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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0350-353/18

High Court of Gampaha Case No:

HC/80/2003

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Tennekoon Arachchige Premathilka alias chutiya (deceased)
2. Tennekoon Arachchige Sunil Rathnasiri alias Podi Sunil
3. Tennekoon Arachchige Wijesuriya
4. Tennekoon Arachchige Piyadasa alias Lokka
5. Tennekoon Arachchige Jayatillake alias Chutta

ACCUSED

AND NOW BETWEEN

Tennekoon Arachchige Sunil
Rathnasiri alias Podi Sunil
(2nd accused-appellant)
Tennekoon Arachchige Wijesuriya
(3rd accused-appellant)
Tennekoon Arachchige Jayatillake
alias Chutta
(5th accused-appellant)

ACCUSED-APPELLANTS

Vs.

The Attorney General
Attorney General's Department
Colombo 12
RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dr Ranjith Fernando with Champika Monarawila For the second Accused Appellant

: Indica Mallawaratchy for the third, and fifth Accused Appellants

: Riyaz Bary, D.S.G. for the Respondent

Argued on : 19-05-2022

Written Submissions : 09-10-2019 (By the 2nd Accused-Appellant)

: 18-09-2019 (By the 3rd, and 5th Accused-appellants)

: 27-10-2021 (By the Respondent)

Decided on : 18-07-2022

Sampath B Abayakoon, J.

These appeals are by the second, third, fourth and the fifth accused appellants (hereinafter sometimes referred to as appellants) on being aggrieved by the conviction and the sentence of them by the Learned High Court Judge of Gampaha. The fourth accused appellant, namely Tennakon Arachchige Piyadasa alias Lokka) had died during the pendency of the appeal. Therefore, it is the appeals by the second, third and the fifth accused appellants that will be considered in this appeal.

The appellants, along with one Tennakoon Arachchige Premathilaka alias Chutiya (first accused) was indicted before the High Court of Gampaha on the following counts:

1. For being members of an unlawful assembly on 14-11-1998 with the intention of causing injuries to Thalkola Devage Sunil Munasighe, an offence punishable in terms of Section 140 of the Penal Code.
2. Being members, of the unlawful assembly and causing the death of Sunil Munasinghe at the same time and at the same incident, an offence punishable in terms of Section 296 read with Section 146 of the Penal Code.
3. At the same time and at the same incident causing cut injuries to Thalkola Devage Indrani by the use of a sword while being members of the said unlawful assembly, an offence punishable in terms of Section 315 read with Section 146 of the Penal Code.

4. At the same time and at the same incident committing the offence of robbery of gold jewellery from the possession of earlier mentioned Thalkola Devage Indrani while being members of the said Unlawful assembly, an offence punishable in terms of Section 380 read with Section 146 of the Penal Code.
5. At the same time and at the same incident causing the death of the earlier mentioned Thalkola Devage Sunil Munasighe an offence punishable in terms of Section 296 read with Section 32 of the Penal Code.
6. At the same time and at the same incident causing cut injuries by the use of a sword to earlier mentioned Thalkola Devage Indrani an offence punishable in terms of Section 315 read with Section 32 of the Penal Code.
7. At the same time and at the same incident committing the offence of robbery on earlier mentioned Thalkola Devage Indrani, an offence punishable in terms of Section 380 read with Section 32 of the Penal Code.

Since the first accused had died during the pendency of the trial, his name has been removed from the list of accused and the indictment has been amended accordingly by naming him as a person who is dead and acted along with the other accused in committing the above-mentioned crimes.

After trial without a jury, the appellants were found guilty for the first, second third and the fourth counts preferred against them. Since the other three counts are counts that need to be considered as an alternative for the counts they were found guilty, they have been acquitted of the said three counts by the Learned High Court Judge of Gampaha by his judgment dated 19-10-2018.

Accordingly, they were sentenced as follows:

1. On count one- 6 months rigorous imprisonment and a fine of Rs 5000/-, in default 3 months imprisonment.
2. On count two- death sentence.
3. On count three- 3 years rigorous imprisonment, and a fine of Rs 5000/-, in default 3 months imprisonment.

4. On count four- 10 years rigorous imprisonment and a fine of Rs 5000/-, in default 3 months imprisonment.

The facts as elicited by way of evidence at the trial, in brief, are as follows:

PW-01 Thalkola Devage Indrani was at home around 4 and 5 p.m. on the date of the incident, namely 14-11-1998. She was living there with her mother and the brother who is the deceased. The deceased Sunil Munasighe was at home and the second accused whom PW-01 identified as Podi Sunil has come and called her brother to come with him. Her brother has willingly left their compound with the earlier mentioned second accused and gone to the land in front of their house which belonged to one Chamila and Janaka. The moment the deceased reached the said land the first accused whom she identified as Chutiya has attacked the deceased with a rock which has struck his head. It was her evidence that he was hiding in the land and came and attacked her brother as earlier mentioned.

This has resulted in the deceased being fallen onto the ground. At that time, the earlier mentioned second accused has attacked the deceased with a sword which he was concealing in his hand. At the same time, the third accused whom she has identified as Jayasuriya although his name is Wijesuriya according to the indictment, and the fourth accused whom she has identified as Lokka, and the fifth accused whom she has identified as Chutta has all come and surrounded the deceased and has assaulted him with swords.

Seeing what was happening, PW-01 has ran towards her brother and the second accused, after uttering "තෝත් ආවාද?" has assaulted her too, using the sword he was carrying. Although she started to run away from the scene of the incident the second accused has forcibly grabbed the gold chain and the bangle PW-01 was wearing at that time.

It was her evidence that their mother who was at home saw the incident as well, but she is not in a position to give evidence as she is ill and unable to speak.

Later, the witness has been admitted to the hospital and has come to know of the death of her brother. It was her evidence when the second accused came and spoke to her brother, he was seated in the front of their porch. It was also her evidence at that time, there appeared to be no dispute between her brother and the second accused and her brother willingly went out with him.

The Judicial Medical Officer (PW-05) has marked his postmortem report as P-03 at the trial. He has observed 14 injuries on the body of the deceased and all but one of the injuries have been cut injuries. He has also examined PW-01 who received injuries in this incident and has marked the medico-legal report relevant to her as P-04. He has observed one cut injury on her.

The only other eye witness mentioned by PW-02 namely the mother of the deceased was dead at the time the PW-01 has concluded her evidence. Accordingly, her deposition at the Magistrate Court non-summary inquiry number NS- 05-99 has been led as evidence, marked as P-06. The other witnesses called at the trial are the police officers who conducted the investigations into the incident.

At the conclusion of the prosecution evidence the Learned High Court Judge has called for a defence from the accused appellant and all four accused including the now deceased accused appellant has made dock statements. In their brief dock statements, they have claimed that they are unaware of any of the incidents and they are not guilty of the charges preferred against them.

Pronouncing his judgment, the Learned High Court Judge of Gampaha has convicted the appellants as earlier mentioned and has sentenced them accordingly.

At the hearing of the appeal, the Learned Counsel appearing for the second accused formulated two grounds of appeal for the consideration of the Court. However, during the submissions he conceded that he is in no position to maintain the 1st of the grounds of appeal, namely, the ground that the

prosecution has failed to prove the death of PW-02 before adopting her deposition in Court, since her death was an admitted fact at the trial.

His other ground of appeal is as follows:

1. There was an error in the Learned High Court Judge's approach as to the burden of proof which has caused a prejudice to the appellants.

The Learned Counsel appearing for the 3rd and the 5th accused appellants formulated the following grounds of appeal.

2. The evidence lead at the trial does not support the ingredients of an unlawful assembly against the third and the fifth accused appellants.
3. If the second ground of appeal succeeds the imputation of vicarious liability on the appellants on the basis of common object should necessarily fail.
4. The conviction of the third and the fifth accused appellants on count 03 and 04 preferred against them are legally flawed.

Making submissions in relation to the first ground of appeal urged, it was the contention of the Learned Counsel for the second accused appellant that the Learned High Court Judge who pronounced the judgement did not have the benefit of listening to the evidence of the key witnesses. It was his position that the Learned High Court Judge was misdirected when he commented at page 35 of the judgement (page 337 of the appeal brief) that:

> "ඒ හැරෙන්නට වෙනත් කාරණා කිසිවක් නොකියයි. එම කෙටි වාක්‍ය සදහන් කිරීම තුලින් පමණක් මේ වන විට සාදාරණය සැකයකින් තොරව චෝදනා තකවුරු කිරීමට සමත්ව ඇති පැමිනිලියේ නඩුකරයට කිසිදු සැකයක් ඇති කිරීමට එය සමත් නොවන බව මගේ තීරණයයි."

It was his contention that by the above conclusion that the Learned High Court Judge has considered that the prosecution has proved its case beyond

reasonable doubt before he considered the defence of the appellants, which he termed as a misdirection in law which has caused a prejudice to the appellants.

The main contention of the Learned Counsel for the second and the fifth accused appellants was that to formulate an unlawful assembly by five or more persons there must be evidence that the formation of such an assembly. It was her argument that the evidence led in this case has established that the third, fourth and the fifth accused have come to the place of the incident subsequent to the initial attack and therefore it is clear that they have had no common object along with the other accused. It was her position that the charge of unlawful assembly should therefore necessarily fail, and as a result the conviction based on unlawful assembly should also fail.

Replying to the submission of the learned Counsel for the accused, it was the position of the Learned Deputy Solicitor General (DSG) for the respondent that the main witness, namely PW-01 has given clear evidence to support that there was an unlawful assembly with the participation of the five accused originally named in the indictment.

It was also his submission that Learned High Court Judge has never shifted the burden of proof to the appellants or has decided that the prosecution has proved the case beyond reasonable doubt before considering defence put forward by the appellants. It was his position that the Learned High Court Judge has well considered the relevant facts and the law before reaching his verdict which needs no disturbance from this court.

Consideration of the Grounds of Appeal

First Ground of Appeal:

It is well settled law that in a criminal case an accused person need not prove anything and it is the responsibility of the prosecution to prove its case beyond reasonable doubt.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** that;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it's sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

In the appeal under consideration, although it was the argument of the Learned Counsel for the first accused appellant that the approach of the Learned High Court Judge on the burden of proof was not correct, I am in no position to agree with this contention. It appears that the argument of the Learned Counsel is based on the earlier mentioned comment by the Learned High Court Judge in the judgement taken in its isolation. However, it is clear from the judgement that the Learned High Court Judge has never shifted the burden of proof to the accused appellant, He has always looked whether the evidence led by the prosecution has proven the charges beyond a reasonable doubt against the appellants. It is clear from the judgment that he was well aware that in a criminal case an accused need not prove anything, and if there is a reasonable doubt created as to the evidence of the prosecution witnesses, or at least a reasonable explanation has been provided as against the evidence, the benefit of that should to go to the accused.

The above comment by the Learned High Court Judge has been made in relation to the short dock statements made by the accused appellants where they have made a mere denial of the charges preferred against them which in any manner are not reasonable explanations or creating a doubt as to the incriminating evidence against them.

In this action the prosecution has led strong prima facie direct evidence to prove the culpability of the appellants to the crime. Our Courts have consistently followed the dictum commonly known as Ellenborough Dictum which is

attributed **Lord Ellenborough** in **Rex Vs. Cocharane (1814 Gurneyes Report 499)** which reads:

> *"no person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless but if he refuses to do so where a strong prima facie case had been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistency with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

I find that the Learned High Court Judge has commented as stated before because of the mere denial of the charges by the accused appellants and not because of the burden has been shifted to the appellants. I am of the view that the said comment needs to be viewed in the total context of the evidence and the judgment and not in its isolation.

If viewed in that context, it is clear that the Learned High Court Judge has not shifted the burden of proof in any manner. Therefore, I find no merit in the first ground of appeal urged by the learned counsel.

Second, Third and the fourth Grounds of Appeal:

As all the above grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal together.

It was the argument of the learned counsel for the second and the fifth accused appellants that the prosecution has failed to prove that all five accused indicted before the High Court had the common object of causing the death of the deceased since, if at all, the formation of the assembly had been after the incident.

The offence of unlawful assembly as described in Section 138 of the Penal Code reads 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 of 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 right 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."**

Section 139 of the Penal Code which refers to being a member of an unlawful assembly reads as follows:

139- Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

The effect of this section has been well considered in the case of **Kulathunga Vs. Mudalihami 42 NLR 331** which reads thus:

"That the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concerned it had to prove that he was a member of the assembly which he intentionally joined and he knew the common object of the assembly."

The offence of unlawful assembly imputes vicarious liability on each member of the assembly for things done by other members of the said assembly in furtherance of the common object of the assembly. In terms of the Section for vicarious liability to be imputed on the member of an unlawful assembly the prosecution must prove either:

a) That the offence was committed in prosecution of the common objective of the unlawful assembly or
b) That the members of the unlawful assembly knew the offence was likely to be committed in prosecution of the common object (**Vide Andrayes V the Queen 67 NLR 425**).

Dr Gour in his book **Penal Law of India** has discussed the principles applicable in relation to the offence of unlawful assembly in the following terms **(Vol II page 1296 – 11th edition)**

"All persons who convened or who take part in the proceeds in an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or by curiosity alone without taking any part in the proceedings are not guilty of the offence even though those persons

possess the power of stopping the assembly and failed to exercise it. Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown he has done something or he has omitted to do something, which would make him a member of an unlawful assembly or unless the case fails."

In this matter the evidence clearly establishes the fact that it was the second accused appellant who came and met the deceased in order to lure the deceased out of his house. It is clear that he has come for that purpose as a part of a wider plan of taking him out of his house. The deceased has accompanied the second accused appellant to the land situated opposite to his house without suspecting the *bona fides* of him. At that time, the occupants of that land were not at their home. The PW-03 has seen that the moment deceased entered the land the first accused who has been waiting in hiding expecting the deceased striking him on his head.

It is clear that he was waiting in hiding before the deceased was lured into the land. Once the deceased was struck with a rock and fell, the rest of the accused appellants who were also on that land has come and attacked the deceased using swords along with the second appellant who also attacked the deceased using a sword, which he has kept concealed, even when at the time he came to the house of the deceased.

This provides ample proof beyond reasonable doubt that the object of all the appellants and the first accused was to attack and kill the deceased. I am in no position to agree with the contention of the learned Counsel that acts of the appellants are independent to each other and, therefore, unlawful assembly has not been proved.

I am of the view that the evidence placed before the Court has provided evidence beyond reasonable doubt that this was an act committed with a common objective in mind.

Evidence also provides that after attacking the deceased, the PW-03 who came to rescue him was also attacked with a sword and the gold jewellery she was wearing was robbed in furtherance of the common objective by those who formed the unlawful assembly.

For the reasons adduced as above, I am of the view that the grounds of appeal urged on behalf of the second and fifth accused appellants are also devoid of any merit.

The appeals of the second, third and the fifth accused appellants are dismissed, as I find no merit in them.

The conviction and the sentence of them by the Learned High Court Judge of Gampaha is hereby affirmed.

Judge of the Court of Appeal

P.Kumararatnam, J.

I agree.

Judge of the Court of Appeal