

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

Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal No:
CA/HCC/232-236/2020

High Court of Homagama Case No:
HC/07/2017

-Vs-

1. Koralage Darshana Priyankara *alias* Aju
alias Raju
2. Koralage Karunaratne (deceased)
3. Koralage Susil
4. Koralage Nalin Ranjith
5. Koralage Kusum Nawaratne *alias* Rala
6. Jayasinghe Arachchige Ajith Sarath
Kumara *alias* Kaluwa

Accused

AND NOW BETWEEN

1. Koralage Darshana Priyankara *alias* Aju
alias Raju
2. Koralage Susil
3. Koralage Nalin Ranjith
4. Koralage Kusum Nawaratne *alias* Rala
5. Jayasinghe Arachchige Ajith Sarath
Kumara *alias* Kaluwa

Accused-Appellants

-Vs-

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

Complainant-Respondent

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Saliya Pieris, PC with Anjana Ratnasiri and Sudeshna
Rupasinghe for the 1st Accused-Appellant

: Anuja Premaratna, PC with Nayana Dissanayake for
the 2nd Accused-Appellant

: Shavindra Fernando, PC for the 3rd Accused-Appellant

: Neranjan Jayasinghe with Randunu Heellage and
Pravindika Kularatne for the 4th Accused-Appellant

: Nalin Ladduwahetty, PC with Kavithri Hirusha
Ubeysekera for the 6th Accused-Appellant

: Shanil Kularatne, ASG for the Respondent

Argued on : 23.01.2026

Decided on : 27.05.2026

Pradeep Hettiarachchi, J

Judgement

Background

1. The Accused-Appellants (hereinafter referred to as “the Appellants”) were indicted before the High Court of Homagama on 08-09-2016 for the following counts;

(a) That on or about 09-10-2009, at Habarakada, the Accused, being members of an unlawful assembly with the common object of causing hurt to Isanka Sameera Silva, committed an offence punishable under Section 140 of the Penal Code.

(b) At the same time, place, and during the course of the same transaction, one or more members of the said unlawful assembly caused the death of Isanka Sameera Silva, thereby committing an offence punishable under Section 296 read with Section 146 of the Penal Code.

(c) At the same time, place, and during the course of the same transaction, the Accused caused the death of Isanka Sameera Silva, thereby committing an offence punishable under Section 296 read with Section 32 of the Penal Code.

2. When the indictment was read out, all six Accused pleaded not guilty to the charges leveled against them and agreed to proceed with the trial without a jury.
3. Accordingly, the trial commenced on 05-01-2018, and 13 witnesses, including the Judicial Medical Officer of the Homagama Base Hospital, gave evidence on behalf of the prosecution.

4. After the close of the prosecution's case, the defense was called. The 1st and 2nd Accused had made dock statements, while the 3rd, 4th, 5th, and 6th Accused had given evidence under oath and further called witnesses to give evidence on their behalf.
5. The 2nd Accused passed away during the pendency of the trial, and thereafter, the indictment was amended on 04-09-2019 to reflect this change.
6. The Learned High Court Judge, at the conclusion of the trial, found the Accused guilty of the charges contained in the indictment and convicted them. He imposed six months rigorous imprisonment in respect of the 1st count, and all the Accused were sentenced to death in respect of the 2nd and 3rd counts.
7. Being aggrieved by the aforesaid conviction and sentence, the Appellants have preferred this Appeal.

Evidence of the Main Eyewitness

8. It transpires from the evidence of PW1 that the deceased was known to him as he lived in the same neighborhood, and it was his evidence that on the morning of 09-10-2009, the deceased had come to PW1's place and thereafter, both of them had gone to meet one Jayalath in the deceased's three-wheeler. According to PW1, Jayalath is engaged in farming. On some days, they used to help Jayalath with the work in the paddy field. On the day of the incident, they had met Jayalath, who was working in the paddy field with two or three other people. One Shantha was also working there in the paddy field.
9. After spending time at Jayalath's place for some time, PW1 returned home with the deceased. However, in the evening, he had gone to Jayalath's place with the deceased. As they reached Jayalath's place, Jayalath had already finished his work at the paddy field and asked them to buy a bottle of arrack. Accordingly, the deceased and PW1 had gone to the junction to buy a bottle of arrack. According to PW1, both he and the deceased had consumed alcohol. However, PW1 stated that both of them had only one drink each.

10. PW1 testified that there were about four other people, namely, Shantha, Wasantha, Tharanga, and PW1's brother named Sampath, at Jayalath's house that evening. PW1 testified that they were at Jayalath's place till 8.00-8.10 p.m. and then left Jayalath's place in the deceased's three-wheeler. PW1's brother, Wasantha, Tharanga, and Shantha had also come with them in the same three-wheeler. They had come near PW1's house and parked the three-wheeler at a small plot of land situated in front of PW1's house. While others left, Shantha had asked the deceased to drop him and his family.
11. After dropping Shantha and his family members at around 8.00-9.00 p.m., the deceased had proceeded with PW1 towards PW1's house in order to drop him. According to PW1, he was seated in the rear seat. As per PW1's testimony, in order to reach PW1's house from Shantha's place, they had to go through a road across the paddy fields. There are no street lamps or any kind of lighting on the said road.
12. The deceased had then suddenly stopped the three-wheeler in the middle of the said road and had started reversing it. PW1 had then asked the deceased the reason as to why he was reversing the three-wheeler, and the deceased had responded “මහඩ් වැඩක් තියෙනවා බලලා යන්.” The said road was named Welikadayawatte Road. PW1 also confirmed that there were no electricity lamps at the place where they stopped the three-wheeler. However, the lights of the three-wheeler were on.
13. When the deceased started reversing the three-wheeler, PW1 had put his head out from the left side of the three-wheeler to look back. At the cross-examination, it was suggested to PW1 that if they did not stop the three-wheeler, they would not have met anyone. Thereafter, PW1 stated that he got to know the next day that the deceased had stopped the three-wheeler as some coconut logs were across the road, obstructing them from proceeding beyond that point.
14. PW1 stated that he saw one Nalin (i.e., the 3rd Appellant) and Susil (i.e., the 2nd Appellant), who were known to him, approaching the three-wheeler in an aggressive manner. He has observed them at a distance of about 5 feet. According to PW1, the

3rd Appellant was carrying a manna knife in his hand, and the 2nd Appellant was carrying a wooden club.

15. PW1 further stated that when he was about to get down from the three-wheeler, three other people came from the right side of the three-wheeler. PW1 had recognized them as Aju (i.e., 1st Appellant), Rala (4th Appellant), and Kaluwa (5th Appellant). PW1 stated that all three of them were known to him prior to the incident, as they live close by. PW1 further stated that the 1st Appellant had a wooden club in his hand.

16. When he was about to get down, the 1st Accused had struck him with a wooden club. After a short while, PW1 had somehow managed to get out of the three-wheeler from the right side and had started running towards the opposite direction. The 1st and the 4th Appellants had then come chasing PW1 up to the place where there was a bunt. PW1 had managed to escape by jumping onto the paddy field from the bunt. Thereafter, PW1 had seen them running towards the deceased's three-wheeler.

17. PW1 had then observed from the paddy field, as to what was happening at the place where the deceased was. He stated that there was moonlight that day, and as a result, he could see what was happening. He further stated that the road where the incident took place was on an elevated level and there were no trees around. Therefore, even a person who is on the other side of the paddy field could see what was happening.

18. PW1 had seen that the place was surrounded by the Accused persons, and he had heard the deceased screaming, asking them what they were going to do to him. The people who assaulted the deceased had dragged him on the ground towards the shop belonging to the 5th Appellant. PW1 stated that the deceased was outside the three-wheeler, and the Accused persons were gathered around him. He stated that, even if he could not clearly identify how many and who were there at a distance, he had identified the five of them earlier.

19. Thereafter, PW1 had run towards the house of a person known as “Malli,” and with him he had gone to Jayalath’s house. PW1 had then informed Jayalath that the deceased was being assaulted. A little later, PW1, Jayalath, and Malli had gone to the crime scene in a three-wheeler driven by Jayalath’s friend. As per PW1’s testimony, by the time they reached the place where the incident took place, the deceased was already dead. PW1 stated that there was sufficient light to identify the body of the deceased, as there was a street lamp nearby. As described by PW1, the deceased had been wearing a short and a banian at the time. Furthermore, the deceased’s leg had been severed and thrown away. His hand and head were also cut. PW1 further testified that by the time they reached the crime scene, the Accused persons had already left the place.
20. Upon seeing the horrific incident, Jayalath had suggested them go to the police. Accordingly, PW1 had gone to Athurugiriya Police Station with Jayalath and Malli and informed the police of the said incident. After giving the first statement, PW1 gave another statement to the police regarding the incident. He stated that at the time of making the statement to the police, he mentioned the names of the Accused persons to the police. However, PW1 also admitted that he couldn’t give a detailed statement to the police in the first instance as he was disturbed by the incident.
21. At the trial, PW1 identified the 2nd Accused, who was the father of the 1st Accused. PW1 further admitted that he did not see the 2nd Accused at the place where the incident took place. When asked whether he could identify the manna knife and the wooden clubs used to assault the deceased PW1 initially stated that he could not identify them as there was no specific mark on them. However, at the trial, PW1 identified the manna knife (Production marked as “P1”), two black wooden clubs (Productions marked as “P2 (a) and P2 (b)”) shown to him, and the black colored three quarter size trouser (marked as “P3”) and the t-shirt (marked as “P4”) worn by the deceased person. The butter colored three- wheel bearing the no WPQA 6195 was marked as “P5,” and it was admitted by both parties that it was the three-wheel on which PW1 and the deceased travelled on the day in question.

22. PW1 also stated that a complaint had been made against the deceased for assaulting the 1st Appellant, which had resulted in a rift between the deceased and the Accused persons. He further admitted that, although he himself sustained injuries as a result of the assault by the 1st Accused, he did not admit to the hospital for treatment. As per his testimony, the deceased's body was not taken to the hospital, but remained at the scene until the Learned Magistrate arrived the following day to conduct the inquest.
23. At the trial, PW1 admitted that there is a pending case in the Magistrate's Court against the deceased for assaulting the 1st Appellant and that he is also named as an accused in the said case. According to PW1, the said incident had happened about 3-4 months prior to the deceased's death.

Grounds of Appeal

24. The common grounds of appeal advanced by the Appellants in their written submissions are as follows;
- (a) The Learned Trial Judge had convicted the Appellants based on the uncorroborated testimony of the eyewitness.
 - (b) The Learned Trial Judge has not considered the fact that the eyewitness did not mention the names of the Accused-Appellants apart from the 1st Appellant when he narrated the incident for the first time to PW4.
 - (c) The Learned Trial Judge has failed to consider whether there was sufficient light at the scene for the eyewitness to identify the Appellants.
 - (d) The Learned Trial Judge has failed to consider whether all six Accused who allegedly formed an unlawful assembly were present together at the scene at the commencement of the incident.

- (e) The judgment of the High Court is devoid of the principles relating to unlawful assembly, common object, and common murderous intention.
- (f) The Learned Trial Judge has failed to consider the infirmities in the evidence of the eyewitness.
- (g) The Learned Trial Judge has failed to consider evidence of the Appellants in a fair manner.
- (h) The Learned Trial Judge has failed to give the benefit of the doubt to the Appellants.
- (i) The Learned Trial Judge has failed to consider the lapse on the part of the police.

Consideration of Grounds of Appeal

25. Accordingly, one of the main grounds of appeal advanced by the Appellants is that the Learned Trial Judge failed to consider whether PW1 was in a position to make a proper identification, having regard to the lighting conditions that prevailed at the time of the incident.
26. At the trial, PW1 testified that all the Appellants were known to him prior to the incident, as they were from the same area. According to him, there were no street lamps along the road situated between the paddy fields. However, he stated that he was able to identify the 1st to 5th Appellants at the initial stage, as there was sufficient moonlight and the lights of the three-wheeler were also on. He further stated that, after being chased away by the 1st and 4th Appellants, he jumped into the paddy field and observed the incident from the other side. According to him, the road where the incident took place was at an elevated level, and there were no trees in the vicinity, such that even a person standing on the opposite side of the paddy field could see what was happening. He also stated that there was a half-moon on that night.

27. Based on the above factors, the Learned Trial Judge has arrived at the conclusion that PW1 may have had sufficient light and time to make a proper identification of the Accused.
28. However, it was submitted by the Learned President's Counsel for the 2nd Appellant that, given the fact that the full moon Poya day was one week prior to the date of the incident, and the south west monsoon started in September, the nights are generally cloudy and dark. Therefore, it would have been difficult, if not impossible, for the only eyewitness to have identified the Accused. It was also submitted that since PW1 was also in a hurry to leave the place so as to evade any attack by the perpetrators, he may not have been able to make a proper identification of the Accused. It is in evidence that PW1 was unable to state whether the deceased was even able to get out of the three-wheeler or if he was assaulted by the 2nd Appellant, as he was mostly concerned about his own escape.
29. The well-known decision of ***R vs. Turnbull* [1977] QB 224** is based on the court's acknowledgement of the real risk of miscarriages of justice in visual identification cases and can be distilled from the following passages in the judgment of Lord Widgery CJ:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken ... Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made ... Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives

and friends are sometimes made. All these matters go to the quality of the identification evidence ... [P.228]

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ... The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so.” The Turnbull guidelines were formulated in the context of visual identification evidence. [P230]”

30. However, it is pertinent to state at this juncture that there are some authorities in Indian jurisprudence that provide a different perspective when the issue of identification arises under circumstances similar to those of the case in hand.
31. Following authorities consistently establish that eyewitness identification in low-light or night-time conditions is reliable when the witnesses are familiar with the accused and attentive, particularly in rural settings where the villagers’ eyesight and perception are adapted to dim light from lanterns, earthen lamps, or starlight, and that identification can be made by facial features, voice, silhouette, shadow, or gait.
32. Even minimal light is generally sufficient for recognition, especially when the accused are known to the witnesses, and the proximity and attentiveness of the witnesses at the time of the incident further support the credibility of their identification. Thus, poor lighting alone does not render identification unreliable.

33. For instance, in the case of ***Kalilro Tiwari v State of Bihar***, AIR 1997 SC 2186, the Indian Supreme Court held:

"where the only source of light at place of occurrence which was village where dacoit in question took place where an earthen lamp, the identification of Accused even in such light would not be problem for villagers especially when many of dacoits were direct relations of complainant. The visibility capacity of urban people who are acclimatized to fluorescent lights or in candescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country- made lamps. Their visibility is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that the identification of the assailant by the witness from what he heard and observed was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the court which saw the witness and formed its opinion as to his credibility and of High Court which considered the evidence against the appellant and accepted the testimony."

34. In ***Nathuni Yadav and Others v State of Bihar and Another***, AIR 1997 SUPREME COURT 1808, it was held:

"We have considered the said contention from all its angles. Ever assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be born in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that assailants were no strangers to the inmates of the tragedy bound house, the eye witnesses being well acquainted with the physiognomy of each one of the

killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meagre, was enough for the assailants why should we think that same light was not enough for the injured who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander.”

35. However, in evaluating the reliability of the evidence relating to the identification of the Appellants, the aforementioned facts must be considered together with the rest of the evidence. In other words, it would not be safe to base a conviction solely on the ground that, since the Appellants were known to the eyewitness prior to the incident, he may have been able to make a proper identification despite the poor lighting conditions that prevailed at the time of the incident.

36. When considering such factors with the rest of the evidence given by PW1, it is important to note that PW1, at a later point, has admitted that he was unable to identify the number of the Accused persons or each of them separately at the time of the attack due to the distance. At the trial, PW1 testified as follows;

“ප්‍ර: ඉසංක ත්‍රීවිල් එකෙන් එළියේ ඉන්නවා තමන් දැක්කද?

උ: ඔව්, කට්ටිය වට වෙලා හිටියේ. කට්ටිය එනන පොදියට හිටියේ. කට්ටිය එක ලඟ වගේ හිටියේ. හරියට පෙන්නේ නැහැ ඇතට. එතැන ඉඳලා බැලුවම කට්ටියක් ඉන්නවා වගේ ජේනවා.

ප්‍ර: තමන් ඔය ත්‍රීවිල් එකෙන් ඉස්සෙල්ලාම එළියට බැහැලා එනකොට තමන් දැකපු, තමන් අධිකරණයේ හඳුනා ගන්න විත්තිකරුවන් පස්දෙනාම ඒ ඉසංක ඉන්න තැන ඉන්නවා තමන් දැක්කද?

උ: මම සිටිය තැනට පෙන්නේ නැහැ මේ අහවලා අහවලා කියලා මම මුලින්ම දැක්කා.

.....

ප්‍ර: කොයි විදියටද මේ ඇදගෙන යනවා දැක්කේ?

උ: ගහලා ඇදගෙන යනවා තමයි දැක්කේ මම. කොහොම අරන් යනවාද කියලා මම හරියටම දැක්කේ නැහැ.

ප්‍ර: ඒ ඇදගෙන යන වෙලාවේ ඔබ මේ අඳුරා ගන්න විත්තිකරුවන් පස් දෙනාත් එතන හිටියාද?

උ: මම මුලින් දැක්ක පස්දෙනා දැක්කා. මට ඇතට එතැන කීදෙනෙක් හිටියද, කවරු හිටියාද කියන්න මට පැහැදිලි නෑ.” (At pages 157 and 159 of the Appeal Brief)

37. Therefore, according to PW1’s own admission, it is clear that PW1 had not been able to make a proper identification of the Accused at the time of the attack due to the distance between the crime scene and the place where PW1 was observing the incident from.

38. Furthermore, the unreliability of PW1’s evidence in relation to the identification of the Appellants is further reinforced by the evidence given by PW4 at the trial before the High Court.

39. While PW1 stated that he narrated the incident to PW4, PW4 stated that PW1 merely informed him that some persons, including the 1st Appellant, had chased him and that he had run away. According to PW4, PW1 did not disclose to him what had happened thereafter, even when questioned by PW4. At the trial, PW4 testified as follows:

“ප්‍ර: ජයලත්ගේ ගෙදරට ආපහු තුෂාර ආවේ ඇයි?

උ: කෑගහගෙන දුවගෙන ආවා.

ප්‍ර: මොකක් කියලද කෑගහගෙන ආවේ?

උ: අපි වෙලා මැද්දේ නතර කළාම කට්ටියක් ආවා කිව්වා. ඊට පස්සේ මම ත්‍රිවිල් එකෙන් බැස්සා කිව්වා. එයා පාරේ කට්ටියක් එලෙච්වා කිව්වා. එයා දිව්වා කිව්වා. එයාටත් පාරක් බෙල්ල දිහාට ගැහුවා කිව්වා.

අධිකරණයෙන්

ප්‍ර: කවුද එහෙම කිව්වේ?

උ: තුෂාර.

ප්‍ර: මේ නඩුවේ සාක්ෂි දුන් 1 වන සාක්ෂිකරු.

උ: ඔව්.

ප්‍ර: තුෂාර කෙසේද කිව්වේ? කවිද නතර කළා කිව්වේ?

උ: කෙනෙක් කිව්වේ නැහැ.

ප්‍ර: තුෂාරල විසින්ම නතර කළා කිව්වද?

උ: නැහැ. කට්ටියක් ත්‍රිවිල් එක නතර කළා කිව්වා. මම පැනලා දිව්වා කිව්වා.

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ප්‍ර: තමන් ඇහුවද ඉසන්කට මොකද වුණේ කියලා?

උ: ඔව්.

ප්‍ර: තුෂාර මොකද කිව්වේ?

උ: දැක්ක දෙයක් මට කිව්වේ නැහැ. එයා පැනලා දිව්වා කිව්වා.

.....

ප්‍ර: ඇයි පැනලා දිව්වේ කියලා ඇහුවාද?

උ: ඔව්. මා පාරේ කට්ටියක් එලවාගෙන ආවා කිව්වා ගහන්න.

ප්‍ර: කවුද ආවා කිව්වේ?

උ: ආප්ප්” (At pages 307-308 and 310 of the Appeal Brief)

40. Interestingly, although PW4 was called by the prosecution to corroborate the testimony of PW1, the evidence of PW4 has instead created a reasonable doubt regarding the prosecution’s version. Had PW1 in fact witnessed the incident, there appears to be no reason for him not to have mentioned the names of the other Appellants.

41. However, notwithstanding the aforesaid inconsistencies in the evidence of PW4, the Learned Trial Judge concluded that PW1 may have furnished additional information to PW4 while they were proceeding to the crime scene (*vide page 947 of the Appeal Brief*). In the absence of any evidence to substantiate such a finding, that conclusion amounts to nothing more than conjecture and speculation.

42. In my opinion, the above-mentioned inconsistencies that exist in the evidence given by PW1 and PW4 are not confined to minor or peripheral matters, but strike at the very root of the prosecution's case, namely, the identity of the assailants and raise a reasonable doubt as to whether PW1 in fact saw the incident.
43. Also, prior to PW1 making a complaint to the police regarding the incident, police had already received an anonymous call, and the names of the suspects were given to them (*Vide pages 427 and 430 of the Appeal Brief*). Therefore, there is a possibility of including or even suggesting names of the other Appellants to PW1 by the police at the time of recording his statement, even if PW1 had not actually witnessed the incident.
44. When these factors are considered cumulatively, the poor lighting conditions, the inconsistencies between the evidence given by PW1 and PW4, and the fact that PW1 could be an interested witness, I am of the view that it would be unsafe to base a conviction on such evidence without independent and reliable corroboration. Where the evidence of identification is coupled with material inconsistencies, the court must be slow to act upon such testimony unless it is corroborated by other reliable evidence.
45. Furthermore, it is significant to note that the Learned Trial Judge, after analyzing and evaluating the prosecution evidence, concluded that two possible inferences could be drawn on the basis of the said evidence. Firstly, the Learned Trial Judge observed that, as the deceased was a person of violent disposition and was also addicted to drugs, he could have been killed by a person who bore animosity towards him, and that the Appellants may have been falsely implicated for the murder. Secondly, it was also inferred that, due to the existing animosity between the Appellants and the deceased, the Appellants themselves could have committed the murder. (*Vide page 942 of the Appeal Brief*).
46. However, having acknowledged the existence of these two competing inferences, the Learned Trial Judge proceeded to accept the latter inference without any cogent evidentiary basis upon which the former inference could be excluded beyond a

reasonable doubt, which, according to settled legal principles, is patently erroneous in law and cannot be sustained. What is discernible from the findings of the Learned Trial Judge is that he proceeded to accept the more probable version out of the two possible inferences and accordingly found the Appellants guilty of the charges. This approach is in total violation of the principles governing the burden of proof in criminal trials, in particular where the prosecution relies on circumstantial evidence.

47. When considering a case on circumstantial evidence, the Court has to bear in mind that the prosecution must prove beyond a reasonable doubt that the circumstantial evidence led at the trial must only be consistent with the guilt of the Appellant and not with any other hypothesis. When two reasonable inferences are possible, the inference favorable to the accused must prevail. Accordingly, the above conclusion reached by the Learned Trial Judge is erroneous and is contrary to the established principles of circumstantial evidence.

48. Following authorities would provide some important guidance in the evaluation of circumstantial evidence.

49. In ***Don Sunny vs. Attorney General [1998] (2) Sri. L.R. 1***, it was held that:

“1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.

3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

4. *The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*”

50. In ***Krishantha De Silva vs The Attorney General [2003] (1) Sri. L.R, 162***, it was held inter alia that:

“Circumstantial evidence can be acted upon only if from the circumstances relied upon the only reasonable inference to draw is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence.”

Per Edirisuriya, J.

“The hypothesis of innocence must be excluded by the circumstance relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused”

51. At this point, I wish to set out a set of rules outlined in the case of ***Junaiden Mohamed Haaris v Hon. Attorney General (SC Appeal 118-2017)*** decided on 9.11.2018 by Justice Aluwihare, which are as follows,

“1) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

2) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Watermeyer J. in R v Blom 1939 A.D.188) The rule regarding the exclusion of every hypothesis of innocence before drawing the inference of guilt was laid down way back in 1838 in the case of R vs Hodges 1838 2 Lew, cc.227). The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.” In the same judgment further reference has been made to the definition of circumstantial evidence in the book by E. R. S. R. Coomarswamy “The Law

of Evidence” where it has stated as follows, “The chain or strand of proved facts and circumstances must be so complete that no link in it is missing. If any vital factor which is necessary to make the chain or strand complete is missing or has remained unproved, it must be held that the prosecution has failed to establish its case. A vital link should never be inferred.”

52. In light of the above authorities, where the evidence adduced by the prosecution is capable of giving rise to two possible inferences, the Learned Trial Judge could not and should not have proceeded to convict the Appellants. It is apparent that the Learned Trial Judge himself was satisfied that the prosecution’s evidence gave rise to two competing inferences, one of which was favourable to the Appellants.
53. In those circumstances, the conclusion of the Learned Trial Judge that he would accept the more probable inference would, in my opinion, by itself be sufficient to warrant an acquittal of the Appellants, as such an approach is contrary to well-established legal principles governing criminal trials.
54. It was also argued that the Learned Trial Judge had failed to consider the evidence of the Appellants in a fair manner. It is pertinent to note that the 2nd, 3rd, 4th, and 5th Appellants have taken up the position that they were not present at the time of the incident and that they were elsewhere.
55. The position of the 2nd Appellant was that, on the night of 09-10-2009, he visited the house of one Lalith Ravindra, on the direction of one dayakaya at the temple, to get it written on the ‘kuwithansiya’ that two cows and two calves were handed over to said Lalith. After visiting Lalith, the 2nd Appellant had gone to see his sister and handed over some money to his mother. He had then gone to the bakery at the Habarakada junction, bought a loaf of bread and came back home at around 9.30 pm. He further stated that when he was about to reach home, he saw that the road was crowded and a person named Sampath told him that one Isanka had been killed. The 2nd Appellant had returned home as his child was waiting for him till he brings bread. On the following day, as he set out on his bicycle to tether the cow, one Upul had come and asked for his bicycle, stating that he wanted to go to the nearby shop

to buy a cigarette. The 2nd Appellant had given him the bicycle and had been waiting for Upul. While he was waiting, two persons claiming to be from the Athurugiriya Police came to him and asked for his name and address, stating that they were recording statements from persons in the area in connection with a murder case. The 2nd Appellant thereafter accompanied them to the police station and gave a statement.

56. The said Lalith Ravindra testified on behalf of the 2nd Appellant and stated that on the day of the incident the 2nd Appellant handed over a couple of cows to him and on the same day around 7.30 pm, the 2nd Appellant came to his house and in order to get a receipt. The said receipt obtained by the 2nd Appellant was marked as “38X” at the trial. As per his testimony, the 2nd Appellant left his residence around 9 pm. The witness further stated that the 2nd Appellant’s brother Gamini requested him to give evidence on behalf of the 2nd Appellant.

57. In analyzing the evidence of the 2nd Appellant, the Learned Trial Judge observed that it was rather unusual for the 2nd Appellant to narrate, in such great detail, the events that allegedly took place on the date of the incident, unless he claimed to possess an extraordinary memory or had made contemporaneous notes thereof (*Vide page 957 of the Appeal Brief*). The Learned Trial Judge further rejected the evidence of the 2nd Appellant on the basis that the facts stated in the receipt, the testimony of the 2nd Appellant, and the evidence of Lalith Ravindra were contrary to each other.

58. The 3rd Appellant stated that, on the day of the incident, he had worked in the paddy field until about 6.00 p.m. and thereafter returned home. Upon his arrival, his wife informed him that she wished to visit her mother, as her mother had applied knee guards. Thereafter, the 3rd Appellant and his wife travelled on his motor bicycle to his mother-in-law’s residence.

59. According to the 3rd Appellant, he left his in-laws' residence with his wife at approximately 9.15 p.m. Upon returning home, he observed that a number of people had gathered in the vicinity and inquired as to the reason for the commotion. He stated that one Thushara informed him that there had been a fight near Kaluwa's shop, namely the shop belonging to the 5th Appellant.
60. The 3rd Appellant further stated that, since his wife had expressed concern that it would be troublesome if their child awoke from sleep, and suggested that they retire for the night, he did not proceed to the scene of the incident but instead went to bed.
61. According to the 3rd Appellant, he became aware of the deceased's death only on the following night. In support of his defence, both his wife and his father-in-law testified before the Court.
62. According to the evidence of the 3rd Appellant's wife, they had gone to visit her parents at around 7.00 p.m. and returned home at approximately 8.30 p.m. DW3, the father-in-law of the 3rd Appellant, also confirmed that, on the day of the incident, both his daughter and the 3rd Appellant had visited their residence and had left at around 9.30 p.m.
63. The 4th Appellant is a brother of the 1st Appellant and the son of the 2nd Accused (now deceased). His position was that, from the year 2007, he had been residing with his mother-in-law, Siriyawathie, as he was not on good terms with his father due to his marriage. According to him, on the night of the incident he was in Deraniyagala.
64. The 4th Appellant further stated that he came to Homagama after receiving a telephone call from his mother. His mother informed him about the incident and further advised him that he should surrender himself to the Court. The 4th Appellant also testified that, upon surrendering before the Magistrate's Court, he submitted an affidavit marked "4X", in which he stated that he had not been present at the scene of the incident.

65. The mother-in-law of the 4th Appellant also gave evidence at the trial and stated that, after the 4th Appellant came to reside at her house in Deraniyagala, he did not visit his home in Habarakada except on the occasion of his father's funeral.
66. The 5th Appellant also testified that he did not have any animosity towards the deceased. According to him, on the day of the incident, he had gone out for a hire in the evening and returned to the shop at around 7.30 p.m. Thereafter, he and his wife returned home. The 5th Appellant further stated that he came to know about the incident only on the following morning. His position was that PW1 had disclosed his name to the police at the instigation of PW4, as the family had not accepted a marriage proposal brought by him for their sister.
67. The wife of the 5th Appellant also testified and stated that, on the day of the incident, the 5th Appellant returned to the shop at around 7.30 p.m., after which they closed the shop and went home.
68. The Learned Trial Judge rejected the evidence of the 3rd, 4th, and 5th Appellants on the basis that their defence of alibi was not raised at the earliest possible opportunity, but was instead advanced for the first time at the trial stage as an afterthought. The Learned Trial Judge observed that, in the affidavits tendered to the Magistrate's Court, they had merely denied their presence at the scene of the crime and had not set out the particulars of their alleged alibi. Likewise, no such explanation had been given during the non-summary proceedings before the Magistrate's Court. The Learned Trial Judge further noted that it is highly improbable that the Appellants and their respective witnesses would be able to recall, in such detail, how they spent the relevant day after the lapse of nine years (*Vide pages 958–959 of the Appeal Brief*).
69. In this backdrop, it is pertinent to discuss the importance of furnishing the details regarding the alibi at the earliest opportunity.

70. The importance of furnishing the details regarding the alibi at the first opportunity was highlighted by Tilakawardane J. in *Silva v. Silva* [2002] 2 Sri LR 29 at 33:

“The plaintiff-appellant who gave evidence at the trial in the District Court, denied his presence at the scene of the alleged incident and stated that at the relevant time he was at the house of his brother which was situated some considerable distance away. He averred that the defendant knowing this had falsely implicated him deliberately and maliciously. The learned District Judge had rejected this submission. Several reasons have been cited. He had failed to set up this alibi promptly and it was therefore belated. In his statement given to the Balapitiya Police on 24. 09. 1984 (P15) though he denied being at home at the time of the incident, he never made mention of the fact that he was at the relevant time at his brother’s house. Therefore, in the absence of these facts being furnished to the Police, no contemporaneous statement of his brother was recorded. The statement to the Balapitiya Police was the first available opportunity given to the plaintiff to record his alibi, and he had failed to do so. Even at the trial though his brother was a listed witness he was not called to give evidence. Instead, he called his father who did not even mention his alibi in his examination in chief, despite referring to the Magistrate’s Court case. He only adverted to it under cross-examination. The evidence of the father is pertinent in that whilst he corroborated the case of the prosecution that an incident did occur on the date as alleged by them, his testimony was only that his son the plaintiff was not involved. He does not corroborate the alibi, that his son the plaintiff was at his brother’s house during the relevant time. In all the circumstances there appeared clearly a basis for the rejection of the evidence pertaining to alibi by the District Judge.”

71. In considering the plea of alibi, the following authorities would be of much relevance:

72. In *Jayatissa v. Attorney General [2010] 1 Sri LR 279 at 283*, J.A.N. De Silva C.J suggested three postulates where an accused sets up a defence of alibi:

1. *if the evidence is not believed the alibi fails;*
2. *if the evidence is believed the alibi succeeds*
3. *if the alibi evidence is neither believed nor disbelieved but would create a reasonable doubt the accused should get the benefit of the doubt.”*

73. Similar sentiments were expressed by Justice Dep (as he then was) In *Ranasinghe v. O.I.C, Warakapola Police Station (SC/APPEAL/39/2011, SC Minutes of 02.04.2014)*, as follows:

- “(i) if the alibi is true the accused is entitled to an acquittal*
- (ii) it is probably true or probably untrue it raises a reasonable doubt in the prosecution case and the accused is entitled to an acquittal*
- (iii) even if the alibi is rejected, the prosecution has to establish its case beyond reasonable doubt.”*

74. In *Viswanathan vs Attorney General [2021] (1) Sri. L.R. 14* it was held inter alia that:

1. *A witness need not be disbelieved on the sole basis of having made a belated statement to the police if the delay can be explained.*
2. *When an alibi is pleaded by the accused, there is no burden on the accused to prove it. The burden is on the prosecution to establish the accused's presence at the scene of the offence. It is a misdirection in law to conclude that the accused did not prove the alibi.*
3. *If the accused takes up a plea of alibi, he shall put it to the witnesses of the prosecution during cross-examination. If the plea of alibi is made for the first time in the dock statement, the court can reject it as false.*

75. In the present case, the 3rd, 4th, and 5th Appellants have raised the defense of alibi in their joint affidavit tendered to the Magistrate Court of Homagama dated 11-11-2009. While the said affidavit does not contain any details as to their whereabouts that day, the police had not taken any steps to probe into their alibi. Needless to say, once the plea of alibi is raised by an accused without any delay, there is a duty cast on the police to inquire into and verify such a defense. However, far from conducting any investigation into the alibi raised by the 3rd, 4th, and 5th Appellants, the police failed even to record statements from them.

76. It is apparent from the trial proceedings that the High Court Interpreter was called as a witness for the defence and testified that, during the non-summary proceedings, the Learned Magistrate had specially directed the police to record statements from the 3rd, 4th, and 5th Appellants upon their surrender before the Court. Notwithstanding such direction, the police failed to comply with the said order and omitted to record statements from the Appellants. Had such a statement been recorded at the earliest stage, the Appellants would have had an opportunity to place before the investigating authorities particulars relating to their whereabouts at the time of the alleged offence, thereby enabling the Court to properly consider and verify the plea of alibi.

77. However, the learned High Court Judge rejected the defence of alibi on the basis that it had not been specially put to the prosecution witnesses during the cross-examination and had allegedly been raised for the first time at the trial. Such a finding is clearly contrary to the material available before the Court. The affidavit dated 11.11.2009 tendered before the Magistrate's Court expressly disclosed the plea of alibi, following which the Learned Magistrate directed the police to record their statements. The subsequent failure of the police to do so cannot be attributed to the Appellants nor used against them to discredit their defence.

78. The Learned High Court Judge further erred in concluding that no prejudice had been caused to the Appellants by the failure of the police to record their statements and, in fact, that such omission had operated to their benefit (*Vide page 951 of the*

Appeal Brief). With respect, such a conclusion is untenable in law and in fact. Had the police recorded statements from the Appellants and properly investigated the plea of alibi, the result of such inquiry could either have strengthened the defence or further corroborated the prosecution's case. If the Appellants had satisfactorily explained their whereabouts, such material would have supported their plea of alibi. Conversely, if they had failed to account for their whereabouts, the defence of alibi would have collapsed, and the prosecution's case would thereby have been strengthened. Therefore, the failure of the police to record statements from the Appellants and to investigate the plea of alibi has resulted in a serious lacuna in the investigation and caused substantial prejudice to the Appellants.

79. In these circumstances, the Appellants were effectively deprived of the opportunity to place before the Court material capable of establishing that they were elsewhere at the time of the alleged incident. The omission on the part of the police to comply with the direction of the Learned Magistrate and investigate the plea of alibi has consequently impaired the Appellant's right to a fair trial. Accordingly, the benefit of such doubt arising from the defective investigation ought to be extended in favour of the Appellants.

80. Furthermore, the importance of conducting a fair investigation had been emphasized by this Court in a long line of judicial authorities.

81. For instance, in the case of ***Commission to Investigate Allegations of Bribery or Corruption v Indikeiya Hewage Kusumadasa Mahanama and Another*** SC TAB 1A & 1B/2020 (Decided on 11-01-2023), the Supreme Court held that the lawful investigation is a prerequisite for a fair trial and that investigative irregularities can vitiate the entire prosecution. The Court held;

“As a lawful investigation is prerequisite for a fair trial, an entrapment gives rise to the distinct possibility of the accused being deprived of a ‘fair trial’ ...If detected during the appellate stage. ... the responsibility of the appellate judge is to... quash the conviction and acquit the accused, if the

reception of such evidence at the trial had deprived the accused of a 'fair trial' resulting in a miscarriage of justice."

82. Another ground of appeal advanced by the Appellants is that the judgment of the High Court is devoid of the principles relating to unlawful assembly, common object, and common murderous intention.

83. The Learned Trial Judge has convicted the Appellants for the first and second counts on the basis of unlawful assembly. However, the judgment does not contain any analysis as to whether each Appellant has acted in furtherance of the common objects set out in counts one and two.

84. At this juncture, it is of much relevance to discuss the constituents of an unlawful assembly.

85. Dr. Gour in Penal Law of India discusses the law in respect of unlawful assembly as follows (Vol. I page 1296-11th Edition):

"Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 I. P.C If members of the family of the appellants and other residents of the village assembled, such persons could not be condemned ipso facto as being members of that unlawful assembly. It would be necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears axes etc., this kind of omnibus evidence has to be very closely scrutinized in order to eliminate all chances of false or mistaken implication."

86. Dr. Gour at pg. 1299 further states that:

“The first thing to remember in cases of this nature is that where a large number of persons has assembled and some of them resort to violence or otherwise misbehaved it need not necessarily mean that every one of the persons present actually shares the opinions, intentions or objects of those who misbehave or resort to violence.

In fact, the possibility of some of the persons actually resenting or condemning the activities of the misguided persons cannot be ruled out. Caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly”

87. Also, in ***Bandaranayake vs. Jagathsena*** [1984] 2 Sri LR 397 it was held as follows:

*“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 an 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 fault of their's. The common object of an assembly is an inference from facts to be deduced 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 behaviour 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 offences committed by it in the course of the riot and to infer that all these were originally part of its common object. The conclusion must normally be based on more evidence than the mere acts themselves.”

88. Notwithstanding the well-established legal principles set out in the aforesaid authorities, the Learned Trial Judge has failed to consider and evaluate the acts of participation attributed to the Appellants in light of the principles governing unlawful assembly. In particular, the judgment does not examine whether the respective acts of each Appellant were carried out in furtherance of the common objects found in counts one and two of the indictment.

89. Also, this Court has consistently held that failure on the part of the Trial Judge to give adequate reasons as to why he convicted all the accused on the basis of common intention results in a miscarriage of justice.

90. In ***Banda v Attorney General*** [1999] 3 Sri. LR. 168, emphasizing the importance of taking into account the acts of participation on the part of each one of the accused

separately to analyze their acts and relate them to the principles of law relating to common intention, Jayasuriya J held that:

“The learned trial Judge has used the term common intention only in one solitary passage in his judgment. He has culpably failed to consider the acts of participation on the part of each one of those accused separately to analyse those acts and relate them to the principles of law relating to common intention and having regard to their respective acts to determine whether they were actuated by a common intention.”

91. Also, in ***Rajadheera and Others v Attorney General*** [2008] 2 Sri LR 321 Ranjith Silva J held as follows:

[...] Failure to give adequate reasons as to why he convicted all the accused on the basis of common intention and the failure to consider the concept of common intention, in my view, have resulted in a miscarriage of justice. Therefore, we are unable to apply the proviso to Section 334 of the Criminal Procedure Code and proviso to Article 138 of the Constitution. Further if we are going to apply the proviso to Section 334 of the Criminal Procedure Code, we have to rewrite the judgment which is not the function of the Court of Appeal. (At pg 325)

92. In the present case, although the Learned Trial Judge convicted the Appellants for the third count on the basis of common intention, the judgment is devoid of any proper analysis or evaluation of the alleged common murderous intention said to have been shared by the Appellants. I am of the opinion that such failure on the part of the Learned Trial Judge has resulted in a serious miscarriage of justice to the Appellants.

93. In the aforesaid circumstances, I conclude that it is not safe to affirm the conviction against the Appellants.

94. For the reasons set out above, we allow the appeal and we proceed to quash the convictions and sentences imposed on the Appellants by the Learned High Court Judge of Homagama.

95. Accordingly, we acquit the Appellants of all the charges leveled against them.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal