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

In the matter of an Appeal made under 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.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Court of Appeal No:
CA/HCC/0162 ABC/2015
High Court of Badulla
Case No: HC/111/1995

1. Chakkrawarthi Arachchge Don Padmasiri Gunawardena alias Chutiya
2. Herath Mudiyanselage Gunasekara alias Gune
3. Rathnayake Mudiyanselage Ranjith Rathnayake alias Ukkuwa
4. Badana Mudiyanselage Hemantha

ACCUSED

AND BETWEEN

1. Chakkrawarthi Arachchge Don Padmasiri Gunawardena alias Chutiya
3. Rathnayake Mudiyanselage Ranjith Rathnayake alias Ukkuwa
4. Badana Mudiyanselage Hemantha

ACCUSED-APPELLANTS

Vs

The Hon. Attorney General
Attorney General's Department
Colombo-12

RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Saliya Peiris, PC with Thanuka Nandasiri and Dhimarsha Marso for the 1st Appellant.**
Shantha Jayawardena with Hiranya Damunupola, Wihangi Tissera Tharuka Ranatunga for the 2nd Appellant.
Neranjan Jayasinghe with Randunu Heelage and Imangsi Senarath for the 3rd Appellant.
Shanil Kularatne, PC, ASG for the Respondent.

ARGUED ON : **23/06/2025, 26/06/2025 and 15/07/2025**

DECIDED ON : **29/08/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named 1st, 3rd, and 4th Accused-Appellants (hereinafter referred to as the 1st, 2nd, and 3rd Appellants) along with the 2nd Accused were indicted in the High Court of Badulla as follows:

1. That on or about the 22.06.1990 at Bogahakumbura, the accused named in the indictment with persons unknown to the prosecution were members of an unlawful assembly with the common object of causing hurt to Nadarajah Chandramohan thereby committing an offence punishable under Section 140 of the Penal Code.

2. At the same time and same place, and in the course of the same transaction the accused being a member of an unlawful assembly committed the murder of Nadarajah Chandra Mohan and thereby

committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

3. At the same time and same place, and in the course of the same transaction the accused being a member of an unlawful assembly committed the murder of Nadarajah Chithradevi and thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

4. At the same time and same place, and in the course of the same transaction the accused being a member of an unlawful assembly committed the murder of Nadarajah Parathadasan and thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

5. At the same time and same place, and in the course of the same transaction the accused being a member of an unlawful assembly committed the murder of Milagan Ramachandran and thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

6. At the same time and same place, and in the course of the same transaction the accused being members of an unlawful assembly voluntarily caused hurt to Nadarajah Chandra Mohan and thereby committed an offence punishable under Section 317 read with Section 146 of the Penal Code.

7. At the same time and same place, and in the course of the same transaction the accused caused the death of the afore named Nadarajah Chandramohan and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.

8. At the same time and same place, and in the course of the same transaction the accused caused the death of the afore named Abeysinghe Nadarajah Chitradevi and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.

9. At the same time and same place, and in the course of the same transaction the accused caused the death of the afore named Abeysinghe Nadarajah Paradathasan and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.

10. At the same time and same place, and in the course of the same transaction the accused caused the death of the afore named Mailagan Ramachandra and thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.

11. At the same time and same place, and in the course of the same transaction the accused voluntarily caused hurt to Nadarajah Chandar Mohan and thereby committed an offence punishable under Section 317 read with Section 32 of the Penal Code.

The trial commenced before the Judge of the High Court of Badulla as the Appellants and the other Accused had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had acquitted the Appellants and the 2nd Accused in respect of counts Nos. 01, 02, 03, 04, 05 and 06 on the basis that the prosecution had not established, that they were members of an unlawful assembly. The 2nd accused was acquitted in respect of counts number 07, 08, 09,10 and 11. The above-named Appellants were convicted for the aforesaid counts number 07, 08, 09, 10 and 11 and sentenced them to death. In respect of count number 11,

the Appellants were convicted of causing hurt under Section 315 of the Penal Code and they were sentenced to a term of 2 years rigorous imprisonment.

Being dissatisfied with the judgment of the Hight Court dated 16.10.1997 the Appellants had preferred an appeal before the Court of Appeal and the Court of Appeal in its judgment dated 08.11.1999, sent this case back to the High Court of Badulla to conduct a fresh trial on the same indictment.

Upon the said order of the Court Appeal, a retrial was commenced on 23.03.2000 and the Appellants had preferred a jury trial at that time. When this case was called on 10.01.2001, they had withdrawn their previous request for a jury trial, and elected a non-jury instead.

When this matter was called on 01.08.2005, the 1st Appellant had absconded the court. Hence, evidence was led under Section 241(1) of the Code of Criminal Procedure Act and the case was fixed in absentia of the 1st Appellant.

At the tail end of the prosecution case, the 1st Appellant was arrested and produced before the court by the police on 05.11.2013. After an inquiry under Section 241(3) of the Code of Criminal Procedure Act No.15 of 1979, the learned High Court Judge of Badulla refusing a trial in de novo, continued the case. After marking the deposition of PW1 under Section 33 of the Evidence Ordinance, the prosecution had closed their case. The learned High Court Judge having satisfied there is a case to be answered by the Appellants, called for the defence and explained their rights. The 1st Appellant and the 2nd Appellant had opted to give evidence from the witness box and the 3rd Appellant gave a statement from the dock.

After considering the evidence presented by both parties, the learned High Court Judge had acquitted the Appellants from counts number 01, 02, 03, 04, 05 and 06. They were convicted for counts number 07, 08, 09, and 10 and were sentenced to death on 28.08.2015. For the 11th Count the Appellants were found guilty under Section 315 of the Penal Code and were

sentenced to two years rigorous imprisonment with a fine of Rs.5000/- and a default sentence of 06 months simple imprisonment.

Being aggrieved by the aforesaid convictions and sentences the Appellants preferred this appeal to this court. For clarity the arraignment of the Appellants in the High Court Trial is as follows:

1st Appellant (1st Accused in the indictment)

2nd Appellant (3rd Accused in the indictment)

3rd Appellant (4th Accused in the indictment)

The learned Counsels for the Appellants informed this court that the Appellants had given consent for this matter to be argued in their absence. During the argument, the Appellants were produced via zoom platform from prison.

Background of the Case albeit briefly is as follows:

As PW1 had passed away before the re-trial commenced, the prosecution had commenced the case by leading the evidence of PW2, Nadarajah Chandramohan. According to him, he was 15 years old when the incident occurred. The deceased were his mother, sister and two brothers. The younger brother who died in the incident was only 4 years old.

On the day of the incident, as usual when he was at home with the others, the 2nd Accused who was a known person had come to his house under influence of liquor, had a chat with them and left the house only after some time. The 2nd Accused had given a toffee to PW2 before he left the house. After a while at about 8.15 p.m. the 2nd Accused had come to his house with all the other Appellants and had first closed the main door. At that time, PW2 had received a blow on his body and received a cut by the 1st Appellant who was yielding a long knife. It had struck the left side of his neck. At that time, the 2nd Accused had opened the door and had paved a way for him to escape.

When he came out of house, he had heard sounds similar to flesh being cut. In the meantime, he had seen his brother, PW3 also outside the house without any injury. At that time, due to anger he had rushed inside the house armed with a mamoty, but had been restrained by the 2nd and 3rd Appellants. As he had fallen down on the floor, he had been dealt with another blow from the knife. He was unable to say what happened thereafter. This witness had clearly identified all the Appellants at that time.
During the cross examination, PW2 had said that when all the Appellants entered the house, the 1st Appellant had shouted that he came to kill all of them.

PW3, Nadarajah Ravichandran who gave evidence next too corroborated the evidence given by his brother PW2. He too identified the Appellants and the knife at the trial.

As PW1, Kadiravel Nadarajah the father of PW2 and PW3, had passed away before the trial, his evidence given in the non-summary inquiry was admitted under Section 33 of the Evidence Ordinance. He too had corroborated the evidence given by PW2 and PW3.

According to the JMO who produced the post-mortem reports of all the deceased, all deceased had sustained cut injuries to the vital parts of the body.

The knife had been recovered upon the statement of the 2nd Appellant.

The First Appellant had filed the following grounds of appeal.

1. The 1st Appellant was deprived of a fair trial due to failure of the learned High Court Judge to afford him an opportunity to cross-

examine the witnesses in terms of Section 241(3) of the Code of Criminal Procedure Act No.15 of 1979.

2. It appears from the Judgment that the learned High Court Judge had examined the statement of the witnesses.
3. The entire judgment is a narration of the witness testimonies and does not contain any analysis.
4. The learned High Court Judge has misdirected himself regarding the burden of proof.

The 2nd Appellant had filed following grounds of appeal.

1. The evidence of the prosecution does not pass the test of credibility.
2. The learned High Court Judge erred in law in arriving at the conclusion that the 2nd Appellant had entertained the common murderous intention.

The 3rd Appellant had filed following grounds of appeal.

1. The learned High Court Judge had failed to appreciate whether the presence of the 3rd Appellant was a participatory presence.
2. It appears from the Judgment that the learned High Court Judge had examined the statement of the witnesses.

As the appeal grounds raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

The learned President's Counsel who appeared for the 1st Appellant contended that his client was deprived of a fair trial due to either the failure of the learned High Court Judge to afford him an opportunity to cross-examine the witnesses in terms of Section 241(3) of the Code of Criminal Procedure Act No.15 of 1979.

The Sri Lankan Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-

at-law at a fair trial by a competent Court. The right to a fair trial led to the proper determination of whether an accused is innocent or guilty. This is an internationally recognised human right. Fair trials help to establish the truth and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure fair and just societies, and limiting abuse by governments and state authorities.

In **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

> *"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".*

In this case after arraignment, the 1st Appellant had absconded the court and the trial continued in his absence up to leading all prosecution witnesses. Just before the closure of the prosecution case he was arrested and produced before the court by the police. The learned High Court Judge had conducted an inquiry under Section 241(3) of the Code of Criminal Procedure Act and decided that his absence in court is not bona fide but was mala fide. Hence, the application for the recall of all prosecution witnesses was turned down by the learned High Court Judge.

In **Rajapaksha v The State** [2001] 2 SLR 161 the court held that:

> *"In terms of S. 241 (3) the accused person if he appears before Court and satisfies court that his absence at the trial was bona fide, the court shall set aside the conviction/sentence/order and the trial then would be fixed de - novo."*

In this case, all Appellants named in the indictment had been given a fair trial by the trial judge. The court has followed all procedures correctly and had treated all parties equally.

Next, the learned President's Counsel for the 1st Appellant and the Counsel for the 3rd Appellant contended that the learned High Court Judge had examined and referred the statement of the witnesses in the judgment.

In general, a judge cannot peruse all police statements when making a judgment. A court can only consider police statements that have been properly admitted as evidence, usually through contradiction or other means.

K. A. Shantha Udayalal v The Hon. Attorney General SC. Spl. LA. No. 57/2017 dated 30.01.2018 the Supreme Court held that:

> *"I would like to refer to a judicial decision in Punchimahaththaya Vs. The State 76 NLR page 564 wherein the Court held as follows: "Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statements of witnesses recorded by the Police in the course of their investigation (i.e. statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122(3) of the Criminal Procedure Code which enables such statements to be sent for to aid the Court is applicable only to Courts of inquiry or trial".*

The learned Counsels referred the following portion of the judgment to substantiate their argument that the learned High Court Judge had referred to the statements of witnesses.

The relevant portion is re-produced below:

Page 924 of the brief.

සාක්ෂිකරුවන් ප්‍රකාශ කර ඇති ප්‍රකාශයන් අනුව පැහැදිලි වන්නේ නිවසට පැමිණියේ නාඳුනන අයවලුන් නොව, නියම නම්වලින් කීමට නොදන්නා අය බව පමණක් ප්‍රකාශ කර ඇති බව වේ. එම තත්ත්වයට සාක්ෂිකරුවන් අධිකරණයේ දී සාක්ෂි දෙන ආකාරය අනුවද මනාව තහවුරු වන

අතර, සිද්ධිය දුටු සාක්ෂිකරුවන් කිසිවෙකුත් විත්තිකරුවන් නියම නම්වලින් හඳුනා නොගත්තා යැයි සැලකීමේ දී හඳුනා ගෙන ඇත්තේ ඔවුන්ගේ අනවර්ථ නම්වලින් වන අතර, එය පැහැදිලි ලෙසම මෙම සිද්ධියට සම්බන්ධ විත්තිකරුවන්ට අදාල නම් බව සාධාරණ සැකයකින් තොරව නිශ්චිතවම පිළිගත හැකි හඳුනා ගැනීමක් බව මාගේ තීරණය වේ.

Considering the portion of the judgment referred above, it is not clear whether the learned High Court Judge had referred or compared the evidence given by the witnesses with their statements. The learned High Court Judge had only considered the evidence led in the trial to form his decision.

Next the learned President's Counsel for the 1st Appellant contended that the entire judgment is a narration of witness testimonies and does not contain any analysis.

One can see judgment writing as more of an art rather than a science. Therefore, like art, the standard and quality of a judgment depends on the subjectivity and individual style of the creator – the judge.

In **Alexander Machinery (Dudley) Ltd. v. Crabtree** (1974) LCR 120 it was observed:

> *"Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court."*

Although, the learned President's Counsel strenuously contended that the judgment sans an analysis, on a careful perusal of the judgment, I conclude that the learned High Court Judge has adequately dealt with and analyzed the evidence presented in the trial to arrive at his conclusion.
In his final ground of appeal, the 1st Appellant argues that the learned High Court Judge misdirected himself regarding the burden of proof which he wrongly cast upon the Appellants.

The presumption of innocence is a cornerstone of justice, operating under the premise that an accused individual is deemed innocent until proven guilty. Shifting the burden of proof undermines this principle by obliging the accused to demonstrate their innocence, thereby inverting the traditional burden of proof. This practice can lead to unjust outcomes, as it unfairly compels the accused to substantiate a negative assertion. Such a shift is often regarded as inequitable, placing the onus on the accused rather than the prosecution. Conversely, the accused may bear the legal responsibility of refuting a statutory presumption or establishing a statutory defence or exception to liability.

Considering the judgement of the High Court Judge, I am of the opinion that nowhere in the judgement has the Learned High Court Judge reversed the burden onto the Appellants obliging them to prove their innocence.

Counsels for the 2nd and 3rd Appellants jointly contended that the prosecution has failed to prove that the Appellants had entertained common murderous intention in committing the murder of the deceased.

Common Intention is depicted under Section 32 of the Penal Code of Sri Lanka. It reads:

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

Common Intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common Intention comes into being prior to the commission of the act, but a long gap in time need not be present. To bring this section into effect a pre-concert is not necessary to be proved, but it may well develop on the spot as between several persons and could be inferred from the facts and circumstances of each case.

In **The Queen v. Mahatun 61 NLR 540** the court held that:

> *"Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such as if it were done by him alone.*
>
> *To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment".*

In **S. Fernando v. H. De Silva 68 NLR 166** the court held that:

> *"In order to sustain the charge based on common intention it is essential that both the accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence".*

Although the accused did not commit any physical act, yet liability could be imposed upon him on the basis that his presence was a participatory presence. All these are generally established through circumstantial evidence.

According to the evidence of PW1, adopted under Section 33 of the Evidence Ordinance, all Appellants had come together and entered the house. A knife

was noticed in the hand of the 1st Appellant. He had witnessed the 1st Appellant attacking his son PW2 first.

PW2 in his evidence corroborating the evidence given by his father PW1, stated that he ran away from the house with the help of the 2nd Accused who opened the door for him to escape. In the meantime, when PW2 had gone into the house armed with a mamoty to rescue the inmates of the house, the 2nd and 3rd Appellant had restrained him inside the house. The relevant portion of the evidence is re-produced below:

Page 366-367 of the brief.

ප්‍ර : ඊට පස්සේ තමන් මොකක්ද කලේ ?

උ : ඒ අය කපන්න යයි කියා මම ගියා.

ප්‍ර : කවුරු කපන්නද ගියේ ?

උ : මේ අය එක්කෙනෙක් හෝ මරල යනවා කියා මම ගියා.

ප්‍ර : ඒ වෙලාවේ තමන් විතර ද සිටියේ ?

උ : ඔව්.

ප්‍ර : ඊට පස්සේ මොකක්ද වුනේ ?

උ : මම එලියට ඇවිත් පරණ උදැල්ලක් තිබුණා. ඒක අරගෙන ඇතුළට ගියා. මල්ලි පිටිපස්ස පැත්තේ. ඒ පැත්තේ ඇරලා උදැල්ල අරගෙන කොටන්න යනකොට සිටියා ගුනේ කියන අය. එයා කොටන්න යනකොට උක්කුං කියන අයයි බාදන කියන අයයි එකපාරටම මාව අල්ලාගත්තා.

ප්‍ර : ඊට පස්සේ මොකද වුනේ ?

උ : එහෙමම වැටුනා ගේ ඇතුලේ.

Further, the 3rd Appellant in evidence had confirmed the presence of all the Appellants at the time of the incident. The evidence clearly established that the Appellants were together until they left the house after the horrific event.

It is not disputed that when the 1st Appellant cut the deceased to death, the 2nd and 3rd Appellants were inside the house. They have not disassociated until they left the house together. The knife which was used in the incident was recovered upon the statement received from the 3rd Appellant.

The evidence presented by the prosecution had clearly established that the Appellants were together when the incident had taken place inside the house. The learned High Court Judge had accurately considered the evidence presented by the prosecution that the Appellant had committed the offence upon actuating common murderous intention.

In this case the evidence given by PW2 and PW3 are cogent and lacks any ambiguity whatsoever. When this gruesome incident happened PW2 was only 15 years and PW3 was only 13 years old. Their family members had been murdered in front of them in a gruesome manner. Even though both were children at the time of the incident, both had given evidence without any major contradictions about the main incident. As such, the Trial Judge is correct to conclude that the prosecution had presented a prima facie case against the Appellants. Hence, referring to the Ellenborough dictum, the judgement had not caused any prejudice to the Appellants.

Finally, the learned Counsel for the 2nd Appellant contended that the contradictions highlighted are important and sufficient to affect the credibility of PW2 and PW3. The learned High Court Judge in his judgment had correctly considered the said contradictions and had correctly held that the contradictions highlighted are not sufficient enough to disturb the core of the case.

In **Bandara v. The State** [2001] 1 SLR 63 the Court held that:

> *"Discrepancies and inconsistencies which do not relate to the core of the prosecution case, ought to be disregarded especially when all probability factors echo in favour of the version narrated by a witness".*

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He had properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted.

As discussed under the grounds of appeal advanced by the Appellants, the prosecution had adduced strong and incriminating evidence against the Appellants. The learned High Court Judge had accurately analyzed all evidence presented by all the parties and come to a correct finding that the Appellants were guilty of the charges levelled against them. Therefore, I dismiss the Appeal and affirm the conviction and the sentence imposed on them on 28.08.2015 by the learned High Court Judge of Badulla.

The appeal is dismissed.

The Registrar of this Court is directed to send this judgement to the High Court of Badulla along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL