියෙනවා නේද?

උ - නෑ ස්වාමීණි දැනට කොළඹ මහාධිකරණයේ විභාග වන 6739 නඩුවේ සැකකරුවන්.

ප්‍ර - ඒ නඩුවේ විත්තිකාරයෝ කවුද කියන්න?

උ - විත්තිකාරයන්ගේ නම් මේ අවස්ථාවේ මතක නෑ අන්වර්ථ නම් දන්නෙ.

ප්‍ර - තව එක්කෙනෙක් හිටියා ලොකු මල්ලි කියලා දන්නවාද?

උ - ඔව්.

ප්‍ර - ලොකු මල්ලි නෙමෙයි මහත්තයො චුටි මල්ලි කියලා හිටියේ. බොරු කියන කොට මගේ බොරුවම ආයෙ කියන්න එපා. චුටි මල්ලි කියලා එක්කෙනෙක් හිටිය මහත්තය දන්නවාද?

උ - මේ අවස්ථාවේ නම් මතක නෑ.

Although he has stated that, he was acquainted and associated with the 1st accused-appellant he was unable to explain how he was acquainted or how he had associated with the 1st accused. It is unclear in evidence as to whether he identified the accused on CCTV before or after the statement of the 1st accused-appellant was recorded. Amidst these discrepancies witness PW 58 staed that he identified the 1st accused-appellant being on the right of the 3rd accused-appellant on a CCTV footage based on the 1st accused's "appearance and style of movement (හැඩරුව සහ ගමන් කරන විලාශය.)" According to the CCTV footage, this identification was at 01:33:48. However, this position is highly improbable as document P 23 demonstrates that the 1st accused has called the 3rd accused at 01:33:53. This call had been accepted by the main investigator of the prosecution, PW 59 Jayasekara.

The CCTV footage was displayed during the trial in the presence of the learned High Court Judge and all parties present, and in cross-examination, witness PW 58 accepted that he could not identify the vehicles and other large objects on the CCTV footages as displayed in Courts.

The learned counsel for the respondent stated that it is interesting to note, neither the 1st, 2nd nor the 3rd accused-appellants sought access to the CCTV footage, nor challenged the same vide the provisions of the Evidence Ordinance (Special Provisions) Act, No. 14 of 1995. It was only the 4th and 5th accused who made such application, to whom such access was granted. The order made by the learned trial Judge dated 06.03.2017 allowing the CCTV footage to be adopted as evidence was not challenged by the 1st, 2nd or 3rd accused-appellants. Only the 4th and 5th accused sought to challenge the said order. However, even in the Court of Appeal, no order was made setting aside the order dated 06.03.2017.

Thus, he further stated that for all purposes concerning the trial, the order dated 06.03.2017 is valid and in force. it is redundant that the appellants now seek to challenge the said order, whilst having acquiesced to the legality of the order. The respondents state that, the appellants are now estopped from challenging the admissibility of the CCTV footage, which in effect seeks to call in question the order dated 06.03.2017.

Page 1980-1982 of the appeal brief in volume 2 is as follows;

ප්‍ර - මහත්මයාට පේනවාද **01:33:27** වේලාවට කට්ටියක් ඇවිදගෙන එනවා?

උ- ඔව්.

ප්‍ර- තාම මහත්මයාට හඳුනාගන්න බෑ කව්ද කියලා හරි නේද?

උ- හරි.

ප්‍ර- මහත්මයා අර වාහනයක් යනවා නේද දැන් වේලාව **1:33:44** යි. ඒ වාහනයේ නොම්බරේ පේනවාද?

උ- නොම්බරේ පේන්නෙ නැහැ.

ප්‍ර- ඒක තමයි. මහත්මයාට කියන්න පුලුවන්ද මොන වර්ගයේ වාහනයක්ද කියලා?

උ- එහෙමයි ස්වාමිණි.

ප්‍ර - මොකක්ද වර්ගය?

උ- ජීප් රථයක් වගේ මට පේන්නේ.

ප්‍ර- නමුත් ජීප් රථය මොන ආකාරයේ ජීප් රථයක් ද මොන ජාතියෙ ජීප් රථයක් ද කියලාවත් මහත්තයාට කියන්න බෑ?

උ- මට කියන්න හැකියාවක් නැහැ.

For the accused-appellants, the contention was that this witnesses' evidence should have been considered with caution especially considering the fact that he was an investigator and a trained witness and therefore would testify to secure a conviction. Unfortunately, the learned High Court Judge did not consider any of this material and decided to act upon the evidence of PC 77667 Sumith (PW 58) without considering or judicially evaluating any such discrepancies.

In the case of Weerasinghe Vs. Bribery Commissioner 2013 (1) SLR 359, it was held that the police evidence should be scrutinized with caution as they testify on items of evidence that they purportedly unearth.

Two witnesses implicated the accused-appellants. They are witness PW 1 Hathalawaththa who merely stated that he saw the accused-appellants somewhere in the vicinity but did not say whether they were members of the unlawful assembly or that he saw the 1st, 2nd and 3rd accused-appellants doing any contributory act towards the prosecution of any object of the unlawful assembly.

Consequent to an omission being brought to the attention of the Court the learned High Court Judge at page 211 of the judgement decided to act upon the evidence recreated which was a statement made by Hathalawatta (PW 1) to the police.

Cross Examination of SI Amarawansa (PW 56) at Page 1930- 1931 of volume 2 of the brief is as follows:

ප්‍ර - එම සාක්ෂිකරුගේ ප්‍රකාශයේ පළවන විත්තිකරු එම ස්ථානයේ බැස සිටි බවට, එනම් නිලන්ත ජයකොඩි යන පුද්ගලයා එම ස්ථානයේ බැස සිටි බවට ඔය ප්‍රකාශයේ කොහේ හරි සඳහනක් තියෙනවාද?

උ - සටහනක් කර තිබෙනවා නිලන්ත ජයකොඩි යන අය සිටි අතර ඔහු කළ ක්‍රියාවක් මම හරියට දුටුවේ නැහැ.

ප්‍ර - බැස සිටියා යැයි සඳහනක් නැහැ නේද?

උ - 'සිටි අතර' කියලා පමණයි ස්වාමීනි සටහන් වෙන්නේ.

ප්‍ර - බැස සිටි බවක් සටහන් වෙන්නෙ නැහැ නේද?

උ - නැහැ.

ඉතාමත් ගෞරවයෙන් **2017-05-02** වන දින සටහන් කර ඇති මෙම ඌනතාවය ගරු අධිකරණයේ අවධානයට යොමු කරනවා.

It is evident that the learned trial Judge had failed to consider the ingredients as required to be proved by the prosecution in a charge under the principle of common object.

The evidence of the presence of the 1st accused-appellants in the vicinity is the most unreliable identification of the 1st accused by witness PC 77667 Sumith (PW 58). He had identified a person merely walking next to the 3rd accused-appellant to be the 1st accused-appellant.

Page 1947 of the appeal brief in volume 2 is as follows;

ප්‍ර - කවුද ඔබ හඳුනාගත්තෙ?

උ - මම චම්පා ට්‍රේඩර්ස් සී.සී.ටී.වී දර්ශන වලට අදාලව ඒ වනවිට විදුලි බල හා බලශක්ති නියෝජ්‍ය අමාත්‍ය ප්‍රේමලාල් ජයසේකර මහතා ගමන් කිරීම හඳුනා ගැනීමක් සිදු කලා. එසේම කොට කලිසමක් වැනි කලිසමක් ඇඳ සිටින සෙරප්පු දෙකක් දමාගෙන, ප්‍රේමලාල් පයසේකර මහතාගේ දකුණු පසින් ගමන් කරන පුද්ගලයෙකු නිලන්ත ජයකොඩි යන 1 වන සැකකරු බවට හඳුනාගත්තා. එසේම වම් පසින් ඉරි සහිත ටීෂර්ට් එකක් ඇඳ ගමන් කරන පුද්ගලයා කහවත්ත ප්‍රාදේශීය සභාවේ සභාපති වපිර දර්ශන සිල්වා යන අය බවට මම හඳුනාගත්තා.

Page 1950 of the appeal brief in volume 2 is as follows;

සාක්ෂිකරු විසින් 01:33:48 වෙලාවේ නතර කරන ලෙසට ඉල්ලා සිටී.

ප්‍ර - ඇයි මේක නැවැත්තුවේ?

උ - මෙහි සුදු ෂර්ට් එකක් සහ කලිසමක් සකස් කරමින් ඒ කියන්නේ කලිසම උස්සමින් ඉන්න පුද්ගලයා ඇමති ප්‍රේමලාල් ජයසේකර මහතා බවට හඳුනාගන්නවා.

In both these instances, it was reiterated by the Counsel for the 1st accused-appellant that, there was no overt act on the part of the 1st accused and that he was not a conscious member of the unlawful assembly and that the 1st accused being aware of the facts that render the assembly unlawful intentionally joined or remained in such unlawful assembly.

The above legal principle as laid down in section 146 has been judicially evaluated in the case of Sukhun Raut and others Vs. State of Bihar 135 of 2000. The Supreme Court of India held that the prosecution must, to secure a conviction based on unlawful assembly, prove that the accused did an overt act.

This position has also been followed in the case of Sammy and Others Vs. The Attorney General 2007 (2) SLR 216.

It is pertinent to note that there is no overt act on the part of the 1st, 2nd and 3rd accused-appellants that the prosecution has led in evidence, and therefore that a conviction cannot sustain for the accused-appellants based on the common object. The learned High Court Judge at page 223 of the judgement concludes that the 3rd accused-appellant had given some kind of leadership. Considering the above evidence, it is startling as to what material has directed the learned trial Judge to come to this conclusion. It is my view that this legal position which is of paramount importance has never been considered by the learned High Court Judge.

The learned trial Judge has misdirected himself on the common object of the alleged unlawful assembly.

The unlawful assembly of which the accused-appellants were said to have been members according to the charge, is an unlawful assembly with the common object of causing hurt and

causing mischief to decorations done by the supporters of UNP. The learned trial Judge in his judgment at page 224 has misdirected himself and held that:

> "01, 02, 03 විත්තිකරුවන් පොදු අපේක්ෂක මෛත්‍රීපාල සිරිසේන මහතා පිළිගැනීම සඳහා සකස් කර තිබූ සැරසිලි වලට අනර්ථයක් සිදුකිරීම සහ දෙදෙනෙකුට තුවාල කිරීම පොදු අරමුණ කරගත් නීතිවිරෝධී රැස්වීමක, ඔවුන් සාමාජිකයන් වී සිටි බවට පැමිණිල්ල විසින් විත්තිකරුවන්ට එරෙහිව සාධාරණ සැකයෙන් තොරව ඔප්පු කිරීමට සමත්ව ඇති බවට සඳහන් කරමි."

It had been concluded by the learned trial Judge that there was a murderous common object shared amongst the members of the unlawful assembly which, has not been disposed of in evidence and this misdirection itself vitiates the conviction. The learned trial Judge had failed to consider that charge 2 has not been proved against the accused-appellants. No evidence whatsoever has been elicited in the testimony from any of the prosecution witnesses in respect of the presence of the 1st, 2nd and 3rd accused-appellants when any vandalizing of the decorations occurred. The identity of the accused-appellants has not been proved on the 2nd charge.

On behalf of the aggrieved party, it was argued that PW 3 was a police officer who was an independent witness. The prosecution had submitted video evidence captured by CCTV located in the vicinity of the crime scene. The learned President's Counsel stated that those CCTV recordings demonstrated the nature of the assembly, arms used and the behaviour of the assembly on or before the scene of occurrence. The prosecution had called for mobile tower reports of the accused-appellants during that particular time.

He further stated that, as mentioned earlier the prosecution had called eyewitnesses, mobile tower reports and submitted CCTV video evidence to strengthen their case and that there is direct evidence to confirm the presence of all 3 appellants at the time of the incident shooting. Furthermore, PW 1, PW 3, PW 5 & PW 6 testified and confirmed the presence of all the appellants and marked contradictions or omissions which were highlighted and such contradictions and omissions failed to challenge the credibility of the witnesses. Counsel for the aggrieved party further argued that the learned trial judge had properly analysed all the omissions and contradictions which were marked. The learned trial Judge categorically stated in his judgment that the omissions and contradictions marked do not affect the core issues of this matter.

The 2nd and 3rd accused-appellants during the dock statements admitted that they visited the place of the incident and that they were present and the 3rd accused-appellant admitted that he had a conversation with PW 3 who is a police officer in that location. He is an independent witness and testified that he identified the accused-appellant at the time of the incident, and he further testified that the accused-appellants actively participated in the unlawful assembly which had a common object. Witness PW 1 in his evidence-in-chief stated that on or around 05.01.2015 at Lihiniya Junction, Kahawaththa around 1.30 a.m. the appellants came to the location and they were present at the time of the incident.

PW 1 has stated in his evidence-in-chief as follows in vide page 1216 of the appeal brief;

> ප්‍ර : එතකොට ඔබ ආපහු ලිහිණියා හංදියේ සිට රත්නපුර ගෝල්ඩ් හවුස් එක වෙනකම් ආ ඒ ගමන වෙනකොට දැන් අඳුන ගත්ත 1,2,3 විත්තිකරුවන් වාහන දෙකකින් පාර හරස් කරලා බිම හිටියා කිව්වා?

උ : ඔව්.

ප්‍ර : ඉන්පසු කිව්වා වෙඩි තැබීමක් වුනා කියල?

උ : ඔව්.

ප්‍ර : ඒ වෙඩි තැබීම සිදුවුනේ මේ විත්තිකරුවෝ වාහන අසල ඉන්නකොට?

උ : වාහන අසල ඉන්න කොට.

ප්‍ර : බෞද්ධ මන්දිරය පැත්තේ ඉදලා ලිහිණියා හංදිය පැත්තට මේ වෙඩි තැබීම සිදු වුනා කියලා කිව්වේ?

උ : ඔව්.

ප්‍ර : ඒ වෙඩි තැබීම එක්ක 3 වන විත්තිකරු, මොනවද කළේ?

උ : එතුමා ඉන් පසුව වාහනයේ නැගලා එම ස්ථානයෙන් ගියා යන්න.

ප්‍ර : ඒ වෙඩි තැබීම සිදුවුන වෙලාව ඔරලෝසුව බලා වෙලාව කියන්න බැහැ. ඒ වෙඩි තැබීම සිදුවුන වේලාවයි ජයසේකර මහතා ජීප් එකට නැගලා ගිය වෙලාවයි අතර ගැප් එක කොපමණ විතරද?

උ : එකම වේලාවේ සිදු වුනේ.

ප්‍ර : මේ 3 වන විත්තිකාර ප්‍රේමලාල් ජයසේකර මහතා ජීප් එකේ නැගලා යන විට 1, 2 විත්තිකරුවන් දෙදෙනා මොනවාද කලේ?

උ : ඒ සියලු දෙනා එම ස්ථානයෙන් ගියා. කවුරුවත් එම ස්ථානයේ හිටියේ නැහැ, පස්සේ බලන විට.

The witness PW 3 testified that on 05.01.2015 around 1.45 am the 1st ,2nd and 3rd accused-appellants came to the Lihiniya Junction, Kahawaththa and surrounded the place by a group of people and several vehicles. PW 3 who was on duty at that time informed the 3rd accused-appellant to leave the place with his followers and once PW 3 turned to other side he had heard three gun shots coming from the direction where the 3rd accused-appellant's vehicle was located.

PW 3 has stated in his evidence in chief as follows at page 1296 of the appeal brief;

ප්‍ර : ඔබ පේමන්ට් එකට නගිනකොටම මොකද වුනේ?

උ : ලිහිණියා හංදියේ රැස්ව සිටි පිරිසගෙන් ලොකු හූ හඬක් ආවා.

ප්‍ර : යූ.ඇන්.පී. එක පැත්තෙන් ලොකු හූ හඬක් ආවා.

උ : එහෙමයි.

ප්‍ර : ඔබ ඒ පැත්ත බැලුවා ද?

උ : එහෙමයි. අවධානය යොමු කළා ඒ පැත්තට.

ප්‍ර : ඊට පසුව?

උ : ඒ සමගම ජීප් රථය දෙසින් වෙඩි හඬවල් 3ක් ඇහුණා.

ප්‍ර : වෙන් වෙන්ව වෙඩි හඬවල් 3ක් ද?

උ : එහෙමයි.

ප්‍ර : ජීප් රථය කියා ඔබ කිව්වේ මේ චිත්තිකාරයා නැගපු ජීප් රථයද?

උ : එහෙමයි.

ප්‍ර : නමුත් ඔබට එය පෙනෙන්නේ නැහැ?

උ : නැහැ.

ප්‍ර : සද්දය ආවේ ඒ පැත්තෙන්?

උ : එහෙමයි.

ප්‍ර : ඒ දකුණු පැත්තෙන් එන හූ හඬ එක්ක ඔබ වම් පැත්තෙන් වෙඩි හඬවල් තුනක් පිටවෙලා තිබුනා?

උ : එහෙමයි.

On behalf of the aggrieved party the contention was that the learned High Court Judge has correctly considered that the prosecution has proved beyond reasonable doubt that there was an unlawful assembly and the accused-appellants were members of the said unlawful assembly.

Further it was argued that PW 1's and PW 3's evidence are corroborated by the evidence of PW 5, who has testified as follows vide page 1417 of volume II of the appeal brief;

ප්‍ර : ඔබ මොකක්ද දැක්කේ?

උ : එක පාරටම දැක්කා බෞද්ධ මන්දිරය හා ඔරලෝසු කණුව පැත්තේ වාහන කිපයක් ඇවිත් පාර හරස් කරලා නැවැත්තුවා. එවකට හිටිය නියෝජ්‍ය අමාත්‍ය ප්‍රේමලාල් ඇමතිතුමාගේ වාහන දෙක මම හඳුනා ගත්තා. රතු පාට ජීප් එකයි සුදු පාට ජීප් එකයි. ඊට අමතරව තිබුනා ප්‍රාදේශිය සභාවේ කැබ් එක. ඊට අමතරව පළාත් සභා සභා මන්ත්‍රී නිලන්ත ජයකොඩි මහතාගේ කැබ් එක තිබුනා. තව පිටිපස්සේ වාහන තිබුනා. ඒ අතර මගේ කකුලට වෙඩිල්ලක් හෝ මොකක් හරි වැදුණා. මම හිරි වැටිලා එහෙම්ම ඇදගෙන වැටුනා. බෝක්කුව කණුව උඩ පාරට මාව වැටුණා.

In addition, for the aggrieved party it was submitted that according to the CCTV evidence the members of the mob unlawfully assembled and appeared to be led by the 3rd accused-appellant, the CCTV evidence shows that some members of the unlawful assembly were armed with firearms, the prosecution has proved through the government analyst that the shots were not fired by the weapons which had been licensed and that the learned trial judge had concluded this case by correctly evaluating the evidence of the prosecution.

The learned High court judge has stated in his judgment as follows vide page 2721 and 2722 of volume II of the appeal brief;

ඒ අනුව හිස් පතොරම් කොපු වෙනත් නීති විරෝධී ටී-56 ගිණි අවියකින් නිකුත් වූ ඒවා බවට අධිකරණයට තහවුරු වන අතර එහිදී පැ.සා. 1 හා 3 යන සාක්ෂිකරුවන්ගේ සාක්ෂිවලට අනුව 3 වන චිත්තිකරු ගමන් කළ අපරාධ ස්ථානයේ තිබූ සුදු පැහැති ජීප් රථය තුළ නීති විරෝධී ගිණි අවියක් හෝ කිහිපයක් තීබී ඇති බවට අනෙකුත් සියලු සාක්ෂි හා කරුණු මත සනාථ වන බවට සඳහන් කරමි.

As per the submissions of the aggrieved party evidence of the prosecution can be believed. It was further submitted that from the perusal of the evidence led by the prosecution, the prosecution had established as well as proved that the common object of the unlawful assembly and 1st to 3rd accused-appellants were members of that unlawful assembly and that the 1st to 3rd accused-appellants actively participated in it. Accordingly, the existence of the common object in an unlawful assembly is the only conclusion consistent with the facts and circumstances proved in the prosecution case. The learned President's Counsel submitted that the learned High Court Judge had correctly concluded in his judgment and the same was held in the judgment as follows at pages 2745 and 2746 of volume II of the appeal brief;

> "ඒ අනුව මෙම නඩුවේ 8 වන විත්තිකරු නීති විරෝධී ගිණිඅවි අත දරාගත් පුද්ගලයින් සමග විරුද්ධ පාර්ශවයේ සැරසිලි කටඅවුට් බැනර් ඉවත් කරමින් පැමිණි පිරිසට නායකත්වය දෙමින්, පැමිණෙ ඇති ආකාරය සලකා බැලීමේදී සාමකාමී ලෙස වේදිකාවක් සැරසිලි කරමින් සිටි පිරිසක් ආසන්නයට පැමිණිමේදී මෙවන් තත්වයක් ඇති විය හැකි බවට වගකිවයුතු දේශපාලඥයෙකු ලෙස ඔහු දැන සිටිය යුතු අතර ඒ අනුව 3 වන විත්තිකරුගේ නායකත්වයෙන් සිදුව ඇති මෙම අපරාධය සඳහා 1 හා 2 විත්තිකරුවන්ද වගකීමට යටත් වන බවට සඳහන් කරමි. ඒ අනුව මෙම විත්තිකරුවන් තිදෙනාම මෙවැනි බරපතල ගනයේ අපරාධයක් සිදුවිය හැකි බවට දැන සිටියා විය යුතු අතර ඒ අනුව ඔවුන්ගේ සාපරාධී අරමුණ පැහැදිලි වේ."

It is an established fact that the burden of proof in a criminal trial is that the charges must be proved beyond reasonable doubt by the prosecution. This legal principle enunciated by the House of Lords in case Woolmington vs DPP [1935] AC 462 has been accepted by our courts throughout and the instant case is no exception. The learned trial Judge did not consider that the accused had no legal burden and that a reasonable doubt in the prosecution case would accrue to the benefit of the accused and thus, the accused should be acquitted.

In Padmathilake vs. Bribery Commissioner (SC 99/07 dated 30.07.2009), the court emphasized that 'Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt to which the accused is entitled, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind.'

As per Karunadasa vs. OIC, Nittambuwa cited in Mudiyanse Appuhamy vs. State (CA 61/98 dated 11.01.2001) the court further said that "The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defense. When the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right."

In Kamal Addaraarachchi vs. State (2008 3 SLR 393), it was held that "The case of the prosecution is not considered to be proven until the 'presumption of innocence' is disproved regarding the defendant. Statements made by the defendant or the stance taken by him being rejected do not prove the prosecution case".

This position was approved in the case of Mahinda Herath vs. AG (CA 21/2001 dated 13.09.2005), where it was held that, "The trial judge must always bear in mind that the accused is presumed to be innocent until the charge against him is proven beyond reasonable doubt. What happens when a plea of alibi or complete denial is taken up by an accused person is rejected? The trial judge

should not forget the above legal principles regarding the burden of proof and the presumption of innocence".

The fact that the weakness of the defence case should not bolster the prosecution case was not correctly identified in the judgment. The learned trial Judge was not mindful that suspicious circumstances would not entail liability on the accused, and it was the duty of the prosecution to prove the case beyond reasonable doubt based on credible evidence. At the outset in the judgment, the learned trial Judge has not identified the proper manner of evaluating the credibility of witnesses, including the tests relating to evaluating credibility.

The importance attached in evaluating credibility by the trial Judge has been stressed by the superior courts and certain established tests have been laid down.

In Wickremasuriya vs Dedoleena (supra) it was held that "Arriving at determinations with regard to Credibility and testimonial trustworthiness of a witness is a question of fact and not a question of law".

In Kumara De Sllva and 2 Others vs Attorney General 2010 (2) SLR 169 it was observed that "Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge".

It has been accepted that 'Credibility' is a matter for the trial judge.

In Dharmasiri vs Republic of Sri Lanka 2010 (2) SLR 241, Justice Sisira De Abrew referring to the cases of Fraud vs. Brown & Company Limited 20 NLR 282 and Alwis vs. Piyasena Fernando (1993) 1 SLR 119 held that "Credibility of a witness is mainly a matter for the trial Judge, Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the credibility of a witness unless such findings of trial Judge are manifestly wrong".

Similar observations were made in the following cases;

Rev. Maharagama Suneetha vs. Attorney General 2006 (3) SLR 266,

Chaminda vs. Republic of Sri Lanka 2009 (1) SLR 144,

Ariyadasa vs. Attorney General 2012 (1) SLR 84,

Sunil Jayarathna vs. Attorney General 2011 (2) SLR 91.

Perusal of the judgment indicates that the learned trial Judge has failed to evaluate the credibility of each witness, including that of the defence witnesses, being mindful of the said tests laid down.

For the aggrieved party it has been submitted that by carefully analysing the evidence of this case the learned High court Judge has concluded that the prosecution had proved the case beyond reasonable doubt establishing the existence of unlawful assembly and that the 1st to 3rd accused-appellants were members of that unlawful assembly. It was further argued that there is no evidence adduced during the entirety of the trial that either of the appellants had made public any intention to cease to be members of the unlawful assembly. They failed to directly or indirectly deny the common object or their membership from the unlawful assembly until the point of shooting.

It was held in the judgment as follows on page 2746 of volume II of the appeal brief;

> **"ඒ අනුව නීති විරෝධී රැස්වීමක සිටිය යුතු සාමාජිකයින් සංඛ්‍යාවත්, පොදු අරමුණක පැවැත්ම සාමාජිකයින් තුළ තිබීමත්, එම පොදු අරමුණේ ස්වභාවයත් වැදගත් වන අතර, ඒ අනුව 3 වන විත්තිකරු නායකත්වය දෙමින් නීති විරෝධී ගිණි අවි සන්තකය දරමින් කලහකාරී ලෙස හැසිරුණු පුද්ගලයින් සමග සිටි මෙම 1, 2 හා 3 විත්තිකරුවන්, පොදු අපේක්ෂක මෛත්‍රීපාල සිරිසේන මහතා පිළිගැනීම සඳහා සකස් කර තිබූ සැරසිලි වලට අනර්ථයක් සිදු කිරීම, එක් අයෙකුගේ මරණය සිදුකිරීම හා දෙදෙනෙකුට තුවාල කිරීමේ පොදු අරමුණ කරගත් නීති විරෝධී රැස්වීමක ඔවුන් සාමාජිකයින් වී සිටි බවට පැමිණිල්ල විසින් විත්තිකරුවන්ට එරෙහිව සාධාරණ සැකයෙන් තොරව ඔප්පු කිරීමට සමත්ව ඇති බවට සඳහන් කරමි."**

The evidence established the existence of an unlawful assembly that continued and existed at the time of the shooting. Therefore, it is being argued by the Counsel for the aggrieved party that the conviction and the sentence of the 1st to 3rd accused-appellants were on par with the law.

Evidence led on Closed Circuit Television Camera footage under and in terms of the Evidence Special Provisions) Act No. 14 of 1995

The learned President's Counsel for the 3rd accused-appellant submitted that before the commencement of the trial the 4th and 5th accused persons on 15.11.2016 and 23.11.2016 objected about the lawful process by which evidence which falls under the Evidence Special Provisions Act No 14 of 1995, could be led. Following submissions both written and verbal, the learned High Court judge by order dated 06.03.2017 overruled the objections raised by the co-accused (4th and 5th accused persons). They applied to revise the said order CA PHC 37/2018.

He stated that in the said order the 4th and 5th accused persons submitted *inter-alia* that the said order was bad in law and accordingly urged the court to exercise its powers of revision against the said order. The accused-appellant stated that the said evidence sought to be led was about Close Circuit Television Camera (CCTV) footage obtained by the prosecution. The said footage goes to the root of the case and was subsequently relied upon both by the prosecution and the learned High Court judge.

An undertaking was first given by the State that it would not lead the said evidence against the co-accused after which the State took up the position that the evidence does not implicate the 4th and 5th accused in the case. Thereafter evidence was led on the said footage by the prosecution. The learned President's Counsel for the 3rd accused-appellant argued that the conduct of the prosecution is irregular and illegal and violative of the Law.

The learned High Court Judge misdirected himself in accepting the evidence of CCTV and photographs when in fact they were not in compliance with the Evidence (Special Provisions) Act No. 14 of 1995. The Law of Evidence Book 1, E.R.S.R. Coomaraswamy (page 33) on "Automatic Recordings General Rules Regarding Use and Admissibility of Automatic Recordings;

> "A party relying on an automatic recording such as a tape-recorder or film must satisfy the judge that there is prima facie case that it is authentic and it must be intelligible enough to be placed before the jury. The evidence must show its origin and the history of its recording up to the moment of its production in court. If the defendant in Criminal

proceedings dispute its authenticity, the prosecution must satisfy the Judge that prima facie it is genuine"

Section 4 of the Evidence (Special Provisions) Act No. 14 of 1995 is as follows;

> 4(1) In any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording reproduction thereof, tending to establish that fact shall be admissible as evidence of that fact. If it is shown that;
>
> (a) the recording or reproduction was made by the use of electronic or mechanical meant;
> (b) subject to subsection (3) of this section, the recording or reproduction is capable of being played, replayed, displayed or reproduced in such a manner to make it capable of being perceived by the senses;
> (c) at all times material to the making of the recording or reproduction the machine or device used in making the recording or reproduction, as the case may be, was operating properly, or if it was not, and respect in which it was not operating properly or out of operation, was not of such a nature as to affect the accuracy of the recording or reproduction;
> (d) the recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which It was in such custody.

The authenticity of the CCTV footage goes to the root of the case which has not been established by the prosecution. The learned High Court Judge had not made his observations on the CCTV footage and rather had narrated what the witnesses had seen from the footage.

It was argued for the 3rd accused-appellant that evidence was also led illegally and irregularly about photographs. Therefore, any inference and conclusion from the said evidence are illegal.

After the prosecution led evidence, all 3 accused-appellants, opted to deliver statements from the dock and on behalf of 3rd accused-appellant only, several witnesses were called to give evidence on behalf of the defence case.

The 1st accused person said in his dock statement that he debuted into politics in 2006, succeeding his father. After contesting for the first time representing SLFP he became the Chairman of Pradeshiya Sabha while PW 1 who contested on UNP ticket became a member of the opposition of the same Pradeshiya Sabha. It is evident that in 2008, the 1st accused person and PW 1 ran for the Provincial Council election representing the same electorate on tickets of dissenting political parties namely SLFP and UNP, and whilst he got elected to Sabaragamuwa Provincial Council, PW 1 got defeated.

He asserted that a political rivalry developed between them, which must have been the motivation for PW 1 to falsely implicate him to conveniently side-line him from active politics. For the 1st accused-appellantit was stated that he learnt about the shooting incident and the fact of

his being implicated in it, only the following morning. The police seized a cab belonging to his father from the house of his father. Thus, he vehemently refuted the charges levelled against him and asserted his innocence.

The 2nd accused person said in his dock statement that on the night of the incident, he came from home to a fuel station to fuel his cab. On his way, at Kahawaththa Clock Tower, he met the 3rd accused who intimated that their propaganda materials were being sabotaged and the OIC at Kahawaththa despite his request had not taken any precautions; therefore, the 3rd accused-appellant had asked the 2nd accused-appellant to accompany him to inquire into this matter. Acceding to this request, the 2nd accused-appellant had accompanied the 3rd accused-appellant. On their way, PW 3 had come forward and pleaded with them not to proceed as the supporters of opposing political party were behaving unruly ahead.

Evidence revealed that heeding to this request, the 3rd accused-appellant had boarded his vehicle and left. The 2nd accused person too had walked back to pick his vehicle which was left at a fuel station. As the police had instructed him not to proceed through the main road, he arrived at his home through a by-route. He claimed that, he too learnt about his implication in this crime on TV the following day. He further mentioned in his dock statement that contrary to the claim by PW 1, Kahawaththa Pradeshiya Sabawa had never owned a red coloured cab but a silver coloured one.

The 3rd accused person said in his dock statement that in 1997 he debuted into politics by being elected as the Chairman of Nivithigala Pradeshiya Sabha. In 2001 he was first elected to the Parliament and then in 2004 he was conferred with a deputy ministerial portfolio. In 2010 he again returned to the Parliament where he was conferred with a deputy ministerial portfolio of power through which he could serve immensely enlightening the houses of people in Ratnapura District. On 4th January 2015, in close run up to the Presidential Election where he threw his lot behind the victory of the then President Mahinda Rajapakse, he had had a busy day attending number of election rallies.

When he was on his way around 12.00 -12,30 am on 05.01.2015, he was informed by way of a phone call that propaganda materials near his party office in Kahawaththa were being sabotaged and his party office was under threat. Immediately, though unsuccessfully he had tried to contact the OIC in Kahawaththa. However, he had managed to report to Kahawaththa Police that their party office in Kahawaththa was under threat. It was occupied by several people; therefore, he had asked the police to beef up the security. He was intimated those two officers namely, Bodaragama and Sampath were on duty at Kahawaththa area. Then he said that he set off to Kahawaththa. On his way, he had met the 2nd accused. When he learnt that the police were stationed ahead, both of them alighted from the vehicle and walked until witness PW 3 was met.

Inspector Bodaragama (PW 3) intimated to him about unruly people on rampage ahead and admitted that he had prevented sabotage of one of their propaganda materials, assured non-recurrence and asked them to leave. He had denied that he inquired about OIC using filthy words. He had further asserted that he arrived in by a red colour Sahara Jeep in which he had been travelling the entire day. While boarding his vehicle he ha heard hooting. His security officials inside the vehicle too had insisted on quick departure.

He claimed that he subsequently learnt that Hon. Thalatha Athukorala influenced the investigation and distorted the facts, in order to intercept his political career. On returning home, between 2 am and 3 am one of his media secretaries informed him by way of a call that a problem has arisen in Kahawaththa. He had replied that he just returned from Kahawaththa but had not witnessed any problem other than their propaganda materials were being sabotaged.

On the following morning, he was informed by a police officer that, his name too was implicated in the incident. He was the Chief Organizer for Nivithigala Electorate and it was his responsibility to nominate and deploy polling agents. He alleged that, if he had surrendered to court or police, he would have abdicated his duty. Therefore, he waited until the conclusion of the election to surrender to the police. With that intention, he along with his family, shifted to one of his relatives' homes in Aluthgama where at around 1.30 am the Slave Island Police raided the house and arrested him. He said that, when he visited Kahawaththa on the night of the incident, there were supporters from both fractions but he did not know who committed this crime.

It is important to note that based on the evidence that transpired in the trial, the learned trial Judge, has accepted the evidence of witness PW 1 in convicting the accused-appellants. Witness Upali Hathalawatta's (PW 1) evidence has been accepted by the learned trial Judge on the following premises;

(i) Omissions spotted on his evidence on behalf of the 1st accused was disregarded.

(ii) The suggestion of the 2nd accused that PW 1 implicated him maliciously to injure his political career was rejected on the basis that, no material had transpired showcasing malicious intention on the part of PW 1.

(iii) The contradictions marked in respect of PW 1's evidence on behalf of the 3rd accused were disregarded.

(iv) Though PW 1 held a dissenting political view, it was not established that he was maliciously motivated to implicate the accused persons in such a grave crime.

(v) It was not established that PW 1 was either an aggressive person or a politically notorious person. Neither had it been disclosed from his evidence that, UNP supporters had either been armed or gone on a rampage before the shooting incident.

(vi) PW 1 passed the test of spontaneity in as much as he had recorded a statement with the police within one and a half hours of the incident.

Inspector Bodaragama's (PW 3) evidence was decided to be acted upon by the learned trial Judge due to following reasons;

(i) It was sufficiently revealed that fire was discharged from the side of the vehicle in which the 3rd accused-appellant travelled.

(ii) PW 3 also passed the test of spontaneity in as much as he had entered notes at 5 am the same day.

(iii) He identified the white coloured vehicle the 3rd accused-appellant was claimed to have arrived in.

(iv) Through this witness, the presence of the 2nd accused-appellant had been duly established though the latter had not actively taken part in the process.

(v) No evidence was adduced to establish that, Hon. Thalatha Athukorala had influenced the investigation.

(vi) Contradiction 3 (marked V3) on his evidence was disregarded.

(vii) Discrepancies between his evidence before the Court and the statement he had recorded with the Senior Superintendent of Police at the first instances were dispensed with based on his mental confusion in the wake of this incident.

Mohommed Hussain Ilshan's (PW 6) evidence was decided to be acted upon by the learned trial Judge due to following reasons;

(i) Omission as regards the white coloured vehicle as against his 1st police statement was disregarded.

(ii) Only this witness had omitted to disclose about the colour of the vehicle the 3rd accused was claimed to have arrived in, at the very first occasion.

(iii) The presence of few vehicles on the crime scene was established through this witness.

It is important to note that though the Government Analyst (PW 64) confirmed that none of those spent cartridges had been discharged from T 56 weapons referred to him, since facts contrary to the above seemed to have been established through PW 1, PW 3 and other evidence, the learned trial Judge was having the impression that there must have been one or more illegal T 56 weapons in the vehicle of the 3rd accused-appellant travelled in. Nevertheless, there was no solid evidence in that regard.

The learned trial Judge was of the view that the OIC of Kahawaththa Police corroborated PW 3. His evidence which stated that the DIG had influenced him to omit the name of the 3rd accused person from 'B' report although he did not accede to, was not controverted by the defence. The testimonies of the witnesses who testified to CCTV footages lend credence to prosecution's claim of unruly mob which consisted of people wielding T 56 weapons and clubs, sabotaging decorations and movements of vehicles as revealed by PW 1 and PW3. The learned President's Counsel argued that the point: a person without clarity of face cannot be identified, is excluded by the learned trial Judge and the trial court had outright determined that, a person can be identified with demeanour and deportment as had happened in this matter. The learned trial Judge misdirected himself in accepting the evidence of CCTV and photographs when in fact they were not in compliance with the Evidence (Special Provisions) Act No. 14 of 1995.

When I perused the 226-page judgement I found that the learned Trial Judge has rejected the defences of accused-appellants. They are as follows;

Regarding the 1st accused-appellant and the 2nd accused-appellant;

i. When the 3rd accused led a violent mob that was armed with illegal weapons, both the 1st and 2nd accused would have foreseen a calamity like this, accordingly, they are not exempted from the liability stemming from the acts committed by this unlawful assembly.

ii. The 2nd accused has himself admitted his presence at the crime scene and has failed to explain what prompted him fuel his vehicle between 12.00 am - 1.00 am in the middle of the night.

iii. Both the 1st and the 2nd accused, being close political confederates of the 3rd accused had not taken any attempt to either subdue or disperse the unruly mob, a fact that lends credence to infer that, all 3 accused had been instigating the violent group of people together.

Regarding the 3rd accused-appellant;

i. No evidence has transpired during the trial that, propaganda materials in support of the then president Hon. Mahinda Rajapakshe had been sabotaged by the UNP aids that warranted the intervention of the 3rd accused. Assuming the truth in that claim, the prudent course of action he should have resorted to was to inform the OIC failing which to a superior officer. Instead, the 3rd accused had opted to lead a violent mob as established before the Court.

ii. The 3rd accused had not attempted to subdue the mob. It implies that, the 3rd accused had led it and the people forming the assembly had behaved aggressively on incitation of the 3rd accused.

iii. No evidence was adduced to substantiate that the 3rd accused was not aggressive at the time he boarded the vehicle.

iv. The explanation offered by the 3rd accused for evading the police cannot be accepted.

v. The claim of the 3rd accused that he travelled in a red coloured jeep was rebutted by evidence of PW 1, PW 3 and other investigation officers.

vi. No evidence to demonstrate that the 3rd accused became subdued following conversation with PW 3 and took any attempt to immobilize the angry crowd.

Furthermore, referring to evidence of witnesses called by the 3rd accused to speak on his behalf, the learned trial Judge has found that, evidence of Saman was biased towards the 3rd accused-appellant and the evidence of his security detail was bereft of credit as the pocket notebook from which he refreshed his memory was not transparent in as much as he had not entered any notes therein since one and half months prior to the incident, hence, testimonies of both defence witnesses were rejected. The learned trial Judge also has found fault with accused-appellants for not adducing any explanation in respect of those wielding weapons in the mob that followed them.

The learned President's Counsel for the accused-appellants argued that on the premise aforementioned, the learned trial Judge has concluded that, common objects of unlawful

assembly, causing mischief, death and injury to two persons have been proved beyond reasonable doubt, in which the defence had failed to either create a dent or prove their defence case.

It is the contention of the learned President's Counsel for the accused-appellants that the learned trial judge has improperly rejected the defence case. It is a common ground that, upon the learned trial Judge calling for the defence case, the 2nd accused and the other two accused persons opted to deliver an unsworn statement from the dock. It has been repeatedly held time and again, from which our courts have never budged an inch is that even where the only material adduced for the defence case is the unsworn dock statement, the Court is duty-bound to assess it on its merit.

It was held in Gunasiri vs Republic of Sri Lanka; 2009 (1) SLR 39;

> In evaluating a dock statement, the trial Judge must consider the following principles;
>
> i. If the dock statement is believed it must be acted upon.
>
> ii. If the dock statement creates a reasonable doubt in the prosecution case, the defence must succeed.
>
> iii. dock statement of one accused should not be used against another.

In the case of Pathirage Premathilaka vs Attorney General; CA 268/2010, decided on 27.02.2017. It was held as follows;

> "On a perusal of the judgment, we find that the learned High Court Judge has merely stated in the judgment that the appellant made a statement from the dock denying his involvement in the incidence. The learned trial judge has not stated whether his statement has been accepted or rejected"

In the said authority the appeal was allowed and the accused was acquitted.

Udagama vs Attorney General 2000 (2) SLR 103, it was held that "If the dock statement is the only material adduced on behalf of the accused, it must be considered in the judgment"

In the case of Pantis vs Attorney General 1998 (2) SLR 148 the Court expounded the effect of the dock statement on the outcome of the case;

> "The burden of proof is always on the prosecution to prove the case beyond reasonable doubt and no duty is cast on the accused-appellant and it is sufficient for the accused to give an explanation which satisfied court or at least is sufficient to create a reasonable doubt as to his guilt.

In the Court of Appeal case bearing No. CA 26/06 decided on 25.05.2010, Sarath De Abrew J has elucidated the right of an accused to have his case evaluated on the same scale as it applied to the prosecution. It was further held as follows;

> "In adopting this strange 'cart before the horse' procedure, the learned trial judge had committed the following cardinal errors which should necessarily be construed as a denial of a fair trial and also a denial of the right to be presumed innocent until the final drama is enacted and the curtain falls."

The same principle was cited in approval in the latter case of Wahumpurage Wasantha vs Attorney General CA 114/2015, decided on 21.02.2019.

This time tested and fortified principal was re-affirmed by his Lordship Sisira de Abrew J in the Supreme Court in a couple of very recently decided cases namely, Priyantha Lal Ramanayaka vs Attorney General; SC Appeal 31/2011 decided on 27.01.2020 and Thiruganapillai Shivakumar vs Attorney General; SC 39/2019 decided on 23.01.2020.

In those two cases the Supreme Court while re-affirming the principal aforementioned, proceeded to lay down guidelines for evaluation of defence cases for the benefit of trial Judges and legal practitioners. It was stated as follows;

> "For the benefit of the trial Judges and the legal practitioners of this country, we make the following guidelines as to how the evidence given by an accused person should be evaluated.
>
> (i) If the evidence of the accused is believed by Court, it must be acted upon.
>
> (ii) If the evidence of the accused raises a reasonable doubt in the prosecution case, the defence of the accused must succeed.
>
> (iii) If the Court neither rejects nor accepts the evidence of the accused, the defence of the accused must succeed"

In the present case, the matters propounded through the defence case, dock statement and suggestions confronted to witnesses during the cross-examination can be outlined below;

1. Dock Statement

> On the night of the incident, the 2nd accused-appellant had come from home to the fuel station to fuel his cab. On his way, at Kahawaththa Clock Tower, he met the 3rd accused who intimated that, their propaganda materials have been sabotaged. Despite his request the OIC had not taken any precautions, so the 3rd accused asked the 2nd accused to accompany him to inquire into this matter. Acceding to this request, the 2nd accused accompanied the 3rd accused. On their way, PW 3 came forward and pleaded with them not to proceed as the supporters of opposing political party were behaving unruly ahead. Heeding to this request the, 3rd accused boarded his vehicle and left. The 2nd accused too walked back to pick his vehicle which was left at the fuel station. As the police instructed not to proceed through the main road, he arrived at his home taking a by-route. He claimed that, he too learnt about his implication in this crime through TV the following day.

Contrary to the claim by PW 1, Kahawaththa Pradeshiya Sabha never had a red coloured cab but a silver coloured one, he further mentioned on his dock statement. In the cross-examination of PW 1 on behalf of the 2nd accused-appellant, it was sought to be established that a political rivalry had existed between PW 1 and the 2nd accused who was then the chairman of Kahawaththa Pradeshiya Sabha of which PW 1 used to be a member, representing opposing political parties.

During the cross-examination of PW 3, it was elicited that the 2nd accused must travel, passing Lihiniya Junction across Kahawaththa to reach his home. Answering questions posed on behalf of

the 2nd accused-appellant, PW 1 further admitted that, though he had been aware of the official vehicle of Kahawaththa Pradeshiya Sabha, he did not notice it on the crime scene. Inspector Bodaragama (PW 3) was sought to be projected as a biased witness by the Counsel for the accused-appellants as he had turned his blind eye to illegal decorations being put up by UNP supporters under his very nose.

About these materials presented before the Court on behalf of the 2nd accused-appellant, the learned trial Judge has arrived at adverse finding as follows;

(i) "When the 3rd accused-appellant led a violent mob which was armed with illegal weapons, both 1st and 2nd accused-appellants would have foreseen a calamity like this. Accordingly, they are not exempted from the liability stemming from the acts committed by this unlawful assembly."

(ii) "The 2nd accused has himself admitted his presence at crime scene and has failed to explain what prompted him to fuel his vehicle between 12.00 am - 1.00 am in the middle of the night."

(iii) "Both the 1st and the 2nd accused, being close political confederates of the 3rd accused-appellant had not taken any attempt to either subdue or disperse the unruly mob, a fact that lends credence to infer that, all 3 accused had been instigating the violent group of people together."

It was argued on behalf of the 2nd accused-appellant, that the learned trial Judge has been absent-minded to matters disclosed by the 2nd accused in his defence that have been corroborated and materially particular as pointed out below;

(i) The 2nd accused relentlessly claims that, on the night of the incident, he casually met the 3rd accused at Kahawaththa Junction who invited him to accompany him to inquire into allegations of their propaganda materials being sabotaged by members of the opposing party.

This fact has been corroborated by the dock statement of the 3rd accused-appellant. The law that stands as of today is that, matters disclosed in a dock statement of one accused should not be used against a co-accused. It was decided in Gunasiri vs the Republic of Sri Lanka (2009) 1 SLR 39, but not *vice versa.*

(ii) The 2nd accused further asserts that, upon the said meeting, he left his vehicle at the fuel station at Kahawaththa junction and joined the 3rd accused at the walk on foot.

This fact is corroborated by PW 3 who has stated that both the 2nd and 3rd accused came on foot.

(iii) The 2nd accused further declares that, after the 3rd accused boarded his vehicle and raced off following the talk with PW 3, the 2nd accused-appellant also retreated to the fuel station to pick his vehicle up.

This fact is corroborated by the failure of witness Hathalawatta (PW 1) to identify during the trial, the vehicle in which the 2nd accused was alleged to have arrived. Though PW 1 was emphatical that, he was very much familiarized with the official vehicles assigned to Kahawaththa Pradeshiya Sabha that he could make it out even in a tense moment in the middle of the night, he could not

pick it out during the trial. On the other hand, Inspector Bodaragama (PW 3) provides that, even though he was well acquainted with the vehicle of Kahawaththa Pradeshiya Sabha, he did not notice it at the crime scene. Accordingly, prosecution witnesses' evidence, when taken cumulatively, irresistibly points out to the inference that the 2nd accused's vehicle was not present on the crime scene as claimed by him.

(iv) This incident occurred in the wee hours of the day which was the last designated day for an election campaign aimed at a crucial Presidential Election which was scheduled to be held on 08.01.2015. It was not improbable that the 2nd accused, as the then chairman of Kahawaththa Pradeshiya Sabha who had thrown his lot behind the one candidate, must have been having a busy schedule in educating and encouraging the people in his electorate to cast their vote in favour of the candidate he promoted. That must have made him visit the fuel station in the middle of the night.

It was argued for the 2nd accused-appellant, though not expressly articulated, that these are inferable matters in all likelihood in terms of section 114 of the Evidence Ordinance, in terms of which this Court can presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. Rather than meticulously analysing the matters propounded in the defence case by the 2nd accused, in the context of apparent political rivalry between the fractions represented by PW 1 and the accused, the learned trial Judge, instead, has insisted on proof of defence.

It is important to note that axiomatically, the burden of proof of a criminal case is 'beyond reasonable doubt'. As emphasized in the celebrated judgment of Woolmingtom vs DPP (1935 AC 462);

> "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is a part of the common law and no attempt to whittle it down can be entertained".

Corollary to the presumption of innocence, entrenched in the Constitution of the Republic of Sri Lanka, a criminal proceeding is launched with the presumption of innocence of the accused which, the prosecution must shatter beyond repair for the Court to mete out appropriate punishment.

In this legal matrix, our courts have, from the times immemorial, cherished this ingrained principle of presumption of innocence by espousing that, unless the accused pleads general or special exceptions as provided for in the Penal Code or any other written law, there is no burden on the accused to prove his defence. The conduct of the defence; by cross-examination, impeaching the testimonial trustworthiness of the witness or tendering evidence on behalf of the defence or simply observing silence if it creates a reasonable doubt in the prosecution version, in which case, the latter cannot succeed.

In the case of Martin Singho vs Queen (69 CLW 21), T.S Fernando J held as follows;

"As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact."

In the case of Fathima Fasmila Arshard vs Attorney General CA-50-2009 decided on 17.12.2010, the Court of Appeal re-affirmed the principle that there is no burden on the accused person to prove his defence on a balance of probability unless pleaded special or general defence in terms of section 105 of the Evidence Ordinance.

In the case of Gunawardenage Chandimal Gunawardena vs Attorney General (CA-378-2017) decided on 03.09.2019 where the learned trial Judge had held that it was incumbent upon the accused-appellant to have proved that he had not made any phone call to the house of the prosecutrix on the day of the incident, the Court Appeal pronounced that, such a finding has a ripple effect of reversing the burden of proof.

Accordingly, the cumulative effects of all errors committed by the learned trial Judge in evaluating the defence case, is that the 2nd accused-appellant has not been accorded a fair trial as guaranteed by the Constitution of Sri Lanka, which thus warrants the intervention of the Appellate Court.

When I perused the evidence of the prosecution witnesses carefully, none of the prosecution witnesses has seen who fired the shots. In any event, certainly, the 1st. 2nd or the 3rd accused-appellants had not discharged a weapon. Accordingly, the liability of the accused-appellants in respect of these offences as described in the indictment stems vicariously from their being a part of an unlawful assembly which was possessed of a common object of causing mischief and injuries.

The applicable law which governs vicarious liability imputable under unlawful assembly covers section 138, section 139 and section 146 of the Penal Code. Accordingly, to hold the accused-appellants vicariously liable of the charges because they were a part of the unlawful assembly, the prosecution must prove beyond a reasonable doubt the following elements;

(i) Assembly consisted of five or more persons.

(ii) The assembly was constituted with a view to prosecuting the common object of causing mischief and injures.

(iii) The 1st to 3rd accused-appellants were aware of the facts which rendered such assembly unlawful.

(iv) The 1st to 3rd accused-appellants, with that knowledge, intentionally joined it and continued in it.

(v) Offences were committed by any member of such unlawful assembly in prosecution of the common object or any other offence that the 1st to 3rd accused-appellants knew to be likely to be committed in prosecution of that common object were committed.

The elements referred to above have to be proved beyond reasonable doubt before the 1st to 3rd accused-appellants were pinned on vicarious liability. Vicarious liability cannot be imputed on mere hypothesis or imagination. The onus lies on the prosecution to prove beyond reasonable doubt that the 1st to 3rd accused-appellants were of a guilty conscience which guided them right through the transaction which culminated in commission of offences.

The following authorities are illustrative of how the guilty conscience of an accused sought to be pinned based on unlawful assembly can be determined.

Samy and Others Vs Attorney-General (Bindunuwewa Murder Case) 2007 (2) SLR 216;

> "It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common object does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion"

Sirisena Marakkalage Kurukulasooriya and 5 others vs Attorney General CA 108-108.A-2015 [decided on 27.02.2017];

In this matter where 6 accused were alleged to have committed the murder in the prosecution of their common object of causing hurt on the deceased, evidence showed that only the 3rd accused had dealt the fatal blows while the others assaulted with hands and legs.

The Court held as follows; (at page 5);

> "According to the above witness the other accused persons had assaulted the deceased with the hands and legs. Hence at best they could be charged only for causing hurt. Hence in the said backdrop, the homicidal intention as described in Section 294 of the Penal Code can be attributed only to the 3rd accused-appellant"

Ganga Ram Sha and Others Vs State of Bihar [decided On 27.01.2017];

> "It is trite law that the common object of the unlawful assembly has to be inferred from the membership, the weapons used and the nature of the injuries as well as other surrounding circumstances. The intention of the members of the unlawful assembly can be gathered by nature, number and location of injuries inflicted"

Rathnayake Mudiyanselage Sunil Ratnayake vs Attorney General SC-TAB-01-2016 [decided on 25-04.2019 at page 21];

> "The 1st count is Unlawful Assembly (within the meaning of Section 139 of the Penal Code) the common object of the assembly being to commit "Assault" on Raviwarman. Thus, it is incumbent on the prosecution to prove beyond a reasonable doubt, two factors;
>
> (i) that there was an assembly of five or more persons and
>
> (ii) That the common object of the persons composing that assembly was to commit Assault on Raviwarman.

The Court held that;

"Hence the prosecution has starved the case of evidence as to whether those two who took Raviwarman made any gestures causing apprehension to Raviwarman that those two persons were about to use criminal force on him. With the paucity of evidence on this aspect, a doubt lingers as to whether the reason for taking Raviwarman away was with the object of questioning Raviwarman to ascertain the reasons for their presence in the locality or to commit assault within the meaning of Section 342 of the Penal Code. In this context, I hold that the prosecution had failed to establish that there was an unlawful assembly with the common object of committing Assault on Raviwarman within the meaning of Section 342 of the Penal Code. Thus, counts 1 to 10 of the Indictment must necessarily fail. Accordingly, I set aside the conviction of the accused-appellant on counts 1 to 10."

Mallawa Thanthirige Saman Padmakumara and 04 others vs Attorney General CA 143-147-2017 [Decided on 18.07.2019]. In this case, 5 police officers had been indicted to have allegedly caused the death of a suspect in the prosecution of their common object of causing his death. In appellant's admission, the shooting occurred whilst the deceased suspect guided them to a place where stolen goods were claimed to have been hidden and at the time of the incident, the 1st appellant wielded a revolver and other T-56 weapons. Whilst the police team escorted the deceased suspect in a single file, according to the appellants, a scuffle between the 1st appellant and the deceased erupted and during the ensuing struggle his service revolver accidentally went off. Other appellants asserted that they could not use their T-56 weapons to control the brawl considering the risk involved.

In this context, the Court held that at p. 30;

"When queried by this Court as to the exact point on which the appellants have formed an unlawful assembly, learned DSG replied that it was probably formed when the appellants have taken away the deceased that night. If that is the case, then it had placed no evidence before the trial court to infer that each of the 2nd to 5th appellants knew that they would cause further hurt to the deceased and one of them would likely shoot him in the prosecution of their common object. Merely carrying firearms would not satisfy this requirement"

Further, the Court made reference to Dr. Gour in elucidating the law governing unlawful assembly (at page 26);

"Dr Gour in his treatise titled The Indian Penal Code (13th Edition) has identified several factors which should be established by the prosecution when it sought to impose "constructive criminality" on an accused by invocation of provisions of Section 149 of the Penal Code of India. These factors listed on page 528 are as follows;

(i) there was an unlawful assembly,

(ii) that the accused was a member thereof at the time of committing the offence,

(iii) that he intentionally joined or continued in that assembly,

(iv) that he knew of the object of the assembly,

(v) that an offence was committed by a member of such assembly,

(vi) that it was committed in prosecution of the common object of the assembly, or, as such, as the members of the assembly knew to be likely to be committed in prosecution of their common unlawful object.

Dr Gour in his book also considered the limitations of the scope of Section 146, in imposing constructive criminal liability which he identified in the following terms (at page 524);

> " a person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he endorses all that the other members say or do, nor is he, therefore, responsible for their acts of which he was not conscious."

He further adds that;

> "... the members of an unlawful assembly may have a community of object only up to a certain point, beyond which they mere differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to information at his command but also according to the extent to which he shares the community of object and as a consequence, the effect of this section may be different on different members of the same unlawful assembly."

Ranawaka and Others Vs the Attorney General 1985 (2) SLR 210 [judgement of the Court of Appeal, Divisional Bench)

> " ... the offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members ... the act must be one which upon evidence appears to have been done to accomplish the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object."

In Wilson Silva vs The Queen 76 NLR 414 it was decided that;

> "The questions whether a person is aware of facts which render an assembly unlawful, whether he intentionally joins such an assembly or continues in it, and whether the common object of the assembly is to commit an offence, are all matters which must be determined from a series of circumstances. The acts or omissions of each alleged participant, the weapons used, the manner of their arrival at the scene, their prior utterances and so to speak every circumstance of significance in this regard would have to be evaluated. Such a task is only possible upon the basis of rules relating to the evaluation and assessment of circumstantial evidence. On the degree of proof required of the sharing of a common object, the governing principles are no different from those relating to the degree of proof of common intention, and the authorities hereinafter referred to, showing that such a conclusion must be an inescapable one, would be applicable"

In the present case even if the evidence of PW 1, PW 3 and PW 6 who claimed to be eyewitnesses, is accepted at its face value, those testimonies, even when taken cumulatively, fall far short of manifesting the guilty minds of the accused-appellants as connecting them with the unlawful assembly.

The principle of 'withdrawal' from an unlawful assembly was discussed at length in the recent case of Vithanalage Anura Thushara De Mel & others vs. Hon. AG SC/TAB/2A — D/2017, decided on 11.10.2018. The learned senior DSG says that two crucial questions arise for consideration in respect of the instant matter.

(i) Did the appellants continue to be members of the unlawful assembly from the start of the transaction which involved causing mischief to the decorations until the point of shooting?

(ii) Did the appellants (especially the 3rd accused-appellant) disavow the common object by clear expressions leaving no doubt that he had withdrawn from the unlawful assembly?

Learned counsel for the respondent argued that the evidence led at the trial clearly indicate that the appellants were part of the unlawful assembly from its inception and had engaged in causing damage to the decorations of the opposite party starting from the clock tower until the location of the shooting. It is probable that, if PW 3 had not intervened, the unlawful assembly would have proceeded to the location of the meeting organized by the victim party. Therefore, until the point of shooting, the appellants and the others continued to be part of the unlawful assembly. The words uttered by the 3rd accused-appellant as indicated by PW 3 is a clear indication of the same.

Further, it was contended for the respondent that there is no evidence adduced during the entirety of the trial that either of the appellants made public any intention to cease to be members of the unlawful assembly. They failed to directly or indirectly disavow the common object or their membership from the unlawful assembly until the point of shooting.

Thus, for the respondent it was argued that the only logical conclusion which could be arrived at, based on the available evidence is that the appellants continued to be a part of the said unlawful assembly, even at the time of the shooting. Although the identity of the 'shooter' is not established, the available evidence clearly establish that shots were fired from the group accompanied by the appellants, towards the opposite party which included PW 1, the deceased and the victims (PW 05 & 06). This aspect was analysed by the learned trial Judge in the course of the judgment as well. Counsel for the respondent says that having regard to the judicial dicta referred to above, the likelihood of a shooting taking place was a real and highly probable considering the nature of the events preceding the shooting.

The learned Senior DSG submits that it is reasonable to infer beyond reasonable doubt that the members of the unlawful assembly and ought to have foreseen these events, considering the propensity towards violent behaviour they displayed. It is also interesting to note that, the presence of the 2nd and 3rd accused-appellants was admitted by the defence. Thus, their presence at the location at the time they spoke to PW 3 was never in issue.

The 4th to 7th accused were acquitted on 26.02.2019 subsequent to the order of the learned trial Judge, when the prosecution closed their case.

Perusing the said order, it is clear that the basis upon which the said 4th to 7th accused were acquitted, was due to absence of evidence relating to Identity. However, it is clear that the same issues do not apply to the convicted 1st, 2nd and 3rd accused-appellants. Further, added

confirmation is available in respect of the identification made through CCTV footage. The learned trial Judge held that a person could be identified through his gait as well. However, it must be noted that, in the instant case, the identification of the 3rd accused-appellant was not made solely on the CCTV footage. His presence is established through direct evidence. It is my view that the presence of the 1st, 2nd and 3rd accused-appellants does not confirm that they have intentionally killed Dodamgodage Susil Perera alias Shantha Dodamgoda or intentionally attempted to cause the death of Kaththiriwaththa Weerasinghege Karunadasa Weerasinghe and Mohamed Hussain Ilshan.

The accused-appellants had not wielded any weapon whatsoever. There is no evidence to prove that the accused-appellants were using weapons, firearms or any other similar items during the said unfortunate incident. The accused-appellants have not made any declaration inciting, instigating or endorsing the angry crowd that allegedly followed them.

As found by the learned Trial Judge too, no positive action on the part of the 2nd accused in the prosecution of the common object had been established by the available evidence. When I perused the evidence, it was clear that no positive act even on the part of the 1st and the 3rd accused in the prosecution of the common object had been established. No evidence has been presented to show that the accused-appellants have engaged in any prearrangement or connivance with any other to accomplish the common objects of the unlawful assembly in any manner.

According to evidence of PW 1 and PW 3, the shooting occurred after the 3rd accused had boarded the vehicle, he arrived in. No positive evidence had transpired to show that, the 2nd accused boarded the same vehicle in which the 3rd accused travelled in or out. As per the contention of the Counsel for the 2nd accused appellant, even if assumed without conceding that shots were fired from the vehicle in which the 3rd accused travelled, there were no positive material to indicate that, the 2nd accused had any knowledge as to any illegal weapons being hoarded in that vehicle. Further, his submission was that in any event, the singular evidence that had cropped up during the entire case was that, the 2nd accused was merely present near the 3rd accused during the whole episode which culminated in the shooting.

However, the learned trial Judge has drawn following adverse inferences from the mere presence of the 2nd accused-appellant where the shooting occurred.

1. When the 3rd accused led a violent mob which was armed with illegal weapons, both the 1st and 2nd accused would have foreseen a calamity like this, accordingly, they are not exempted from the liability stemming from the acts committed by this unlawful assembly.

2. The 2nd accused has himself admitted his presence at crime scene and has failed to explain what prompted him to fuel his vehicle between 12.00am - 1.00am in the middle of the night.

3. Both the 1st and 2nd accused, being close political confederates of the 3rd accused had not taken any attempt to either subdue or disperse the unruly mob, a fact that lends credence to infer that, all 3 accused had been instigating the violent group of people together.

In response to the adverse findings of the learned trial Judge, it was argued on behalf of the accused-appellant that it is an ingrained principle in criminal law that, mere presence in the crime scene does not attract any criminal liability. This incident occurred in the wee hours of the day which was the last designated day for an election campaign aimed at a crucial Presidential Election which was scheduled to be held on 08.01.2015. Accordingly, it was not improbable that the 2nd accused person, as then the chairman of Kahawaththa Pradeshiya Sabha who had thrown his lot behind the one candidate must have been having a busy schedule in educating and encouraging the people in his electorate to cast their vote in favour of the candidate he promoted. In terms of Section 114 of the Evidence Ordinance, the Court can presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conducts, and public and private business in their relation to the facts of the particular case.

In the case of The Queen vs P.G. Arasa and Another 70 NLR 404 it was held;

> "This court has held on numerous occasions that mere presence is not a sufficient circumstance to justify an inference of common intention. Such an inference would not have been reached in this case but for inference by the learned Trial Judge to the fact that the second appellant "did nothing to prevent the first accused from stabbing". According to the evidence the stabbing took place so suddenly that it was in our opinion quite unreasonable to suggest to the jury that the second appellant should have tried to interfere"

It was argued on behalf of the 2nd accused-appellant that, merely being the political comrades of the 3rd accused per se cannot impute the criminal liability on the 2nd accused. The 2nd accused, being at the lowest tier of governance such as the local governmental level, was always at the discretion of the 3rd accused-appellant who was, by that time, a powerful minister in the incumbent administration. On defence's admission, it was the 3rd accused who had invited the 2nd accused to accompany him in his inquiry into the allegation of their propaganda materials being sabotaged. Accordingly, the 2nd accused had no say let alone wielded no power over the party supporters that followed him. In this context, it is highly improbable to assume that, the 2nd accused had the courage and stamina to do anything overpowering the 3rd accused.

In the case of Vithanalage Anura Thushara de Mel and Three Others Vs Attorney General [SC-TAB-2A-D-2017 (Decided on 11.10.2018] (Commonly known as Baharatha Lakshman Murder case), it had transpired during the trial that, although the 1st accused-appellant was handed an illegal firearm, he had not used it. The evidence available was to the effect that, the 7th accused-appellant had pulled it off him and had opened the fire. In this context, the Court decided that the 1st accused-appellant could not be held to have acted in furtherance of the common object.

On the part of the 2nd accused that, the learned trial Judge has erred in law in drawing adverse inferences from the evidence reflecting the mere presence of the 2nd accused at the crime scene, a grave error rectification of which, warrants the intervention of this Court.

The learned President's Counsel for the accused-appellants argued another important legal principle that the learned trial Judge has wrongly applied in rejecting the evidence of the defence.

The learned trial Judge had rejected the dock statements of the accused-appellants on the basis that the witness Hathalawatta (PW 1) and witness Sumith (PW 58) who had bases their evidence solely on the CCTV footage has stated something contrary to the dock statements of the accused-appellants. The law does not permit a statement from the dock to be rejected after having considered the same with the evidence of the prosecution. The learned trial Judge should have considered the statement from the dock and thereafter the accused-appellants must be acquitted if it throws doubt on the case of the prosecution.

This concept was highlighted in the case of Shamalie Perera Vs. The State 2012 (1) BALR 175

The evaluation of a dock statement was also considered in the cases of Sumathipala Vs. Republic 2012 BALR Page 80 where it was held that;

> "A dock statement is not inferior evidence. It should not be compartmentalized, and should not be compared with the evidence of the prosecution and even if the dock statement is not believed the accused is entitled to an acquittal if the dock statement is not disbelieved."

Therefore, the dock statements of the accused-appellants were not subjected to a proper evaluation by the learned trial Judge and this has deprived the 1st, 2nd and 3rd accused-appellants of a fair and impartial trial.

The learned Counsel who appeared on behalf of the aggrieved party argued that the learned High Court Judge had correctly evaluated the evidence under section 296 and 300 read with section 146 of the Penal Code. PW 1 in his testimony had testified that the 1st accused-appellant was with the 2nd and 3rd accused-appellants at the time of the incident. In addition to that, CCTV footage also confirmed that the 1st accused-appellant was among the mob and the 3rd accused-appellant which was causing mischief.

The 2nd accused-appellant in his dock statement admitted that he had come to refuel the cab, met with the 3rd accused-appellant and went with him. According to the dock statement made by the 2nd accused-appellant, he confirmed that he was at the scene at the time of incident. As per the contentions of the aggrieved party, this evidence was correctly analysed in the judgment by the learned High Court Judge. It was further reiterated that, the learned High Court Judge had correctly stated in the judgment that the 2nd accused-appellant had failed to explain why he had come to the junction to refuel the cab at around 12 to 1.00 at night and the learned High Court Judge had rightly concluded that, there is no evidence to show that the UNP party members had damaged the cut-outs displayed at the 3rd accused-appellant's office. For the respondent it was further argued that the 3rd accused-appellant should have informed that to the OIC. But the 3rd accused-appellant without making any complaint to the police had arrived at the scene with people carrying illegal firearms and done mischief to the banners and cut-outs of the opposition political party.

Moreover, it was submitted on behalf of the respondent that the CCTV footage clearly indicated the possession of firearms among this group of persons, clearly led by the 3rd accused-appellant. It was the view of the respondent that the learned High Court Judge had correctly analysed the inclination or angle of the gun shots, and correctly concluded that the gunshots could be fired from the window of the jeep and there is no evidence to show that UNP party members were

armed with firearms. In my view there is no evidence to prove that the 1st, the 2nd or the 3rd accused-appellants were holding guns or any other weapons in their hands. Not only that, it was crystal clear that the prosecution had failed to prove that the gun shots were fired by the accused appellants during this unfortunate incident.

The learned High Court Judge had analysed the direction of the shot and the direction of the location of the appellant's vehicle. However, the shooter was not identified. According to the evidence led before the learned trial Judge the shots were fired from the direction of the vehicles. Death of the deceased and the injuries caused to the victims were established but there is no evidence to prove that the 1st, the 2nd or the 3rd accused-appellants had fired the shot and they had intentionally murdered Shantha Dodamgoda and attempted to cause the death of Karunadasa Weerasinghe and Mohamed Hussain Ilshan. Therefore, the learned High Court Judge was wrong in law and fact to convict the accused-appellants for the charges in the indictment.

The Learned High Court Judge concluded that the 3rd accused-appellant had to go back to the jeep at the request of PW 3. However, the evidence does not reveal any loss of impulsiveness with regard to the 3rd accused appellant. The 3rd accused-appellant had gone to the jeep impulsively and he was calmed before he left the place. There was no evidence to prove that he left the scene of the crime belligerently. Not only that, there was no evidence to say that the 1st, 2nd and the 3rd accused-appellants or his followers were engaged in an unlawful assembly at the time of the incident on 05.01.2015.

In the instant case where the 1st, 2nd and 3rd accused-appellants have been found guilty for the offences of committing a murder and two attempted murders, in prosecution of the common objects of the unlawful assembly which were part of to cause mischief and injuries, the accused-appellants seeks to canvass the judgment and sentence entered against them on the basis that, the prosecution's evidence, even if accepted on its face value, fall far short of proof of their vicarious culpability and the learned Trial Judge has failed to observe their defence case having been materially corroborated.

In the case of Martin Fernando vs Inspector of Police, Minuwannda 46 NLR 210 Wijewardena, J re-defined the role of the Appellate Court. It is as follows;

> "An Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically although the decision of a Judge on question of facts based on demeanour and credibility of witnesses carries great weight. Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt"

On the part of the accused-appellants, all grounds of appeal as have been urged above cumulatively point towards miscarriage of justice, failure of justice and irreparable prejudice to the interest of the appellants, hence, the intervention of this Court is *sine quo non* to set things right.

The prosecution has failed to prove its case beyond reasonable doubt and that the conviction and the sentence imposed on the accused-appellants cannot stand.

On the premises aforementioned this Court sets aside the judgement dated 31.07.2020 whereby the 1st, 2nd and 3rd accused-appellants were convicted and sentenced to death and now pronounces a fresh judgment of acquittal from all charges in the indictment.

The case against the accused-appellants were not proven beyond reasonable doubt and the conviction is not within the well-established principles of law as enumerated above. In those circumstances, the conviction of the accused-appellants cannot stand in law and is set aside and the 1st, 2nd and 3rd accused-appellants are acquitted and discharged from all charges in the indictment of this case.

The appeal is allowed and the conviction quashed.

Registrar is directed to send a copy of this judgment along with the main case record to the High Court of Rathnapura and a copy of the Judgement to the prison authorities forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal