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 331 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.

Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal

Case No: CA/182/2019

High Court of Kandy

Case No: 1814/1998

Vs.

Galpoththe Gedara Gunaratne and 6 others

Accused

AND NOW IN BETWEEN

Galpoththe Gedara Gunaratne

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : K. Kugaraja for the Accused-Appellant.

Shanil Kularatne, S.D.S.G for the State.

Argued on : 10.01.2024

Decided on : 14.02.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 21.2.2019 of the High Court of Kandy.
The accused appellant along with the other accused and with others unknown to the prosecution has been indicted under section 140, 146-296,146-410 of the Penal Code.

Upon the conclusion of the trial, the trial judge had convicted the appellant along with the 1st and the 2nd accused for the charges in the indictment and had sentenced accordingly.

The grounds of appeal raised by the Counsel for the appellant were that the,

1) **The trial judge had not considered section 48 of the Judicature act no 2 of 1978 before adopting the evidence led before his predecessor,**
2) **Lack of identification of the appellant.**

The prosecution had led the evidence of three eye witnesses out of which two had been brothers and according to them their father is the deceased.

The three eye witnesses had been bailed out on that day for another murder case and the deceased had gone to bail them out and they had returned to the village in the vehicle of Farook at whose house the incident had taken place.

According to the eye witnesses, the appellant along with the 1st and the 2nd accused with others unknown to the prosecution had come armed with katties to the house of Farook shouting and had attacked the deceased and had damaged property.

The eye witnesses had hidden themselves in fear but had watched the scene although it had been dark there had been illumination streaming from the lights switched on in the house of Farook. (pages 149, 419, 489,165).

The witnesses had very clearly identified the appellant stabbing the deceased while the 1st and the 2nd also did the same. (pages 230,323,)

Once the deceased had been attacked by the appellant and the others, they had gone away from the scene together.

On their way to the house of Farook they had damaged the vehicle parked outside the house of Farook and had activated an explosion also inside the house of Farook.

The motive for the incident had been that the two eye witnessed brothers had been involved in a murder in which the 1st accused has had some personal interest.

Hence although the incident had taken place at about 10.30 in the night and a crowd of about 15 to 20 people had come in to the scene, the participation of the appellant had been clearly identified.

Hence, we are unable to agree with the learned Counsel for the appellant that the identification of the appellant had been unsatisfactory and not reliable.

The other ground of appeal urged by the appellant had been the noncompliance of section 48 of the judicature act.

The appellant referred to an order made on 23.4.2009 in which the learned high Court Judge had refused the application to allow the evidence of the prosecution to be led afresh.

In the said order, it had been observed by the then trial judge that the incident had occurred in 1986 and the trial had commenced in 1998 and if the trial was to commence afresh it would have caused great injustice to all parties which this Court think is very correct.

The Counsel for the appellant quoted section 48 of the Judicature act but we observe that the said section has given the trial judge a discretion to act according to the circumstances of the case.

At this juncture, we draw our attention to the case of **SC appeal SC-CHC-37-2013 by Prasanna Jayawardena J in which it had been said that section 48 of the judicature act "entitled him to prepare and deliver the judgment since his predecessor had been appointed a Judge of the Court of Appeal" and has gone on to further say that " No doubt section 48 of the Judicature act gave the learned judge the discretion to act on the evidence already recorded by his predecessor and proceed to prepare and deliver the judgment."**

Hence it is very clear that the trial judge had been given a specific discretion to act according to the circumstances of the case.

As such we see no merit in the said submission of the learned Counsel for the appellant, and we wish to state furthermore that if the appellant had been so interested, he should have moved in revision at the time the order had been made but to which he had not taken such step.

Hence upon considering the submissions of the learned Counsel for the appellant we see no merit in the same.

But upon considering the evidence led at the trial we see that the appellant had been a member of an unlawful assembly in which he and two others had been armed with Kattis and the appellant and two others had injured the deceased brutally and had killed him. The brutality of the injuries caused had been explicitly explained by the doctor who had conducted the postmortem.

The unlawful assembly which killed the deceased had beforehand caused damage to the vehicle of Farook which had been witnessed by the eye witnesses.

The conduct of the unlawful assembly had been seen by the eye witnesses with the aid of the illumination inside the house of Farook and the torch lights the people had been carrying. Hence, the identification of the appellant has been established by the prosecution beyond a reasonable doubt.

Hence, as urged by the Counsel for the appellant it had not been the testimony of single eye witness but of three.

The appellant in his evidence on oath at the trial had denied the entire incident.

The evidence of the prosecution witnesses has shown very clearly that the appellant had come in to the scene with the others armed and had injured the deceased and had left the scene together with the others in the mob causing damage to the property as such it is evident that he had shared the common object of the unlawful assembly which was to cause the death of the deceased and damage property with the other members.

It has been held in the case of Bandaranaike vs Jagathesan and others 1984 2 SRI L. R 397 that " to constitute an unlawful assembly there must be an assembly of five or more persons having a common object must be one of the six specified in section 138 of the Penal Code. A mere presence of a person in an assembly does not make him a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him such a member or unless being aware of facts which render any assembly an unlawful assembly if he intentionally joins that assembly or continues in it."

In the instant case, it is very clearly discussed and considered above that the appellant had been present in the mob which came to the house of Farook and how he had been armed and how he was seen attacking the deceased.

As such we are of the opinion that the prosecution has performed its duty in proving the case against the appellant beyond a reasonable doubt hence, we see no merit in the instant appeal as such **the appeal is dismissed.**

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal