IN THE COURT OF APPEAL OF THE DEMOCRATIC 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/0200/15

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

High Court of Colombo

Case No: HC/1240/2003

Vs.

1. Ranepura Dewage Prasanna
2. Samarasinghe Gama Arachchige Sugath Samarasinghe *alias* Saneera
3. Ranasinghe Arachchige Chandra Kumara *alias* Kiki
4. Sandanam Christopher

ACCUSED

AND NOW BETWEEN

1. Ranepura Dewage Prasanna
2. Samarasinghe Gama Arachchige Sugath Samarasinghe *alias* Saneera
3. Ranasinghe Arachchige Chandra Kumara *alias* Kiki
4. Sandanam Christopher

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Indica Mallawaratchy for the 1st and the 2nd Accused Appellants

: Nalin Dissanayake, P.C. with Vishwa Rajapaksha and Kelum Ubeysekara for the 3rd Accused Appellant

: Nagitha Wijesekara for the 4th Accused Appellant

: Dilan Rathnayake, SDSG, for the Respondent

Argued on : 04-10-2022

Written Submissions : 28-08-2017 (By the 1st and the 2nd Accused-Appellants)

: undated (By the 3rd Accused- Appellant)

: 27-09-2017 (By the 4th Accused- Appellant)

: 05-12-2017 (By the Respondent)

Decided on : 10-11-2022

Sampath B Abayakoon, J.

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

1. They became members of an unlawful assembly armed with deadly weapons on 27th January 2000 at Grandpass with the common object of committing a crime and thereby committed an offence punishable in terms of section 141 of the Penal Code.
2. At the same time and at the same transaction, one or some members of the said unlawful assembly caused the death of one Hettiarachchilage Kithsiri and thereby committed the offence of murder, punishable in terms of section 296 read with section 146 of the Penal Code.
3. At the same time and at the same transaction, one or more members of the said unlawful assembly caused injuries to one Sunanda Jayaratne by using pistols and thereby committed the offence of attempted murder, punishable in terms of section 300 read with section 146 of the Penal Code.
4. At the same time and at the same transaction, the appellants along with some others unknown to the prosecution caused the death of the earlier mentioned Hettiarachchilage Kithsiri and thereby committed the

offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.

5. At the same time and at the same transaction, the appellants along with some others unknown to the prosecution fired at the earlier mentioned Sunanda Jayaratne using pistols and thereby committed the offence of attempted murder, punishable in terms of section 300 read with section 32 of the Penal Code.

After trial without a jury, the learned High Court Judge of Colombo, by the judgement dated 14-05-2015 found the appellants guilty for all counts preferred against them and they were sentenced as follows.

On count one, each accused was sentenced to two years rigorous imprisonment. On count two, they were sentenced to the death penalty. On the third count, each of the accused were sentenced to twenty years each rigorous imprisonment.

Considering the count four and five for which they were found guilty as alternate counts to count two and three, no sentence was passed in relation to those counts.

This is a matter where the 3rd accused absconded the Court. The trial has proceeded in terms of section 241 of the Code of Criminal Procedure Act against him.

Being aggrieved by the said conviction and the sentence, all four appellants preferred this appeal challenging the conviction and the sentence imposed by the learned High Court Judge of Colombo.

Facts In Brief

This is a matter where the deceased and the PW-01 who was the injured person in relation to the attempted murder charge was fired at when they were travelling on a motorbike passing the Sugathadasa Stadium in Colombo. The PW-01 has been riding the motorbike while the deceased had been the pillion rider. It is in evidence that several others, including PW-02 were also accompanying them in

two other motorbikes at the time this incident happened and they were travelling behind the motorcycle ridden by PW-01. All of them had been returning home after attending to a Court case they had in Colombo.

According to the evidence of PW-01, he has seen two persons standing near the bus stand in front of the stadium and he has identified them as Kiki and Christopher. It had been his evidence that while passing them, Christopher pointed a gun at them and fired causing injuries to him. The gun shots had hit the pillion rider as well. After being injured, PW-01 has attempted to ride the bike across the road over the center island, but he was unable to escape and had fallen on the ground along with the deceased. Thereafter, he has seen some persons approaching him and firing at him and the deceased. Because of the injuries he has already sustained, PW-01 has failed to identify the persons who fired at him for the 2nd time.

The only other eye witness to the incident had been PW-02 who was the elder brother of the PW-01 and also a close relative of the deceased. He had been riding one of the motorbikes that came behind the motorbike ridden by PW-01. It was his evidence that while passing the bus stand in front of the Sugathadasa Stadium, about five persons came on to the road and started firing indiscriminately. It was his evidence that he was about 5-6 meters away from PW-01 when this incident happened. It was also his evidence that after the first firing, the assailants also fired for a 2nd time at the deceased and the injured who were fallen on the road. He has stated that he was able to identify three of the assailants and has stated that one was a person named as Kiki and there was another Tamil person called Raja and the 2nd appellant Sugath Samarasinghe was also present. Apart from these, the witness has spoken about a person who was wearing a chocolate-coloured shirt as one of the persons who fired at the deceased and the injured, and it was the person wearing a chocolate-coloured shirt, Kiki and the Tamil person mentioned, who carried three weapons with them and fired at the deceased.

He had been specific that he was unable to recognize the 1st appellant as a person who was involved in the crime. He has stated that he saw him coming and having a look at the injured and running away from the scene. He has also stated that the 2nd appellant too, though present, did no specific act.

The Grounds of Appeal

At the hearing of this appeal, the following grounds of appeal were urged by the learned Counsel on behalf of the appellants.

For the 1st and the 2nd appellants:

1. The evidence of PW-02 in relation to the identification of the 1st accused appellant was self-contradictory and unreliable.
2. The learned High Court Judge failed to address her mind to the contradictions *inter se* and *per se* of the evidence of PW-01 and PW-02 with regard to the complicity of the 1st and the 2nd accused appellants to the crime.
3. The learned High Court Judge failed to apply Turnbull principles in relation to the proof of identity of the appellants.
4. The conviction of the 1st and the 2nd accused appellants based on unlawful assembly is unsustainable on the evidence led at the trial.

For the 3rd appellant:

The learned President's Counsel while relying on the grounds of appeal urged on behalf of the 1st and the 2nd accused appellants formulated the following ground of appeal.

5. The evidence of PW-01 and 02 was contradictory to each other and the prosecution has failed to properly identify the 3rd accused appellant through the witnesses at the trial.

For the 4th appellant:

6. The prosecution has failed to prove the case beyond reasonable doubt.
7. The learned High Court Judge has acted on insufficient evidence to convict the appellants.
8. The learned High Court Judge has failed to analyze the evidence in its totality and has come to wrong findings in that regard.

It was the submission of the learned Counsel on behalf of the appellants that the prosecution has failed to establish the charge of unlawful assembly before the Court and there was no evidence to suggest that the 1st and the 2nd appellants were members of any group who had committed the crime. It was contended that the mere presence of a person would not amount to being a member of an unlawful assembly.

It was also pointed out that the evidence of PW-01 and PW-02 who are supposed to be the only eye witnesses, is contradictory to each other on material points. It was brought to the notice of the Court that although PW-01 has stated that two persons were involved in the shooting, PW-02's evidence was that about five persons started shooting indiscriminately. It was also pointed out that although PW-01 speaks about a person called Kiki, there was no evidence as to the part he played in the evidence of PW-01 and the prosecution has failed to clearly establish whether the 3rd accused was the person who was mentioned as Kiki by the witnesses. Contrary to that evidence, the evidence of PW-02 had been that the person mentioned Kiki and a person mentioned Raja and another unknown person had weapons and they were the ones who were firing at the deceased and the injured.

In his evidence, PW-01 has stated that it was Cristopher, the 4th accused who fired at them first, but PW-02 who should be in a better position to observe the incident has not mentioned anything about Christopher being involved in the crime. It was the contention of the learned Counsel that given the unreliable

nature of the two eyewitness evidence as to the culpability of the appellants, relying on their evidence was not safe, and therefore, the appellants should have been acquitted by the learned High Court Judge.

Having considered the submissions of the learned Counsel on behalf of the appellants and the judgement of the learned High Court Judge, the learned Senior Deputy Solicitor General (SDSG) agreed that the evidence of two main witnesses were not credible enough to rely on them to decide that the charges have been proved beyond reasonable doubt against the appellants.

He invited the Court to consider the testimonial trustworthiness of the two relevant witnesses and whether the learned High Court Judge has properly considered and analyzed the relevant evidence. He also brought to the notice of the Court the fact whether the divisibility principle can be applied in relation to the two eye witnesses' testimony. The learned SDSG conceded that the arguments presented by the learned Counsel for the appellants have merit and that he is in no position to support the conviction and the sentence of the appellants by the learned High Court Judge.

This Court would like to express our appreciation to the learned SDSG for expressing his views in relation to the appeal, as it was the duty of all parties before the Court to assist in dispensing justice in accordance with the law.

Consideration of the Grounds of Appeal

As the appellants have been found guilty on the basis of them being members of an unlawful assembly, I will now consider whether the evidence presented before the Court has established that fact against the appellants.

In terms of the provisions of the section 138 of the Penal Code, which defines an unlawful assembly, an assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is one of the six objects as shown.

There can be no doubt that the incident falls within one of the six instances that come within the meaning given to an unlawful assembly. However, to prove an unlawful assembly, it is necessary to establish that five or more persons were involved in the incident with a common object. It is also necessary to establish the accused persons were in fact members of that unlawful assembly.

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

Dr. Gour in **Penal Law of India, Volume II, 11th Edition at page 1296** discusses the law in respect of unlawful assembly in the following terms.

> "*All persons who convene, who take part in the proceedings of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or from 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 fail to exercise it. Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he has done something or omitted to do something which would make him a member of an unlawful assembly."*

In the book by **Ratanlal and Dhirailal**, **The Law of Crimes, Volume I, 24th Edition at pages 598 and 599**, deals with the same issue where it has been stated;

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

person was or was not a member of unlawful assembly is a question of fact."

With the above legal principles in mind, I will now proceed to consider whether the prosecution had been able to prove beyond reasonable doubt that the four appellants were members of an unlawful assembly, where the deceased and the PW-01 were shot at.

As agreed, rightly by the learned SDSG, in order to prove this fact, it is necessary to consider whether the evidence of the two eyewitnesses was cogent and credible. According to the evidence, it should be the PW-01 who has first seen the assailants approaching him. He speaks only about the 4th accused whom he has identified as Christopher and a person called Kiki. According to his evidence, they have been waiting near the bus stand in front of the Sugathadsa Stadium before the person whom he identified as Christopher open fire at them. According to his evidence, Christopher is a person well-known to him. Although he has spoken about the person called Kiki standing along with the Christopher at the bus stand, he has not been specific as to the role played by the mentioned Kiki when he was first fired at. He speaks about two persons coming after him and the deceased and firing again after they fell from the motorbike, he has failed to identify the said persons as Christopher and Kiki. The mentioned Christopher is the 4th appellant.

PW-02 who was the other eye witness to the incident was riding the 2nd motorbike behind the motorbike ridden by PW-01. According to his evidence, when they were passing the bus stand in front of the Sugathadasa Stadium, around five persons jumped onto the road and started firing indiscriminately towards PW-01 and the deceased. He has been specific that he was 5-6 meters behind the motorbike of PW-01when the incident occurred. He has started in his evidence that it was a person wearing a chocolate-coloured shirt who fired first at the motorbike. It had been his evidence that the person who was wearing a chocolate-coloured shirt, Kiki and another Tamil person whom he knows as Raja

were the persons who carried weapons and who fired at the deceased and the injured after they fell from the bike.

He has failed to mention any part played by the 4th appellant or to say whether he was present at the scene of the crime. He has been silent as to whether the 4th appellant is a person previously known to him. On the parts played by the 1st and the 2nd appellant, it had been his evidence that he saw them moving away from the scene of the crime after having a look at the deceased and the PW-01, who were fallen on the ground with injuries.

As contended and agreed, the evidence of PW-01 and PW-02 are contrary to each other on material points, which the prosecution needs to prove beyond reasonable doubt in order to come to a finding against the appellants. The evidence of PW-02, who is the only person who speaks about the presence of the 1st and the 2nd accused does not reveal that they actively participated in the crime with any common object.

At this juncture, I would like to reproduce the observations of **Weerasuriya, J** in the Supreme Court decision in **SC Appeal 20/2003(TAB) decided on 21-05-2005 (Bindunuwewa Massacre Case)**.

> "*Whenever in uneventful cruel society something unusual occurs, more or so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with the view of participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly, either participates in the commission of the offence by an overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly. If one becomes a member of the unlawful assembly and becomes or continues to remain a*

member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in persecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly, it is necessary to keep in mind that a life in a village is ordinarily uneventful except for small squabbles where the village community is faction ridden and when a serious crime is committed, people rush just to quench their thirst to know what has happened."

It is my view that the above observations are true not only in relation to village life, but also to people who live in crowded urban environments.

As considered before, the prosecution has failed to prove any act or acts or even omissions by the 1st and the 2nd appellants that can be considered them as members of an unlawful assembly. Therefore, I am in agreement with the contention that the prosecution has failed to prove the charges against the 1st and the 2nd accused appellants.

When it comes to the evidence against the 3rd accused appellant who has absconded during the trial, as pointed out correctly by the learned President's Counsel who made submissions on behalf of him, although the evidence shows that a person called Kiki has been involved in the crime, the fact whether he was the 3rd accused who has absconded had not been correctly established. Although witnesses have said that he was present at the non-summary inquiry, that fact has not been properly established before the trial Court.

The evidence of PW-01 and 02 are *inter se* contradictory as to the part played by the person called Kiki in the commission of the crime. When it comes to the evidence against the 4th appellant, again, the evidence of PW-01 and 02 are contradictory to each other. It had been the evidence of PW-01 that it was the

4th appellant who fired at him first, and he does not speak about the number of persons firing at him at the initial firing. However, the evidence of PW-02 had been that 4 or 5 persons started shooting indiscriminately at the deceased and the PW-01, which shows that there had been at least more than one shooter at the initial firing.

The evidence of PW-02 had been that a person wearing a chocolate-coloured shirt was the person who fired at the deceased and PW-01 first, but he has failed to identify PW-04 as a shooter or even as one of the persons involved or even present at the crime scene. There is no evidence to show that the 4th appellant was not a person unknown to PW-02, who is the brother or PW-01.

For the reasons considered above, I am of the view that relying on such evidence is highly unsafe to convict a person accused of a serious crime of this nature. I am also of the view that this is not a case where it is safe to apply the divisibility principle in consideration of the evidence of the two eye witnesses.

The learned High Court Judge found the appellants guilty for the 4th and the 5th counts preferred against them on the basis that they committed the murder of the person mentioned in the 2nd count and they also committed the offence of attempted murder of the person named in the 3rd count in furtherance of common intention as described in section 32 of the Penal Code.

As I have considered earlier, I am of the view that the prosecution has failed to establish the necessary ingredients of common intention as well.

In order to consider whether the common intention has been proved, it is the duty of a trial Judge to see and consider the part played by each of the accused in committing the offence.

In the case of **King Vs. Asarappu 50 NLR 324**, it was held that;

> "In a case where the question of common intention arises, the jury must be directed that,

1. The case of each accused must be considered separately.
2. The accused must have been actuated by a common intention of the doer of the act at the time the offence was committed.
3. Common intention must not be confused with the same or similar intention entertained independently of each other.
4. There must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.
5. There mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention."

For the reasons as considered above, I am of the view that this Court has no option but to allow the appeals preferred against the conviction and the sentences imposed by the learned High Court Judge. I am of the view that it is highly unsafe to let the conviction stand due to the considered infirmities, in the evidence relied on by the learned High Court Judge.

Accordingly, I allow the appeals by the accused appellants and acquit them of the charges preferred against them for which they were found guilty.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal