

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

In the matter of an Appeal against an
order of the High Court under Sec. 331 of
the Code of Criminal Procedure Act No.
15 of 1979.

1. Thuihannadige Lalith Silva
2. Behima Hannadige Suranjith Peiris
3. Nishshanka Arachchilage Nihal
Asanga Malsiri
4. Mahawaduge Manjula Kumara alias
Kurunduhewage Manjula Kumara
5. Nishshanka Arachchilage Kapila
Chandrasiri Silva
6. Bemina Hannadige Sumanasiri Peiris

ACCUSED-APPELLANTS

CA Case No. 75-79/2016

HC.(Panadura) Case No. 2286/06

Vs

The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Indika Malawarachchi for the

1st Accused – Appellant

Palitha Fernando P.C for the

2nd Accused – Appellant

Jayantha Rodrigo for the

3rd Accused – Appellant

Amila Palliyage for the

4th Accused – Appellant

Dr. Ranjith Fernando for the

5th Accused – Appellant

Darshana Kumara with Aruna

Gamage for the 6th Accused –

Appellant

Dilan Ratnayake D.S.G. for the

Attorney - General

ARGUED ON

: 29th November, 2017

DECIDED ON

: 12th January, 2018

L. Jayasuriya J.

The accused appellants along with the second accused were indicted in the High Court Panadura under the following counts.

1. Under section 146 for being members of an unlawful assembly with the common object of causing hurt to Roy Pradeep Kumara, Chula De Silva and S.Rajendra Silva.

2. Under section 146 read with section 355 of the Penal Code for abducting Roy Pradeep Kumara with the common object to cause his death.
3. Under section 146 read with section 355 of the Penal Code for abducting S. Rajendra Silva with the common object to course his death.
4. Under section 146 read with section 355 of the Penal Code for abducting Chula De Silva with the common object to course his death.
5. Under section 146 read with section 296 of the Penal Code for the murder of the said Chula De Silva.
6. Under section 146 read with section 300 of the Penal Code for attempted murder of the said S. Rajendra Silva.
7. Under section 146 read with section 300 of the Penal Code for the attempted murder of the said Roy Pradeep Kumara.
8. Under section 32 read with section 355 of the Penal Code for abducting the said Roy Pradeep Kumara.
9. Under section 32 read with section 355 of the Penal Code for abducting the said S. Rajendran Silva.
10. Under section 32 read with section 300 for abducting the said Chula De Silva.
11. Under section 32 read with section 296 of the Penal Code for the murder of the said Chula De Silva.
12. Under section 32 read with section 300 for the attempted murder of the said S. Rajendra Silva.
13. Under section 32 read with section 300 of the Penal Code for the attempted murder of the said Roy Pradeep Kumara.

After trial the learned High Court Judge acquitted appellants on the 1st to 7th counts, convicted the appellants on 8th to 13th counts and imposed a term of 15 years RI each. Imposed death sentence on the 11th count. Imposed of a term of 17 years RI for the 12th and 13th counts and ordered to run the sentence consecutively. The second accused was acquitted on all the counts.

This appeal is from the said sentence and the conviction. The grounds of appeal can be summarized as follows.

1. Whether the learned High Court Judge correctly analysed the evidence of the sole eye witness.
2. Whether the evidence of identification given by sole eye witness was satisfactory with regard to each of the appellants.
3. Whether the learned High Court Judge considered each appellant's evidence separately before rejecting their evidence.
4. Whether the learned trial Judge in acquitting the appellant on unlawful assembly based on charges correctly considered the concept of liability under common intention with regard to each appellants.

According to the evidence of the sole eye witness, on the fateful day, he along with a group of his friends had played a game of cricket at the Lunawa Primary School playground in the evening.

After conclusion of the said game around 6 p.m. they had been talking to each other outside the said playground until 7.30 p.m.. Then Prosecution Witness No. 3 Mahinda had come with a musical instrument

(മിറ്റിംഗ്) accompanied by one Suren and had engaged in a sing – song which lasted till about 9.30 p.m. There had been a power cut in force at that point of time. The eye witness says that Prosecution Witness Roy Pradeep Kumara too was with them.

The witness says that Mahinda went to get some cannabis (കൊട) and he walked about 185 feet towards the middle of the playground as he does not smoke in the presence of the deceased and from there he had observed a white coloured van approaching the crowd and the crowd ran away leaving behind the deceased.

When Prosecution Witness No. 1 went towards the said van he had seen a group of about 10 people inside the van and they had alighted from the van and assaulted and put the witness and the deceased inside the van. Under cross examination the eye witness testified that after the van came to a halt another group of about 4-5 people armed with weapons had come from different directions and he could not identify them as it has pitch dark.

Out of the people who arrived in the said van the witness had identified the first and sixth accused. It appears from his evidence that the first and sixth appellants were known people. He says that the head lamps of the van were glowing and those two were identified with the aid of the light shedding from the said head lamps (vide page 170 of the brief).

The first appellant was identified by the witness in the dock whilst giving evidence but the sixth appellant was not identified in court. The

witness refers to the sixth appellant as "Susil" whereas his name reflected in the indictment is Bamunu Handige Sumanasiri Peiris.

It appears from the evidence of the eye witness that the person called "Susil" uttered the words (ආ මුත් ඉන්නවා මුත් එක්ක උගමු) which voice identification cannot be attributed to the sixth appellant. As the sixth appellant was not identified in the dock, the rest of the findings against him will have no bearing on him and therefore he is entitled to an acquittal on that score alone.

I again turn to the evidence of the eye witness. The witness further testified that Roy Pradeep Kumara too was put inside the van and he noticed that he was bleeding in his legs. But does not say under what light he has identified.

The witness says that when he was put inside the vehicle there were about five people in the same, whereas he initially said that about 10 (vide page 170 of the brief) people alighted from the said van. The witness further says that first and fifth appellants tried to stab him but he does not say under what light he recognised those appellants. He further says that the deceased was grappling with the people inside the van and the deceased assaulted the first appellant but does not say that a light was burning inside the van.

The witness says that the sixth appellant had driven the van a distance about 500 meters towards Lunawa and after stopping the said van they had dragged three of them to a bare land owned by the sixth appellant and the sixth appellant inquired as to who had set fire to a van

(vide page 179 of the brief). The witness does not say as to whether there was any light available in the said bare land.

The witness further says that at the said bare land he was held by the sixth appellant and the fifth appellant cut him but does not say with what instrument. He testified that he was forced to lie on the ground and the fifth appellant dealt a blow with a sword which severed his right arm. Unfortunately he does not say under what light he observed this incident.

The witness further testified that he saw the deceased about 1 ½ feet away from him and the deceased was attacked by the third and fourth appellants. Again the question arises under what light this incident was observed by the eye witness. The evidence shows that the acts alleged to have done by the third appellant is restricted to the assault to the deceased.

It was the evidence of the witness that after assaulting him and the deceased they were dumped in a three wheeler and taken towards Lunawa Hospital at which point the witness has jumped out of the three wheeler and thereafter he was admitted to hospital by some people. The counsel for all the appellants argued that the identification of the appellants have not been established by the prosecution.

On a perusal of the evidence it is evident that the identification has not been established. The sole eye witness has not mentioned under what light he identified the appellants. When there is only one eye witness his evidence has to be cogent and reliable. The prosecution has failed to establish how the appellants were identified by the eye witness.

The learned Deputy Solicitor General argued that the identification are of two fold, the physical identification and voice identification. On a careful reading of the evidence of the sole eye witness the voice identification refers to two lines to the effect “(ආ මුත් ඉන්නවා මුව ආගනිං මුව කපපං)” which is not sufficient to establish voice identification.

We find that since the main ingredient has not been proved the prosecution case has collapsed. The learned High Court Judge had misdirected himself when he observed that the identification has been proved.

In view of the above findings the conviction can not be allowed to stand and accordingly we decide to set aside the conviction and the sentence.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I Agree.

JUDGE OF THE COURT OF APPEAL