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

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 and article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal: -
Case No: CA /HCC/128-129/2017
High Court Ampara: -
Case No: HC/1532/2012

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

Vs.

1. Ranpatige Gamini Kumarasinghe
2. Abesekara Wannaku Arachchige Wasantha Kumara
3. Jayawardane Mudiyanselage Nimal Karunarathne

Accused

And Now Between

1. Ranpatige Gamini Kumarasinghe
2. Abesekara Wannaku Arachchige Wasantha Kumara
3. Jayawardane Mudiyanselage Nimal Karunarathne

Accused-Appellants

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

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

&

R. Gurusinghe J.

Counsel:	Saliya Pieris PC with Rukshan Nanayakkara AAL and Nuwan Beligahawatte AAL for the 1st accused-appellant Darshana Kuruppu AAL with Deniru Bandara AAL and Sajini Alvitigala AAL for the 3rd accused-appellant Shanil Kularatne DSG for the complainant-respondent
Written Submissions:	By the 1st accused-appellant on 06.12.2017 By the 3rd accused-appellant 06.12.2017 By the complainant-respondent 04.04.2018
Argued on :	19.05.2022
Decided on :	**21.09.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Ampara, dated 07.06.2017, by which, the 1st and 3rd accused-appellants, who are before this Court, were convicted and sentenced to death for having murdered Ganapathipillai Kumaraswami and Kumaraswami Thanganayagam alias Sellaiya Ranganayagam. The indictment dated 02.03.2009 was served on the appellants on 31.08.2009.

The 2nd accused was not alive to face the charges levelled against him whereas the 1st and 3rd accused persons pleaded not guilty to the charges against them and elected a jury trial whereupon proceedings commenced accordingly. Until 10.08.2015 the accused were not provided with a Sinhala-speaking jury and the matter was postponed on several instances due to lack of space in the Court Room to accommodate a Jury.

Since the matter had continuously been postponed due to various reasons the learned counsel for the accused-appellants moved that the accused be tried before the learned High Court Judge instead of a jury. The said application was allowed by the learned High Court Judge and the trial commenced. In the indictment, 43 charges were levelled against the appellants under sections 296,300,146 and 419 of the Penal Code read with section 32 of the Penal Code.

The appellants were only convicted for charges 24 and 27 and were acquitted from all the other charges against them.

Charge No.24 is as follows;

> "that on or about 23.09.1997 within the jurisdiction of this Court, at Central Camp you along with the deceased Abesekara Wannaku Arachchige Wasantha Kumara (2nd accused person) and several others unknown to the prosecution committed the

murder of one Ganapadhipillai Kumaraswami which is an offence punishable under section 32 reads with the section 296 of the Penal Code."

Charge No.27 is as follows;

"that on or about 23.09.1997 within the jurisdiction of this Court, at Central Camp you along with the deceased Abesekara Wannaku Arachchige Wasantha Kumara (2nd accused person) and several others unknown to the prosecution committed the murder of one Thanganayagam alias Sellaiya Ranganayagam which is an offence punishable under section 32 reads with the section 296 of the Penal Code"

On 31.08.2015, the prosecution started their case and the following witnesses testified on behalf of the prosecution.

Ganeshan Ravindran (PW 1)

Gunasingham Grawri (PW 2)

Ramalingam Yogeshwari (PW 3)

Sellaiya Mainawadi (PW 6)

Samithambi Thangapillei (PW 7)

Kaththamuttu Thangamma (PW 11)

Arulambalam Maheshwaran (PW 13)

Arulambalam Saraswathi (PW 15)

Arumugam Malar (PW 17)

Kadiramalei Arunachalam (PW 18)

Somanadan Ameerdam (PW 20)

Dr. K. Muruganandan (District Medical Officer) (PW 21)

Sunil Gamini Perera (Superintendent of Police Ampara) (PW 23)

Godewatta Arachchige Sundarapala (OIC - Police Station Central Camp) (PW24)

Nishantha Pradeep Kumara (Sub Inspector) (PW 26)

Wijayantha Bandara (Police Officer) (PW 31)

Witnesses Kalikutti Thangapillei (PW 4) and Welayudam Perimbaraja (PW 5) were not alive during the trial and their evidence given at the non-summary inquiry (10869/NS/97) were adopted under section 33 of the Evidence Ordinance, through the Court Interpreter Mudliyar. At the end of the prosecution's case, no witnesses were called by the defence. However, the 1st and the 3rd accused persons made dock statements and concluded their case.

After hearing oral submissions from both parties, the learned High Court Judge fixed the matter for judgement and it was delivered on 07.06.2017. By that judgment dated 07.06.2017, the accused-appellants were acquitted from 41 charges but convicted for charges No 24 and 27 in the indictment as aforesaid and sentenced to death. Being aggrieved by the

said conviction and sentence of the learned High Court Judge of Ampara, the accused-appellants filed the instant appeal.

It is important to note that, 18 witnesses gave evidence on behalf of the prosecution. Only PW 1 and PW 5 gave direct evidence against the appellants. In his oral submissions, it was admitted by the learned State Counsel that this case is solely based on the evidence of PW 1 and the other witnesses were summoned only to prove the background of the case and to prove the damages caused to the property.

The prosecution's main witness was Ganeshan Ravindran (PW 1) and he stated that this incident happened on 23.09.1997 when he was only 16 years old. While he, his parents and his younger brother were at home, around 2.00 pm they had heard gunshots from outside and when they had gone out to look they had seen about 50 policemen setting fire to the houses. He stated that about 3 people came near their gate and called all the family members near the gate. The 3rd accused person had assaulted him and the 2nd accused person had shot his mother's leg (Thanganayagam alias Sellaiva Ranganayagam) and father's head (Ganapadhipillai Kumaraswami).

Being frightened by the said actions of these people, his younger brother had run towards the banana trees and thereafter he had also fled the scene. On the following day, he identified the bodies of his parents at Kalmunai hospital and the funeral was done at the Senakuduirippu village. He stated that before giving evidence at the High Court, he was summoned before the Magistrate Court of Kalmunai and had participated in several identification parades and was able to identify three people connected to the alleged incident which happened on 23.09.1997. In his evidence-in-chief and his cross-examination, for the questions raised by both counsel the witness has answered that it was the 2nd accused who shot his parents and he was not present in the High Court.

Welayudam Perimbaraja (PW 5) was not alive during the trial and his evidence given at the non-summary trial (10869/NS/97) was adopted as per section 33 of the Evidence Ordinance and that evidence was recorded through the interpreter mudliyar. In his testimony at the non-summary trial (10869/NS/97) he had stated that this incident happened on 23.09.1997 between 1.00 pm and 2.00 pm wherein he had heard gunshots and a commotion and had gone towards the scene. According to him, 20 to 25 policemen from the Central Camp Police Station were setting fire to houses and shooting people. He had further stated that four people in police uniform had come towards him and he was shot twice. The person who fired during the particular incident was not among the accused persons, present in Court. In his evidence, he had further testified that he was summoned to the identification parade held at the Magistrate's Court, although the accused were present in the parade, he had feared to identify the accused during the identification parade.

Dr. K. Muruganandan (PW 21) testified in the High Court and said that he was the District Medical Officer who was attached to the Kalmunai hospital on 24.09.1997 and conducted the autopsy of Ganapadhipillai Kumaraswami and Thanganayagam alias Sellaiya Ranganayagam. The relevant autopsy reports were marked through this witness as P 2 and P 4. In his evidence, it was revealed that both the bodies were identified by Ganeshan Ravindran (PW 1) who was the son of the deceased and according to his autopsy report the deaths were caused due to fatal injuries to the brain, loss of blood and convulsion caused by gunshots.

Godewatta Arachchige Sundarapala (OIC, Police Station, Central Camp) (PW 24) was the officer in charge of the Central Camp Police Station during this period. In his evidence- in-chief and his cross-examination, he had stated that the alleged first incident took place in the night of 23.09.1997. In his re-examination, he had stated that it was during noon that this present incident happened. He had also stated that during the period concerned there were around 600 policemen under his command and the accused were among them. According to him the 1st accused was assigned to the minor offences branch and the 3rd accused was trained to activate the generator in case of sudden terrorist attacks. Further in his evidence, it was revealed that both the 2nd and 3rd accused were on duty at the police station during the night of 23.09.1997.

He had further stated that firearms like T56, S 84 and SLR were issued to the police officers during that period. Although the police asked for a government analyst report to identify the nexus between bullets found at the crime scene and the firearms issued, no government analyst report was issued regarding this incident. All the police officers who were attached to the central camp police station on 23.09.1997 were confronted with identification parades held at Magistrate's Court Kalmunai and only these accused were identified by the witnesses.

Wijayantha Bandara (Police Officer) PW 31 was one of the investigating officers who went to Kalmunai hospital with the Chief Investigating Officer Nandadasa (PW 25) who was not alive at the time of the trial. He, had stated that at the hospital he took statements from three witnesses and PW 1 was among them. It was revealed from the cross-examination that in the statement given by PW 1 there was no mention of the identification of the assailants or his ability to identify the accused persons.

As the learned Counsel for the accused persons admitted the holding of the three identification parades relevant to this matter, the reports of such parades were marked and produced without calling the witnesses who conducted the said parades. After the case for the prosecution, the two accused persons gave statements from the dock and concluded their defence case.

The 1st accused person gave a dock statement and stated that he worked at the Central Camp Police Station for 6 years and he is married to one Shriyani Jayanthi Kumari who resides at No. CC 21, in front of the Central Camp Police Station. He was known to the villagers as a policeman and that is how he was identified at the identification parade. He further stated that he had no connection to this crime and on 23.09.1997 he worked at the Central Camp Police Station assigned to the minor offences branch and he had made his notes regarding the official duties done by him on 23.09.1997.

The 3rd accused person gave his dock statement and stated that he worked at the Central Camp Police Station for 5 years and on 21.10.1998 he was transferred to Vavuniya and on 20.09.1999 he was summoned for an identification parade almost two years after the alleged incident and he was identified thereafter. He further stated that he had no connection to this incident.

On behalf of the 1st accused-appellant, learned President's Counsel argued whether the identification of the accused was properly constituted during the trial. He argued that the identification parade held at the Magistrate's Court was not conducted properly and the

prosecution failed to follow the proper procedure regarding the identification parade. Among other witnesses, only PW 1 identified the appellant but after confirming the identification by PW 1 he was never asked about the actions committed by the appellant pertaining to the alleged incident which is a fatal error done by the prosecution.

In the case of Abeysekera vs. The Attorney Generals 1981 (1) SLR 376 it was held the importance of an identification parade was as follows;

> "Identification parades are held to enable persons to identify suspects who had not been known to them earlier. It is therefore of the utmost importance that the identifying witnesses should be called as witnesses at the trial and asked the specific question as to whom they identified at the earlier parade. The best evidence is not obtained by simply asking the officer who held the identification parade to testify as to who identified whom."

It was further argued that after the identification parade the appellants objected to the parade by raising the concern that they were taken to the parade uncovered and the witnesses had the opportunity to see them before the parade. The learned High Court Judge never considered this objection in his judgment. It was revealed from the evidence at the trial that the appellants were known to PW 1 and the other villagers even before the identification parade was held as policemen at the Central Camp Police Station who are residing in the same village. However, this fact has never been considered by the learned Trial Judge.

Dock statement of the 1st accused appellant at page 379 of the brief is as follows;

> මම මධ්‍යම කදවුර පොලිස් ස්ථානයේ අවුරුදු හයකට වැඩි කාලයක් රාජකාරි කළා ස්වාමීනි. තවද මා මධ්‍යම කදවුර පොලිසිය ඉදිරිපිට සී.සී. විසිඑක ලිපිනයේ පදිංචි ශ්‍රියානි ජයන්ති කුමාරි සමග තමයි ස්වාමීනි විවාහ වෙලා සිටින්නේ. ඒ හේතුව නිසා ඒ ස්ථානයේ පොලිස් නිලධාරියකු වශයෙන් මාව කවුරුත් හොඳින් හඳුනනවා.?

Evidence in chief of PW 1 at page 176 of the brief is as follows;

ප්‍ර : ඔවුන් පොලිස් නිලධාරීන් කියලා තමන් කොහොමද හඳුනාගත්තේ?

උ : ගමේ පොලිස් ස්ථානයක් තිබෙන නිසා ඔවුන් එහි සේවය කළා.

ප්‍ර : පොලිස් ස්ථානයේ නම කුමක්ද?

උ : මධ්‍යම කදවුර.

ප්‍ර : එම පොලිස් නිලධාරීන් තමන් මීට පෙර දැක තිබෙනවාද?

උ : ඔව්.

The Counsel for the defence admitted the parade notes and marked them as admissions under section 420 of the Criminal Procedure Code. On behalf of the 1st accused-appellant, learned President's Counsel submitted that even though the parade notes were admitted, it doesn't mean that the identification parade itself is admitted by the appellants. Therefore, his argument was that the learned High Court Judge had erroneously considered this admission as an admission of the identification of the appellant and delivered his judgement erroneously.

The judgement of the learned High Court Judge on page 479 of the appeal brief is as follows;

> "නඩු විභාගයේදී හඳුනාගැනීමේ පෙරට්ටු සාක්ෂි, විරෝධනාවයකින් තොරව අපරාධ නඩු විධාන සංග්‍රහ පනතේ 420 වගන්නිය අනුව පිළිගෙන ඇත. පිළිගන්නා කරුණු ඔප්පු වූ කරුණුය. ඒ අනුව හඳුනාගැනීමේ පෙරට්ටුවේ දුර්වලතා කිසිවක් විත්තිය ඉදිරිපත් කර නැත. ඒ අනුව විසි හතර හා විසි හත අධිචෝදනා සම්බන්ධ වරදවල් සිදුකලේ විත්තිකරුවන් විසින්ම බව ඔප්පු වේ."

Admission of the parade notes by the defence on page 231 of the appeal brief is as follows;

> "ස්වාමිනි මෙම නඩුවට අදාලව පැමිණිලි පාර්ශවය ඉදිරිපත් කිරීමට අපේක්ෂිතව ඇති හත්වන අයිතමය වශයෙන් ගොනුකොට ඇති චුදිනයන්ගේ හඳුනාගැනීමේ පෙරට්ටු වාර්ථා 03 ක් සම්බන්ධයෙන් විත්තිය හබ නොකරන බව ගෞරවයෙන් දන්වා සිටිනවා."

It was revealed from the evidence of PW 1 that the appellant was known to him even before the alleged incident but had failed to make any statement in this regard in his 1st statement at the Kalmunai hospital. The learned President's Counsel stated that this has ultimately impeached the credibility of the identification made by PW 1.

Evidence of PW 31 who was the investigating officer who recorded the statement at hospital at page 333 of the brief is as follows;

> ප්‍ර : එම සාක්ෂියට අනුව එම සාක්ෂියේ සඳහන් වෙනවද ඔහුගේ පියාට හා මවට වෙඩි තැබුවේ කවුද කියන්න ඔහු දන්නේ නැහැ කියලා. (එම ප්‍රශ්නයට අවසර නොදෙමී.)
>
> ප්‍ර : තමුන්ට දුන්න ප්‍රකාශයේ, මවට හා පියාට කවුද වෙඩි තිබ්බේ කියලා හඳුනාගැනීමක් තිබෙනවද?
>
> උ : නැහැ

The defects which prevailed in the identification parade notes which were admitted by the defence proved that the police has failed to conduct a proper identification parade. Further, the learned President's Counsel submitted that since the accused were known to the witnesses even before the alleged incident took place, the parade serves no useful purpose and has no evidential value. It is further submitted by the learned President's Counsel that due to the aforementioned defects, the identification is reduced to a mere dock identification, which ultimately questions the proper identification of the appellant.

It is important to note that the concept of dock identification was broadly discussed in Kokmaduwa Mudalige Premachandra and Two Others vs Attorney General CA-HCC 39-41/1997 where Justice F.N.D Jayasuriya held that;

> "Justice Wijesundara in Gunarathna Banda's case (an unreported decision) which is referred to by the author E.R.S.R Coomaraswamy, Law of Evidence Volume (I), has referred to a series of English and foreign judgements where the view has been expressed that it is against prudence and wisdom to proceed against an accused person in a criminal case on mere dock identification. Justice Wijesundara has followed this development of the law in foreign jurisdictions and recommended to the Trial Judges that they should adopt this rule which prevails in a foreign jurisdiction. In the circumstances, we set aside the findings conviction and sentence, imposed on the 3rd accused-appellant and acquit the third accused."

The identification of an assailant and connecting him with the crime after a fair trial is an integral element of a criminal trial. E.R.S.R Coomaraswamy in his work “Law of Evidence” quoted both R Vs Orton and Wills regarding the issue of identification as follows:

> "A party's identity with an ascertained person may arise both in civil and criminal cases. The question of identity is particularly important in criminal cases. Identity may be proved or disproved by direct testimony or opinion evidence or presumptively by circumstantial evidence. Criminal law insists on proper identification. Cases have shown that what is supposed to be the clearest intimation of the sense, is sometimes fallacious and defective"

Whereas in R Vs Turnbull (1977) Q.B. 224, the court held as follows:

> “Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.”
>
> “He should instruct them as the reason for that warning and should make some reference to the possibility that a mistake. Witness could be a convincing one and that several witnesses could all be mistaken.”

Further, in the decided case Wijepala vs The Attorney-General 2001 (2) SLR 45, it was decided that;

> "The evidence of the sole eye witness raised a strong doubt as to the guilt of the appellant and the court should have given the benefit of that doubt to the appellant."

The learned President’s Counsel argued that as supported by the case law mentioned above there is reasonable doubt regarding the identification of the appellant which the learned High Court Judge had failed to consider.

It is important to note whether the common intention of the accused has been properly evaluated. Under section 32 of the Penal Code, common intention is defined as follows;

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone".

To prove common intention, the prosecution has to prove participatory presence, prearrangement and the sharing of the murderous intention of the accused-appellant. Whereas in the instant case, the prosecution failed to do so but the learned High Court Judge without evaluating any evidence pertaining to the common intention erroneously imposed liability on the appellant under section 32 of the Penal Code. This wrongful evaluation of evidence by the learned High Court Judge can be demonstrated as follows;

Page 456 of the appeal brief is as follows;

> “තමාගේ දෙමාපියන්ට වෙඩි තැබුවේ අධිකරණයේ නැති දෙවන චින්තිකරුය. මෙම විත්තිකරු අබේසේකර වන්නකු ආරච්චිගේ වසන්න කුමාර වේ. මෙම විත්තිකරු හැරෙන්නට තුන්වන

විත්තිකරු තමාට පහර දුන් තැනැත්තා බවටත් හඳුනාගෙන ඇත.ඒ අනුව පළමුවන විත්තිකරු එම ස්ථානයේ හුදෙක් රැදිසිටි තැනැත්තාය."

In Raju and Others v A.G 2003 (3) SLR 116, Justice Edirisuriya widely discussed the law pertaining to common intention and held as follows;

> "It seems to me that the learned Trial Judge has failed to refer to the required mental element which is the murderous intention to constitute the offence of murder. In the case of King vs Assappu 16 NLR 413, Dias J. sitting with Nagalingam, J. and Gratiaen, J. held that in a case where the question of common intention arises the Jury must be directed that
>
> (i) The case of each accused must be considered separately.
> (ii) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
> (iii) The common intention must not be confused with the same or similar intention entertained independently of each other.
> (iv) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.
> (v) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

Justice Sirimanne in the case of Punchi Banda vs The Queen 2003 (3) SLR 116 refers to the legal principle laid down in King vs Assappu (supra) that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32 of the Penal Code."

It is established law that the prosecution has to prove the participatory presence, prearrangement and sharing of murderous intention among the accused to establish the common intention under section 32 of the Penal Code. Whereas in this instant case, the learned High Court Judge had erred in law by considering the mere presence of the appellant as the common intention of the appellant.

The learned President's Counsel for the 1st accused-appellant submits that the a*ctus reus* of the appellant has not been established properly. In this matter, the prosecution failed to establish the common intention of the appellant. Therefore, it is mandatory to prove both the *mens rea* and the *actus reus* of each accused separately to impose criminal liability on them.

In order to establish a criminal case, the prosecution has to establish the basic elements of a crime and without proving the physical element of a crime a conviction cannot stand. In this instance, with regard to the 1st accused-appellant no direct or indirect evidence was produced to prove any action committed by him. Whereas the following portions of evidence make clear that the a*ctus reus* of the 1st accused-appellant was not properly established by the prosecution.

Evidence in chief of the PW 1, page 183 of the appeal brief is as follows;

ප්‍ර : ඒ කියන්නේ පළවන විත්තිකරු මොකක්ද කලේ කියලා මතකද?

උ : ඔවුන් සමග එකට ආව පුද්ගලයෙක් පළවන විත්තිකරු.

ප්‍ර : තුන්වන විත්තිකරු ?

උ : මට පහර දුන්න කෙනා.

ප්‍ර : තව එක්කෙනෙක් හදුනාගත්තා කිව්වා , ඔහු කාටද වෙඩි තිබ්බේ?

උ : අම්මට, තාන්තට වෙඩි තිබ්බා.

ප්‍ර : අධිකරණයේ නැති දෙවෙනි විත්තිකරු තමන්ගේඅම්මට, තාත්තට වෙඩි තිබ්බා කිව්වොත් හරිද?

උ : ඔව්.

Cross-examination of the PW 1, page 350 of the appeal brief is as follows;

ප්‍ර : තමන්ගේඅම්මට, තාත්තට වෙඩි තිබ්බ තැනැත්තා මේ උසාවියේ නෑ කියලා කිව්වා නේද?

උ : හරි.

Evidence of PW5 during the non-summary trial, page 351 of the appeal brief is as follows;

ප්‍ර : ඔබට වෙඩි තියපු කෙනා මෙහි සිටියා නම් කියන්න?

උ : හතර දෙනෙක් අවා. මට වෙඩි තියපු කෙනා මෙම තුන්දෙනා අතරේ නෑ.

ප්‍ර : ඔබට වෙඩි තියන වෙලාවේ හතර දෙනෙක් සිටියාද?

උ : ඔව් වෙඩි තියපු කෙනා මෙහි නෑ.”

Careful consideration of the judgment shows that the learned High Court Judge had wrongly evaluated the evidence in his judgment. Some factual findings used by the learned Trial Judge in his judgment never emanated from the evidence at the trial although those facts were included in his judgment.

Page 471 of the appeal brief is as follows;

> “දෙවන විත්තිකරු වෙඩි තැබූ බවට ඔප්පු වීම හා ලංකා දණ්ඩ නීති සංග්‍රහ පනතේ 32 වගන්නිය අනුව එක තුන චුදිතයන් අවි දරා රවින්ද්‍රන් සාක්ෂිකරුට පහර දී සිංහල භාෂාවෙන් ප්‍රකාශ කර, හුදු සහාගිත්වයක් නොව ක්‍රියාකාරී සහභාගිත්වයක් තිබූ බවට ඔප්පු වීම” මගින් අධි චෝදනා සාධාරණ සැකයෙන් තොරව ඔප්පු වී ඇත.

This fact regarding the 1st accused-appellant assaulting the PW 1 was never revealed from the evidence of the trial. However, PW 1 in his evidence directly testified that the 1st accused-appellant was merely present at the scene and it is the 3rd accused-appellant who assaulted him.

Evidence in chief of the PW1, page 183 of the appeal brief is as follows;

ප්‍ර : ඒ කියන්නේ පළවන විත්තිකරු මොකක්ද කලේ කියලා මතකද?

උ : ඔවුන් සමග එකට ආව පුද්ගලයෙක් පළවන විත්තිකරු.

ප්‍ර : තුන්වන විත්තිකරු ?

උ : මට පහර දුන්න කෙනා.

The learned High Court Judge erroneously included these unproved facts in his judgment.

He considered the admission of the identification parade notes under section 420 of the Criminal Procedure Code as an admission of the identity of the appellant and confers his judgement based on that wrongful premise. This is reflected in the following portion of the evidence.

Admission of the parade notes by the defence on page 231 of the appeal brief is as follows;

> "ස්වාමීනි මෙම නඩුවට අදාලව පැමිණිලි පාර්ශවය ඉදිරිපත් කිරීමට අපේක්ෂිතව ඇති හන්වන අයිතමය වශයෙන් ගොනුකොට ඇති වුදිනයන්ගේ හඳුනාගැනීමේ පෙරට්ටු වාර්ථා 03 ක් සම්බන්ධයෙන් විත්තිය හබ නොකරන බව ගෞරවයෙන් දන්වා සිටිනවා."

The judgement of the learned High Court Judge on page 479 of the appeal brief is as follows;

> "නඩු විභාගයේදී හඳුනාගැනීමේ පෙරට්ටු සාක්ෂි විරෝධතාවයකින් තොරව අපරාධ නඩු විධාන සංග්‍රහ පනතේ 420 වගන්තිය අනුව පිළිගෙන ඇත. පිළිගන්නා කරුණු ඔප්පු වූ කරුණුය. ඒ අනුව හඳුනාගැනීමේ පෙරට්ටු දුර්වලතා කිසිවක් විත්තිය ඉදිරිපත් කර නැත. ඒ අනුව විසි හතර හා විසිංහත අධිචෝදනා සම්බන්ධ වරද කලේ විත්තිකරුවන් විසින්ම බව ඔප්පු වේ."

The following sentence shows that wrongful evaluation done by the learned High Court Judge ultimately unfairly prejudices the appellant. Page 470 of the appeal brief is as follows;

> "රවින්ද්‍රන් හා පෙරිම්බරාජා යන සාක්ෂිකරුවන් විත්තිකරුවන් අපරාධ ස්ථානයේ සිටි බවට නිසැකව සාක්ෂි දී තිබීම හා ඒවා හඳුනාගැනීමේ පෙරට්ටුවලදී ඔප්පු වී තිබීම හා හඳුනාගැනීමේ පෙරට්ටු හබ නොකිරීම."

It was the contention of the learned President's Counsel that in this matter a weak investigation was conducted by the investigating officers. Even a government analyst report was never produced in Court. However, without giving such an advantage to the defence, the learned High Court Judge has erroneously considered those unproven facts as established facts, in his judgement.

Evidence in chief of the PW 24 at page 289 of the appeal brief is as follows;

> ප්‍ර : නමුත් රසපරීක්ෂක වාර්ථාව ආවාද නැද්ද කියලා දන්නවාද?
>
> උ : එහෙම දන්නේ නැහැ.
>
> ප්‍ර : ඔබ මෙම නඩුව සම්බන්ධයෙන් පහල අධිකරණයේ, එනම් කල්මුනේ මහේස්ත්‍රාත් අධිකරණයේ සාක්ෂි දුන්න අවස්ථාවේ, රසපරීක්ෂක වාර්ථාව සම්බන්ධයෙන් කිසිම තොරතුරක් ඒ වෙනකොට තිබුණාද?
>
> උ : තිබුණේ නැහැ.

In the Judgement page 470 of the appeal brief is as follows;

> විත්තිකරුවන්ට ගිනිඅවි නිකුන් කර ඇති බව ඔප්පු වීම.
>
> මරනකරුවන්ගේ මරණය ගිනිඅවිවලින් වූ තුවාල නිසා බව ඔප්පු වීම.

When considering the above 2 sentences it is very clear that the learned High Court Judge created a wrongful nexus between the deaths and the appellant without any supportive evidence and made a serious error in his judgement.

Another argument raised by the learned President's Council on behalf of the 1st accused-appellant was that the learned High Court Judge has not properly evaluated the dock statement made by the appellant.

The appellant gave a reasonable explanation regarding his identification at the identification parade by PW 1 and it corroborates with the evidence of PW 1. However, the learned High Court Judge has failed to properly evaluate the dock statement in his judgement.

The dock statement, at page 379 of the appeal brief is as follows;

> "මම මධ්‍යම කදවුර පොලිස් ස්ථානයේ අවුරුදු හයකට වැඩි කාලයක් රාජකාරි කළා ස්වාමීනි. තවද මා මධ්‍යම කදවුර පොලිසිය ඉදිරිපිට සී.සී. විසිඑක ලිපිනයේ පදිංචි ශ්‍රියානි ජයන්ති කුමාරි සමග තමයි විවාහ වෙලා සිටින්නේ. ඒ හේතුව නිසා ඒ ස්ථානයේ පොලිස් නිලධාරියකු වශයෙන් මාව හොඳින් හඳුනනවා."

This version of the appellant is corroborated by the evidence of the PW 1.

Page 176 of the appeal brief is as follows;

ප්‍ර : ඔවුන් පොලිස් නිලධාරීන් කියලා තමන් කොහොමද හඳුනාගන්නේ?

උ : ගමේ පොලිස් ස්ථානයක් තිබෙන නිසා ඔවුන් එහි සේවය කළා.

ප්‍ර : පොලිස් ස්ථානයේ නම කුමක්ද?

උ : මධ්‍යම කදවුර

ප්‍ර : එම පොලිස් නිලධාරීන් තමන් මීට පෙර දැක තිබෙනවාද?

උ : ඔව්

The appellant's explanation with regard to his *alibi* corroborates the testimony of PW 24 and the learned High Court Judge has failed to evaluate properly the *alibi* of the appellant in his judgment.

The dock statement at page 379 of the appeal brief is as follows;

> "1997.09.23 දින ස්වාමීනි, මම මධාම කදවුර පොලිස් ස්ථානයේ සුළු පැමිණිලි අංශයට අනුයුක්තව රාජකාරි කළා ස්වාමීනි. ඒ රාජකාරි කරන අවස්ථාවේ සුළු අපරාධ තොරතුරු සටහන් පොතේ මාගේ විභාග සටහන් වගයක් ඇතුලත් කරලා තියෙනවා ස්වාමීනි. එහි පිටුව, ඡේදය, වෙලාව මතක නැහැ ස්වාමීනි. මේ සිද්ධිය තුළින් මම පොලිස් ස්ථානය තුල සිටි බව සනාථ වෙනවා ස්වාමීනි."

Evidence in chief of the PW24 at page 296 of the appeal brief is as follows;

ප්‍ර : "ඔය කියන දවසේ ඔබ මේ හඳුනාගන්න නිලධාරීන් ඔය ස්ථානයේ රාජකාරි කලාද?

උ : එහෙමයි.

ප්‍ර : ඔය කියන අවස්ථාවේදී ඒ නිලධාරීන් ඔය කියන රාත්‍රියේ එනම් නමයයි විසිතුන රාත්‍රියේ කිසියම් රාජකාරියකට පිටත්කර හැරියාද?

උ : විශේෂ රාජකාරියකට පිටත්කර හැරියේ නැහැ

ප්‍ර : ඒ අනුව ඔවුන් කොහෙද හිටියේ ඔය කියන දවසේ?

උ : ගාමිණී කියන නිලධාරියා මට මතක හැටියට සුළු පැමිණිලි විභාග කිරීමේ අංශයේ රාජකාරියේ යෙදී සිටියා."

In Ariyadasa Vs Queen 68 CLW 97, T.S Fernando J held as follows;

- if the jury believed the accused evidence he is entitled to be acquitted;
- accused is also entitled to be acquitted even his evidence, though not believed was such that it causes the jury entertain a reasonable doubt in regard to his guilt.

In Martin Vs Queen 69 CLW 21 T.S Fernando J held as follows;

> "Even if the jury declined to believe the appellant's version, he was yet entitled to acquit on the charge if his version raised in the mind of the Jury a reasonable doubt as to the truth of the prosecution's case."

In the case of Dayananda Lokugalappaththi v The State 2003 (3) SLR 362 the Court of Appeal held that;

> "... in respect of an *alibi* what is expected of the defence is merely to create a doubt in the mind of the court, if the alibi is accepted or even if it is not accepted yet if there is a doubt created in the judge's mind, the prosecution shall fail. The trial judge has considered the defence evidence of alibi and weighed it in the balance with the prosecution evidence and has rejected it ..."

It is my view that the learned High Court judge has failed to weigh the evidence of *alibi* against that of the prosecution and as such failed to consider whether a doubt has been caused by the accused-appellant with regard to his presence at the time of the commission of the alleged offence which is a complete violation of the law.

Another important argument was raised by the learned counsel for the 3rd accused-appellant. It is the suspicious circumstances under which the accused were initially made suspects, in this case, that has not been correctly evaluated by the learned Trial Judge. There had been 3 separate Identification parades within a span of 2 years of the incident. Identification of the accused in the said parades could be summarized below.

1st parade which was held on 23.10.1997, Ranpattige Gamini Kumarasinghe was identified by P.W 01

2nd parade which was held on 26.10.1998 (after one year)

Wannakku Arachchige Wasantha Kumara was identified by a witness. But in the report, it was not mentioned by whom.

3rd parade which was held on 20.09.1999 (after two years) Nimal Karunarathna was identified by P.W 01.

It was revealed that none of the witnesses had named any suspect in their statements to the police.

Therefore, according to PW 25, ASP Sundarapala who was in-charge of the investigation, all 600 police officers who were at the මධ්‍යම කඳවුර police camp were "listed for Identification parades.

Page 306 of the appeal brief is as follows;

ප්‍ර : "පෙරෙට්ටුවට කී දෙනෙක් ඉදිරිපත් කළාද?

උ : පෙරෙට්ටුවට 600ක් පමණ ඉදිරිපත් කළ බවට ලේඛන මම දැක්කා. ඊට පස්සේ අපි මාරුවෙලා ගියාට පස්සේ අපි දන්නේ නැහැ මොකද උනේ කියලා.

ප්‍ර : ඒ කියන්නෙ ඔය 600 දෙනාම හඳුනා ගැනීමේ පෙරෙට්ටුවට ඉදිරිපත් කළාද?

උ : 600 දෙනාටම ඉදිරිපත් වෙන්න කියලා ලේඛන සකස් කර තියෙන්නේ. මධ්‍යම කඳවුරේ සිටින සියලුම නිළධාරීන් ඉදිරිපත් කරන්න කියලා නියෝගයක් ලැබුණා."

Witness PW 25 further stated that he was transferred out 3 days after the incident and does not know what happened to the planned parades.

Page 307 of the appeal brief is as follows;

"උතුමාණෙනි සමාවෙන්න. මම මේ සිද්ධිය වෙලා දවස් තුනක් ගිය වෙලේ ස්ථාන මාරු ලැබ ගියා. මම ඉන්න දවසේ ඔක්කොම කටයුතු නන්දිදාස මහතා ඇතුලු කණ්ඩායම් කිහිපයකට බාර දුන්නා. ඉන් පස්සේ ඔය සිද්ධිය වෙනකොට මම ස්ථාන මාරු ලබා ගිහිල්ලා ස්වාමීනී. නමුත් මම ඉන්න දවස්වල 600ක් ඉදිරිපත් කරන්න ඕන කියල ලේඛනයක් හැදිච්ච එක මට මතකයි. ඒ මතකයෙන් කිව්වේ. ඊට පස්සේ සාක්ෂි සටහන් කිරීම පිලිබඳව මොකුත් මම දන්නේ නැහැ."

Under the said circumstances, a serious question arises as to how only the 6 suspects were chosen out of the equally eligible 600 candidates to be produced at the above three identification parades. It is evident that only three parades have been conducted. There is no explanation as to why it took 2 years to complete the three parades. There is also no explanation as to how only 4-5 witnesses were chosen for each parade. What should have been done was to produce all 600 police officers, even in batches for separate identification parades at which all witnesses could have been given opportunities to identify the perpetrators. Therefore, a grave suspicion arises about whether the investigating authorities have used the accused to close the investigations and whether the purported identification could have been set up. The learned Trial Judge has failed to evaluate the vital effect of the illegality in choosing the accused persons and three others as suspects without any evidence.

The 3rd Identification parade should have been rejected totally by the trial judge for two reasons.

(i) It was held after an unexplained lapse of 2 years from the incident.
(ii) The failure to question and record from the witness as to the conduct of the identified suspect at the alleged incident.

Mandatory requirements for an Identification parade have been well settled in law as per the following authorities.

<u>Roshan Vs Attorney General 2011 (1) SLR 365</u>

- The identification parade, if it is to be of value, must be held at the earliest opportunity, so that the impression of the witness remains fresh in his mind and he does not have the chance of comparing notes with others.

- The witness must be questioned and his description according to his recollection of the perpetrator extracted and recorded before he is invited to examine the parade and point out the perpetrator.
- In view of the provisions in Article 13(3) of the Constitution recognizing the right of an accused person to a fair trial by a competent court, evidence of improper identification must be excluded if the court is of the view that its admission would have an adverse effect on the fairness of the proceedings.

Perera Vs the State 77 NLR 224

The proper procedure that the magistrate should have adopted is as follows;

- That the Magistrate should have held several parades
- He should have asked the particular witness to identify any suspect if he was in the parade
- If a witness pointed out any person, then only Magistrate should ask the witness whether that accused whom he pointed, out did anything.
- If so the details of what he did

AG Vs Weerahenndige Joseph 1992 (2) SLR 264 the proper procedure stated by Walgampaya J (in Perera vs state) should be taken as the laying down of the inflexible rules that should apply in all situations, any breach of which will result in evidence of the parade being excluded.

As held in Bati Ahir 1983 CriLJ 434 (SC); "If there is no explanation for the delay, the accused could not be convicted".

In Soni 1983 SCC CriLJ 49; An identification parade held after 42 days was doubtful and hence the conviction was improper.

The learned Trial Judge has failed to correctly evaluate the credibility of the identification of the accused persons by PW 1.

Page 468 of the appeal brief is as follows;

> "ඒ අනුව කුමාරස්වාමී රවිචන්ද්‍රන්ගේ සාක්ෂිය මත පමණක්ම පිහිටා මෙම විත්තිකරුවන් දෙදෙනා වරදකරුවන් කළ හැකි බවට මම තීරණය කරමි."

Due to the following circumstances, serious doubt is created as to whether PW1 actually witnessed the commission of the alleged crimes or whether he had fled the scene at the beginning and later found out the plight of his parents.

PW 1 states in his evidence that he witnessed his deceased mother being shot in the leg.

Page 175 of the appeal brief is as follows;

> උ : මුලින්ම මට ගැහුවා. ඊට පස්සේ අම්මාට වෙඩි තිබ්බා.
>
> ප්‍ර : ඒ වෙඩි කොහේටද වැදුණේ කියලා තමුන් දන්නවද?
>
> උ : කකුලට වැදුණේ
>
> ප්‍ර : ඉන් පස්සෙ මොකද වුණේ?

උ : මම දුවගෙන ඇවිල්ලා අම්මාව අල්ල ගත්තා. වෙඩි තියපු අය ළඟට ආවා.

This position taken by PW 1 is totally contradicted by the medical evidence. According to the post mortem report of the mother (marked as P 3) and evidence of PW 21 (the JMO) who conducted the post mortem, it was revealed that there had been no fire arm injury on her leg.

Three police officers had given evidence, apparently, none of them had visited the crime scene pertaining to charges no 24 and 27. No notes or sketches had been produced in evidence to show where the bodies of the deceased were found. Hence, there is no corroboration to the fact that the crimes concerned had taken place near the gate of the house belonging to PW 1, as alleged by him. The learned Trial Judge has considered the fact that the accused were well known to PW 1 and that he could have had no difficulty in identifying them. He has failed to consider the fact that PW 1 has mentioned in his statement given to the police that he is unable to identify the perpetrators. No explanation has been offered by PW 1 in this regard.

Page 332 and 333 of the appeal briefs is as follows;

ප්‍ර : ඒ තුන්දෙනා සිද්ධියට අදාලව කිසිවෙක් හඳුනාගන්න පුලුවන් කියල තියෙනවාද?

උ : නැත ස්වාමීනී.

ප්‍ර : තමුන්ට දුන්නු සාක්ෂියෙන් මවට හා පියාට වෙඩි තිබ්බා කියල හඳුනාගැනීමක් තියෙනවද?

උ : නැහැ.

It was decided in Subash & Shanker 1987 Cri Lv 991, where an identification parade was held about 4 months after the date of occurrence and the eye witness had not given any descriptive particulars of the accused either in the first information report or in their statements during the investigation. It would be unsafe to base the conviction solely on such identification and the accused was entitled to the benefit of the doubt.

All witnesses (except PW 5) who had resided near the police camp for so many years had, even at the trial before the High Court, failed to identify the accused persons. Some of them stated that all the attackers had come with their faces covered with nets, thus creating a doubt as to why only the three people who had attacked the house of PW 1 had not covered their faces. On the other hand, it may be that PW 1 had not seen the attackers. The learned trial Judge has failed to consider the infirmities in the identification of the accused persons by PW 1 and failed to evaluate his credibility as the sole eye witness to the crimes on charges number 24 and number 27.

It is important to note that PW 5 has stated that all accused persons and the other person who came to his house were wearing police uniforms.

Page 525 of the appeal brief is as follows;

ප්‍ර : ඔවුන් කොහොමද ආවේ?

උ : ඔවුන් යුනිපෝම් ඇදගෙන ආයුධ සමඟ ආවා.

ප්‍ර : යුනිපෝම් කියල කියන්නේ ටී ෂර්ටුයි කලිසමයි කියලද කියන්නේ?

උ : පොලිස් නිළධාරීන් අදින යුනිපෝම් ඇදපු පුද්ගලයන් තමයි දැක්කේ.

(සාක්ෂිකරු ඔහු ළඟින් සිටින යුනිපෝම් ඇදගෙන සිටින පොලිස් නිලධාරියෙකු පෙන්වා සිටී.)

This position of PW 5 contradicts with all other witnesses including PW 1, who say that all the attackers came in plain clothes. This shatters the credibility of PW5 as an interested witness who had introduced new material to his testimony. The defence has had no opportunity to cross-examine him in the trial before the High Court due to his demise. On the other hand, if PW 5 is assumed truthful, then doubt is again created that PW 1 may have not seen the accused persons.

PW 5 has said in the non-summary inquiry that although he identified all accused persons at the identification parades, he did not indicate so due to fear. The learned Trial Judge has accepted this position. However, it is pertinent to note that the said witness PW5 Velayudan Perimparaja has not been a witness in the (3rd) Identification Parade in which the 3rd accused was produced. Therefore, the learned counsel for the 3rd accused-appellant argued that the credibility of PW5 is shaken as far as his identification of the 3rd accused is concerned. The said PW5 is not an eyewitness to the incidents relating to charges number 24 and 27 and his evidence cannot be relied on, against the accused persons.

In many places in the judgement of the learned Trial Judge, has indicated that the alleged attack has been carried out by a group of police officers attached to the මධ්‍යම කඳවුර Police Station due to a killing of a police officer a few days prior to the incident. This could be considered a baseless assumption for the reason that none of the witnesses has supported this theory. The only evidence available was that a police officer was killed at Chawalakade Road, Dadayanthalawa which is 4 Kilo Meters away from the village colony in question. It is also pertinent to note that apart from PW 1 and PW 5 who have testified to the effect that the attackers were police officers from මධ්‍යම කඳවුර Police Station, none of the other witnesses has corroborated that fact even after so many years.

The bullets and empty cartridges found in the village cannot be directly connected to මධ්‍යම කඳවුර Police Station since there have been several armed groups in that area including armed forces and LTTE during that time. In any event, it is prudent to remind again that there is no evidence adduced of finding any bullets, spent cartridges or capsules from the crime scene of the house of PW1, which is relevant to this case.

Therefore, apart from the evidence of PW 1 and PW 5, which is questionable on credibility as shown above, there is no other material to ascertain that the attackers were from මධ්‍යම කඳවුර Police Station. Under the above circumstances, in convicting the accused-appellants for counts number 24 and number 27 of the indictment, the learned Trial Judge has, failed to consider that the identification of the said accused has not been proved beyond reasonable doubt by the prosecution.

In the aforesaid, the identification of the appellants was not properly established and it is unsafe to uphold the conviction of the 1st and 3rd accused-appellants. The prosecution was failed to prove the basic elements of a crime namely, a*ctus-reus* and m*ens rea* or the common

intention relating to the appellants. The dock statements made by the appellants were not properly evaluated by the learned High Court Judge. The learned High Court Judge has failed to consider the above matters and there are serious misdirection's with regard to the burden of proof and evaluating the evidence of the prosecution.

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. On the premises aforementioned, this Court sets aside the judgement dated 07.06.2017, whereby the accused-appellants were convicted and sentenced to death and now pronounces a fresh judgment of acquittal from all charges in the indictment, including charge numbers 24 and 27.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal