

**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/0058/0061/2017

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**High Court of Kandy**

HC/1828/1998

1. Yagange Piyarathne Rupasinghe *alias*

Priyantha

2. Hawamadagedara Premaratne *alias*

Kudde (Deceased)

3. Hawamadagedara Prematilake *alias*

Hawadiyage Kaluwa

4. Ranhitigedara Ranasinghe *alias* Some

5. Rathnayakage Siripala

**ACCUSED**

**AND NOW BETWEEN**

1. Yagange Piyarathne Rupasinghe *alias*  
Priyantha

3. Hawamadagedara Prematilake *alias*  
Hawadiyage Kaluwa

4. Ranhitigedara Ranasinghe *alias* Some

5. Rathnayakage Siripala

**ACCUSED-APPELLANTS**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12

**RESPONDENT**

**Before** : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

**Counsel** : Daya Guruge for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused  
Appellants

: Kanaga Sivapathisundaram for the 5<sup>th</sup> Accused  
Appellant

: Wasantha Perera, DSG for the Respondent

**Argued on** : 08-11-2022

**Written Submissions** : 28-04-2021 (By the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused Appellants), 19-01-2018 (By the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused Appellants)  
: 11-12-2018 (By the Respondent)

**Decided on** : 14-12-2022

**Sampath B Abayakoon, J.**

The five accused persons were indicted before the High Court of Kandy for committing the following offences.

1. For being members of an unlawful assembly with the intention of causing injuries to one Gunathilaka Banda on the 30<sup>th</sup> of June 1995, and thereby committing the offence of unlawful assembly punishable in terms of Section 140 of the Penal Code.
2. At the same time and at the same transaction, with the common object of causing the death of the earlier mentioned Gunathilaka Banda, caused grievous injuries to him by attacking him with a sharp cutting instrument, and thereby committed the offence of attempted murder, an offence punishable in terms of Section 300 read with Section 146 of the Penal Code.
3. At the same time and at the same transaction, causing the death of Ekanayake Mudisanselage Walawwe Gunaratne Banda in furtherance of the common object of the mentioned unlawful assembly, and thereby committing the offence of murder, punishable in terms of Section 296 read with Section 146 of the Penal Code.
4. At the same time and at the same transaction, causing the death of the earlier mentioned Gunaratne Banda, and thereby committing 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, causing injuries to earlier mentioned Gunaratne Banda, using a sharp cutting instrument, and thereby committing the offence of attempted murder, punishable in terms of Section 300 read with Section 32 of the Penal Code.

As the 2<sup>nd</sup> accused indicted, namely, Hawamadagedara Premaratne *alias* Kudde was dead at the time this matter was taken up for hearing before the High Court of Kandy, the indictment had been amended accordingly.

The trial against the four accused appellants had been without a jury, and at the conclusion of the trial, the learned High Court Judge of Kandy found the accused appellants guilty for the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> counts preferred against them. That is to say, they were found guilty for the offences of unlawful assembly, attempted murder and the murder, while being members of the said unlawful assembly.

The learned High Court Judge had not made any order in relation to the 4<sup>th</sup> and the 5<sup>th</sup> counts preferred against them, apparently since he has found the appellants guilty on the three counts based on unlawful assembly.

Accordingly, the accused appellants were sentenced in the following manner.

On count 1, they were sentenced to 6 months rigorous imprisonment.

On count 2, they were sentenced to 10 years each rigorous imprisonment. In addition, they were ordered to pay a fine of Rs. 20,000/- each and in default, two years each rigorous imprisonment.

On count 3, they were sentenced to death.

Being aggrieved by the said conviction and the sentence, the accused appellants, (hereinafter sometimes referred to as the appellants) preferred this appeal.

### **The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> appellants who was the 1<sup>st</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> accused at the trial, formulated the following grounds of appeal for the consideration of this Court.

1. The learned High Court Judge erred in law when he failed to properly analyze the evidence placed before the Court.
2. The learned High Court Judge failed to consider the dock statement of the appellants in its correct perspective.
3. The learned High Court Judge has not considered the possibility of a sudden fight between the parties in his judgement.

The learned Counsel for the accused appellant Rathnayakage Siripala, who was the 5<sup>th</sup> accused at the trial formulated the following grounds of appeal.

4. The learned High Court Judge misdirected himself with regard to the dock statement of the appellant.
5. The learned High Court Judge has failed to consider that the 1<sup>st</sup> witness had deviated from the statement given by him to the police at the trial.
6. There was evidence of a sudden fight.
7. The learned High Court Judge has failed to consider that the prosecution has not been able to properly establish the identities of the appellants through the witnesses.
8. The learned High Court Judge has overlooked the contradictions marked at the trial, especially the contradiction marked as V-03.

### **Facts In Brief**

The injured Gunathilake Banda was the son of the deceased Gunaratne. The deceased, while being a farmer, also had a boutique in the village called Waragolla in the Hasalaka area. The appellants, including the 2<sup>nd</sup> accused who is now deceased are also fellow villagers well-known to each other.

According to the evidence of Gunathilake Banda, (PW-01) on the day of the incident, that was on 30<sup>th</sup> June 1995, he and another relative of him, namely Athula Bandara (PW-06) was returning towards their boutique after giving tea to Athula Bandara's mother Biso Manike, (PW-02) who was working in the field. It was around 1.45 p.m. at that time.

According to his evidence, suddenly the appellants, including the now deceased Premaratne (2<sup>nd</sup> accused in the indictment) have surrounded him having various weapons in their hands and has started assaulting him. It was the 1<sup>st</sup> accused appellant who has started assaulting him towards his ear, and threatened him with a razor knife. He has stated that thereafter, the 1<sup>st</sup> accused cut him using the razor knife. While this was happening, his father Gunaratne Banda has come out of his boutique and has intervened at the place where he was being assaulted questioning as to why. At that instant, the 5<sup>th</sup> accused appellant has stabbed Gunaratne towards his neck. PW-01 has managed to bring his father in front of their boutique and while they were there, the appellants have again pursued them. The 5<sup>th</sup> accused appellant has stabbed the deceased Gunaratne several times and the 3<sup>rd</sup> accused appellant also had cut him using a manna knife and the 4<sup>th</sup> accused appellant who had a club and a rock in his hand had also assaulted the deceased.

Explaining the reasons for the attack, the PW-01 has stated that on the previous day, the 1<sup>st</sup> accused appellant came to their boutique and wanted to buy cigarettes. When he informed that cigarettes are not available, he has gone away after threatening the PW-01. On the same day around 6.00 - 6.30 p.m. while the brothers of PW-01 and a relative was consuming liquor in front of their boutique, the 1<sup>st</sup> three accused indicted, and some others have come and assaulted those who were present. As a result, the brothers of PW-01 and a relative had sustained injuries. He has also spoken about a previous enmity because of an alleged illicit relationship his mother supposed to have had with the 1<sup>st</sup> accused appellant.

It has transpired during the cross-examination that PW-01 has made two statements to the police. In the 1<sup>st</sup> statement, he has stated that while he was being assaulted, his father came armed with a sword and hit the 5<sup>th</sup> accused which hit in his back area. As the witness has denied having said such a thing to the police, that contradiction has been marked as V-03 at the trial.

PW-02 Biso Manike has confirmed that PW-01 and her son Athula Bandara came to the field where she was working at around 1.30 to provide tea for her and left. After hearing a commotion in the direction of PW-01's house, Biso Manike has gone to inquire. On her way, she has met the four accused appellants and the now deceased, 2<sup>nd</sup> accused who are well-known to her. It was her evidence that she saw the 1<sup>st</sup> accused appellant carrying a razor knife and Premaratne (2<sup>nd</sup> accused indicted) carrying a club in his hand, the 5<sup>th</sup> accused appellant was carrying a pointed sharp knife. When she met them, the 5<sup>th</sup> accused appellant has sworn at her stating that "protect your son" ("උබේ පුතා පරිස්සන් කරගනින්"). Subsequently, she has seen Gunaratne fallen on the road and PW-01 being injured.

PW-06 Athula Bandara was the son of PW-02 Biso Manike, and the person who was accompanying PW-02 when this incident happened. He has corroborated the evidence of PW-01 as to how this incident occurred and the way PW-01 and the deceased received their injuries. He has been the person who has gone and informed the deceased that Gunathilaka Banda was being assaulted and returned with the deceased to the place where he was being assaulted. He has given specific evidence as to the fact that it was the 5<sup>th</sup> accused who stabbed the deceased.

The police officers who conducted investigations as to the incident has also given evidence in this matter and it has been transpired that the 5<sup>th</sup> accused has been arrested about a week after the incident.

The District Medical Officer of Hasalaka hospital who has conducted the postmortem of the deceased and also the doctor who has issued the Medico-Legal Report in relation to the injuries sustained by PW-01 has confirmed that the deceased had eight injuries in all. He has described the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> injuries as stab wounds and 5<sup>th</sup> and the 7<sup>th</sup> injuries named in his report as contusions while the 8<sup>th</sup> injury has been a linear abrasion. His evidence shows that the stab wounds have penetrated his internal organs, including the heart cavity which has resulted in internal hemorrhage. He has expressed the opinion that the cause of death was internal hemorrhage into the pleural cavity due to the injuries caused to the right lung.

Giving evidence as to the injuries suffered by PW-01, he has observed 6 injuries in total, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> being injuries caused using a sharp cutting weapon. The 1<sup>st</sup> and the 2<sup>nd</sup> cut injury has been to the face of the injured. The doctor has categorized these two injuries under Section 311 (f) of the Penal Code, which is permanent disfiguration of the head or face.

### **The Consideration of The Grounds of Appeal**

The 1<sup>st</sup> ground of appeal formulated by the learned Counsel for the appellants has been a ground in general terms on the basis that the learned High Court Judge erred in law in his analysis of the evidence placed before the Court. As the other seven grounds of appeal urged by the learned Counsel are grounds based on the premise that the evidence before the Court was not considered in its correct perspective, I will now proceed to consider all the grounds of appeal together.

The learned Counsel for the 5<sup>th</sup> accused appellant has raised a ground of appeal on the basis that the identities of the appellants have not been established through the prosecution witnesses. I find no merit at all for such a ground of appeal. The evidence held before the Court clearly establishes that the appellants as well as the now deceased 2<sup>nd</sup> accused indicted are well-known to all the



prosecution witnesses as they were fellow villagers. All the witnesses have given evidence clearly identifying the appellants and the part played by them in the incident.

The appellants have been convicted on the basis of being members of an unlawful assembly. The submissions of the learned Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused appellants was that since the evidence suggests that the 5<sup>th</sup> accused had come to the scene of the incident later, there was no evidence to establish that five persons participated in the incident, and therefore no basis for a conviction in terms of an unlawful assembly.

It was also his submission that since the prosecution has failed to prove that there was a common intention amongst the appellants, a conviction in terms of Section 32 of the Penal Code has also not been proved.

In this matter, there is clear evidence to show that when PW-01 was walking towards the boutique owned by his father, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants and the deceased 2<sup>nd</sup> accused has surrounded and assaulted him. There is clear evidence that while this assault is taking place, the 5<sup>th</sup> accused has arrived at the scene and he also has taken part in the assault. According to the witnesses, it was the 5<sup>th</sup> accused who has stabbed the deceased initially when he arrived at the scene of the assault. Evidence also establishes that after the deceased was taken near the boutique he owned by his son Gunathilake Banda, all the assailants have come again and attacked the deceased. The most of the injuries have been stab wounds and the evidence clearly suggests that it was the 5<sup>th</sup> accused appellant who caused stab injuries to the deceased. This clearly establishes that the 5<sup>th</sup> accused appellant had been a willing participant of the crime.

The offence of unlawful assembly has been described in Section 138 of the Penal Code in the following manner.

**138. An assembly of five or more persons is designated an “unlawful assembly” if the common object of the persons composing that assembly is –**

***Firstly* - To overawe by criminal force, or show of criminal force, Her Majesty’s Government in Ceylon or the Senate or the House of Representatives or any public servant in the exercise of the lawful power of such public servant; 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 persons 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 practicing military movements or evolutions, without the consent of the Governor-General of Ceylon**

***Explanation* – An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.**

In relation to the facts of this case, I find that the provisions of Section 139 of the Penal Code should also worth mentioning. Section 139 refers to the effect of a person being a member of an unlawful assembly, which reads thus;

**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.**

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

If it is proved that a person was a member of an unlawful assembly with a common object, his action or omissions imputes vicarious liability on other members of that assembly as provided for in Section 146 of the Penal Code which reads:

**146. If an offence is committed by any member of an unlawful assembly in persecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in persecution 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.**

It is therefore, necessary for the prosecution to prove whether;

(a) That the offence was committed in the persecution of the common objective of the unlawful assembly, or

(b) That the members of the unlawful assembly knew that the offence was likely to be committed in the persecution of the common object. (**Vide – Andrayes Vs. Queen 67 NLR 425**)

**Dr. Gour** in **Penal Law of India** discusses the law in relation to unlawful assembly in following terms (Volume II, 11<sup>th</sup> Edition at page 1296);

*“All persons who convene or 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 or unless the case fails.”*

In this regard, it is also necessary to understand the difference between the common object as mentioned in Section 146 of the Penal Code and the common intention as mentioned in Section 32 of the Penal Code.

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

1. *“That a common object in an unlawful assembly is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, then their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves.*
2. *That a person can become a member of an unlawful assembly not only by doing of a criminal act but also by lending the weight of his presence*

*and associating with a group of persons who are acting in a criminal fashion.*

*3. That the common objects of an unlawful assembly may come in succession and need not necessarily exist together at the beginning.”*

It is abundantly clear from the evidence adduced in this matter, that although the 5<sup>th</sup> accused appellant may have joined the other four persons in assaulting the PW-01 at a later stage, he too had the common object in assaulting the PW-01 as his subsequent actions suggest. The evidence shows that it was he who has stabbed the deceased when the deceased came to rescue his son. It is my considered view that the prosecution has led sufficient evidence beyond reasonable doubt that all five persons mentioned in the indictment have acted with a common object and had caused injuries to PW-01 and the deceased in furtherance of the common object.

In the judgement, the learned High Court Judge has considered the contended contradiction marked as V-3 to find whether it has created a doubt as to the evidence of PW-01. In his first statement made to the police, PW-01 has stated that when he was assaulted, his father came out of his boutique with a sword in his hand and the 5<sup>th</sup> accused was hit when the deceased used the sword. However, in his evidence in chief, he has denied that his father came out of the boutique with a sword.

The evidence led before the trial Court has established that on the previous day morning, the 1<sup>st</sup> accused appellant has come to the boutique and there has been an argument over the selling of cigarettes. As a result, in the evening, the 1<sup>st</sup> and the 3<sup>rd</sup> accused appellants and the deceased 2<sup>nd</sup> accused along with some others have come to the boutique and assaulted the family members of PW-01. It clearly appears that the incident where PW-01 has received injuries and the death of the deceased has occurred was a continuation of the earlier attack.

As considered correctly by the learned High Court Judge, the actions of the appellants cannot be attributed to a sudden fight under any circumstances. The

learned High Court Judge has correctly considered the words that have been uttered by the appellants and their actions to come to a firm finding that there was no basis to conclude the offence committed by the appellants amounts to culpable homicide not amounting to murder.

I do not find any basis to conclude that the learned High Court Judge has failed to consider the dock statements made by the appellants either. In the judgement, the learned High Court Judge has clearly considered the dock statements and determined that the statements do not create a doubt in the prosecution case. The learned High Court Judge has considered the injuries inflicted on the deceased and has considered the evidence placed before the Court in order to come to a finding that the appellants have acted with the common objective of causing the death of the deceased, for which I have no basis to disagree.

For the reasons as considered above, I find no merit in the appeals by the appellants challenging the 1<sup>st</sup> and the 3<sup>rd</sup> count preferred against them for which they were convicted.

However, the same cannot be said about the conviction of the accused appellants on the 2<sup>nd</sup> count preferred against them. The 2<sup>nd</sup> count is related to causing injuries to PW-01 Gunathilake Banda using a sharp cutting instrument and thereby committing the offence of attempted murder, punishable in terms of Section 300 read with Section 146 of the Penal Code.

The evidence in that regard shows that when PW-01 was assaulted initially, the assault had been physical, where no weapons had been used. According to the evidence of PW-01, the 1<sup>st</sup> accused has threatened him, pointing a razor knife towards his face and later had caused cut injuries by using the same. The cut injuries had been to the face of PW-01 and the doctor who examined the PW-01 has categorized his injuries in terms of Section 311 (f) of the Penal Code, which is causing a permanent disfiguration on the face.

There was no evidence placed before the Court that the appellants acted with the intention of causing the death of PW-01 in terms of Section 300 of the Penal

Code. What has been proved before the Court was that the appellants being members of an unlawful assembly, caused grievous injuries by using sharp cutting instruments, which is an offence punishable in terms of Section 317 of the Penal Code.

Therefore, acting in terms of Section 178 (1) of the Code of Criminal Procedure Act No.15 of 1979, I set aside the conviction for attempted murder of the appellants and convict them for committing an offence in terms of Section 317 of the Penal Code.

Accordingly, I set aside the sentence imposed on them in that regard, and sentence them for 5 years rigorous imprisonment and to a fine of Rs. 20,000/- each. I direct that in default of paying the fine, they should serve a rigorous imprisonment period of one year each.

The appeals are dismissed with the above variance to the conviction and the sentence on count two preferred against them as mentioned above.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal