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

In the matter of an Appeal under and in terms of the Article 138 (1) of the Constitution read together with the Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No: **CA / HCC / 373 – 374 / 2019**

High Court of Panadura Case No: **HC 3745 / 19**

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Pulunkuttige Mohan Priyantha.
2. W. Mudiyanselage Pradeep Pushpakumara.
3. Vinige Asitha Prabath Jayasinghe.
4. Maiyalage Chaminda Ratnayake.

Accused

AND NOW IN BETWEEN

Wimalasuriya Mudiyanselage Prdeep Pushpakumara.

Maiyalage Chaminda Ratnayake.

<u>02nd And 04th Accused – Appellants</u>

The Hon. Attorney General

Attorney General's Department

Colombo 12.

<u>Complainant – Respondent</u>

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Neranjan Jayasingha with Harshana Ananda for the 1st Accused – Appellant.

Shavindra Fernando, PC with T. Attyagalle, Mirthula Skandaraja, N. Wijesekara for the 2nd Accused – Appellant. (4th Accused in the High Court)

Sudharshana De Silva, DSG for the Respondent.

Argued on: 15.05.2023

Decided on: 20.06.2023

MENAKA WIJESUNDERA J.

The instant appeals have been lodged to set aside the judgment dated 18.12.2019 of the High Court of Panadura.

In the High Court four accused along with the deceased accused have been indicted under sections 140,146/296 and in the alternative 32/296 under the Penal Code. All four accused have pleaded not guilty and trial had proceeded and upon the conclusion of the trial, the judge had acquitted all four accused on count no 3 and had convicted the second and the fourth accused under counts 1 and 2 and had sentenced both to death.

Hence second and the fourth accused being aggrieved by the said judgment had filed the instant appeals. The main ground of appeal is that if the learned trial judge had acquitted the four accused under section 32 of the penal code there is no evidence of a formation of an unlawful assembly since the first and the third had been acquitted and the charges reads, as the four accused along with the deceased accused and not accused unknown to the prosecution were members of an unlawful assembly. Hence the Counsel for the two appellants strenuously argued that there is no formation of an unlawful assembly at any given point of the prosecution case because there was no participation of five or more accused in the offence committed.

The version of the prosecution is mainly narrated by witness no 1 who had been known to the deceased and the 1st accused and on the day of the incident the deceased pw1 and the 1st accused had gone to have a drink at the restaurant in town in the morning and when they went there, there had been a three wheeler parked and another and about six or seven people had been inside the restaurant eating and drinking. The deceased the 1st accused and witness no 3 and 2 had been talking in the kitchen in the restaurant when the second accused had come from inside the

restaurant in to the kitchen and on seeing the deceased had spoken very well to the deceased and had said that the old enmities are well forgotten and had held the hand of the deceased and both of them had gone in to the restaurant and the deceased had locked the door between the kitchen and the restaurant, according to the evidence of pw1 at page 78.

Thereafter the deceased pw 2, 3, and the 1st accused had remained in the kitchen area when the fourth accused had come from outside in to the kitchen shouting in unwarranted language pointing the gun at pw1 and questioning him as to who brought the "Kerio".

Thereafter there had been noise form inside the restaurant and somebody had shouted demanding the door to be opened but no one had identified the said voice. At that point the fourth accused had shot and kicked the door opened and had gone in to the restaurant. Thereafter pw2,3, 1A had runoff and pw1 had remained and he had seen the fourth accused also going away from the house and then he had gone inside to find the deceased fallen injured in the front verandah of the restaurant.(the police observations also support this version)

The police had recovered a firearm on the statement of the fourth accused and a bullet from the scene, the deceased had died of firearm injuries but had sustained 12 injuries in the nature of firearm and contusions.

Upon perusing the judgment of the trial judge, we find that he had started off the judgment at page 483 on the premise that on a preplanned arrangement at a restaurant the deceased had been killed by a drunkard party.

But according to the prosecution evidence this Court sees no preplanning of the four accused along with the deceased accused, in fact we see no evidence of the two accused convicted along with the deceased accused meeting and being at the same

place at the same time. Therefore, we find that the trial judge had started off the adjudication on a wrong premise.

We also found that the trial judge had narrated the evidence of the prosecution and had narrated the principles of circumstantial evidence but had failed to apply the same to the evidence of the prosecution and itemize the relevant portions to say as to what circumstances completed the strands in the rope of circumstantial evidence as said in many of our decided cases which had used the principle of circumstantial evidence to find the accused guilty.

The liability attached to the second accused by the trial judge is the fact that the second accused held the hand of the deceased and took him in to the restaurant before the shooting, *but there is no evidence from the prosecution to say that the second and the fourth were acting in furtherance of a common object or common intention. There is in fact no evidence to say at least that the second and the fourth and the deceased accused had met before or had spoken before or had come to the scene of crime together or at least were known to each other. The evidence of the prosecution is that the deceased had locked the door after entering into the restaurant with the deceased and then the shooting took place.*

The evidence of the prosecution is that the fourth accused shot at the door and after the said shooting there had been no other shooting and also the fourth accused had not been in the kitchen when the second accused had gone in to the restaurant with the deceased.

But we find that the trial judge had concluded that the second and the fourth accused had actively participated in the incident which we find to be wrong (506) and in fact the activity of a dangerous nature had been only from the fourth accused but he too could not have known that the deceased was on the other side of the door when he

shot at it. According to the prosecution version the fourth accused had shot at the door when somebody had shouted requesting the door to be open and there had been several other people on that side of the restaurant. Therefore, we are unable to agree with the findings of the trial judge on the second accused.

The learned trial judge had referred to the evidence of the doctor at page 507 in the judgment and had concluded that he had sustained 12 injuries consisting of contusions and firearm and had concluded that the deceased had been subjected to a scuffle inside the restaurant, but at another point he had said that the deceased had sustained cut injuries but there is no evidence to say that either of the accused convicted had a knife or any other person to that effect.

Anyway, upon taking in to account the analysis of the medical evidence we find that the trial judge had erroneously drawn conclusions sans evidence from the prosecution.

The trial judge had referred to the bullet recovered from the scene of crime to be expelled from the firearm of the fourth accused when in fact there had been no such evidence from the prosecution. (513)

The evidence of the prosecution is that pw1 had identified the second and the fourth at the ID parade but the witness had very clearly said that the accused were shown to him at the police station prior to the parade which is against the basic principles of an ID parade. But this piece of evidence also the trial judge had considered against the accused.

We also observe that the trial judge had erroneously attached an unnecessary liability in considering the dock statements by the accused in saying that the dock statements of the accused ***must create a reasonable doubt in the case for the prosecution****.* ***It has been held in the case of B.A.Premaratne vs the Republic of Sri Lanka CA168/2009 by***

Sisira Abrew J that when considering a dock statement, the following should be applied,

1)it should be considered subject to the infirmities that it is not a sworn statement,

2)if it is believed it should be accepted upon,

3)if it creates a reasonable doubt the defense of the accused must succeed,

4)dock statement of one must not be used against the other.

On perusal of the above case, it is very clear that the creating a reasonable doubt is not mandatory for the accused, what the case has held is IF it creates a reasonable doubt the defense MUST succeed.

Hence in the assessment of the defense case we find that he has cast an unnecessary burden on the defense at page 517.

Therefore, in the light of the above we find that the trial judge concluded contrary to the evidence led at the trial.

As with regard to the basis on which the accused had been convicted at page 521 in the judgment appears to be on the basis of an unlawful assembly which invariable has to have the participation of minimum of five accused and not less.

In sections 138 and 139 of the Penal Code an unlawful assembly has been defined and it reads as follows,

"138. An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is…."

"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 member of an unlawful assembly…." .

The aforesaid sections have been well defined in the case of Jayasena & Others v. G.D.D. Perera, Inspector, Criminal Investigation Department and Mrs. Sirimavo Bandaranayake (Aggrieved Party), [1992] SRI L.R. 371. CA.

The mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he said or did something or omitted to do something which would make him a member of such unlawful assembly. The prosecution must place evidence pointing to each accused having done or said something from which the inference could be drawn that each entertained the object which is said to be the common object of such assembly. Omnibus evidence must be carefully scrutinized to eliminate all chances of false or mistaken implication as the possibility of persons in an assembly resenting or condemning the activities of misguided persons cannot be ruled out and caution has to be exercised in deciding which of the persons present can be safely described as members of the unlawful assembly. Although as a matter of law and overt act is not a necessary factor bearing upon membership of an unlawful assembly, yet, it is safer to look for some evidence of participation by each person alleged to be a member before holding that such person is a member of the unlawful assembly, lest innocent persons be punished for no of theirs. The common object of an assembly is an inference from facts to be deducted from the facts and circumstances of each case. The common object can be collected from the nature of the assembly, the arms used by them, the behavior of the assembly, at or before the scene of occurrence, and subsequent conduct. The common object must be readily deducible from the direct as well as circumstantial evidence, including the conduct of the parties. It is not sufficient for

such evidence to be consistent with such an inference. But must be the only conclusion possible. Merely because the specific offence with which the unlawful assembly is charged is not proved. It does not mean that the common object of the unlawful assembly should be held to be non-existent. In order, to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offence committed by it in the course of the riot and to infer that all these were originally party of its common object. The conclusion must normally be based on more evidence than the mere acts themselves".

In the instant matter according to page 522 of the brief the finding and the sentencing of the trial judge is not at all justifiable because nowhere in the evidence is it shown that there were five accused who had shared a common object and out of the accused found guilty even along with the deceased accused the numerical number of the assembly is only three and all accused have been acquitted on the charge based on common intention.

Therefore, we find the conviction and sentencing of the trial judge to be highly unreasonable and erroneous.

At this stage learned Counsel appearing for the respondents strenuously urged that Court may consider the case under section 436 of Code of Criminal Procedure but we are unable to do so because if so, the learned Attorney General should have taken action to file papers at the time of conviction and not wait until the accused appellants have done so.

As such the instant appeals by the numbers 373 and 374 of 2019 are hereby allowed and we set aside the convictions and the sentences of both the appellants entered by the trial judge.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.