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.

Court of Appeal Case No:
CA/HCC /0287/2014
High Court of Colombo
Case No. HC/13/2000

1. Weerasinghe Arachilage Chandradasa alias Chandra (Deceased)
2. Bomiriyage Nihal Gomes
3. Badugama Hewage Janaka Sampath
4. Merinnage Premasiri Costa (Deceased)

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Nalin Ladduwahetty, PC with Kavithri Hirusha Ubeysekera for the 2nd and 3rd Appellants.**
Dileepa Peeris, ASG for the Respondent.

ARGUED ON : **29/04/2025**

DECIDED ON : **15/05/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted in the High Court of Colombo under the following counts;

1. On or before 24.02.1988 at Pepiliyana was a member of an unlawful assembly with probability to cause injury, robbery and mischief punishable under Section 140 of the Penal Code.
2. In the course of the same transaction committed the murder of Aluthge Don Helenis punishable under Section 296 read together with Section 146 of the Penal Code.
3. In the course of the same transaction committed mischief to the house of Aluthge Don Helenis valued at Rs.28,650/- punishable under Section 410 read with Section 146 of the Penal Code.
4. In the course of the same transaction committed the robbery of gold jewelleries valued at Rs.45,500/- from Dissanayake Mudiyanselage Lalitha Wasanthi punishable under Section 380 read with 146 and 383 of the Penal Code.

5. In the course of the same transaction committed the murder of Aluthge Don Helenis punishable under Section 296 read with Section 32 of the Penal Code.
6. In the course of the same transaction committed mischief by causing damages to the house of Aluthge Don Helenis valued at Rs.28,650/- punishable under Section 410 read with Section 32 of the Penal Code.
7. In the course of the same transaction committed the robbery of gold jewelleries valued at Rs.45,500/- from Dissanayake Mudiyanselage Lalitha Wasantha punishable under Section 380 read with Sections 32 and 383 of the Penal Code.
8. In the course of the same transaction the 1st Accused aided and abetted an unknown person to rape Dissanayake Mudiyanselage Lalitha Wasantha Dissanayake and thereby committed an offence punishable under Section 364 read with Section 102 of the Penal Code.
9. In the course of the same transaction the 2nd Accused aided and abetted an unknown person to rape Dissanayake Mudiyanselage Lalitha Wasantha Dissanayake and thereby committed an offence punishable under Section 364 read with Section 102 of the Penal Code.
10. In the course of the same transaction the 3rd Accused aided and abetted an unknown person to rape Dissanayake Mudiyanselage Lalitha Wasantha Dissanayake and thereby committed an offence punishable under Section 364 read with Section 102 of the Penal Code.
11. In the course of the same transaction the 4th Accused aided and abetted an unknown person to rape Dissanayake Mudiyanselage Lalitha Wasantha Dissanayake and thereby committed an offence punishable under Section 364 read with Section 102 of the Penal Code.
12. In the course of the same transaction the Accused above named had assaulted Dissanayake Mudiyanselage Lalitha Wasanthi Dissanayake punishable under Section 314 read with Section 32 of the Penal Code.

Although the Appellants initially elected for a jury trial, the trial commenced before a judge as on a subsequent occasion the Appellants elected a non-jury trial. The prosecution had called PW1, PW2, PW3, PW5, PW6, PW10, PW13 and PW15 and marked productions P1-10 in support of their case. When the defence was called, the Appellants made dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants for counts 01, 02, 03, 04, 05, 06, 07, 12 and acquitted them from counts 08, 09, 10, and 11. After considering the mitigation, the Appellants were sentenced as follows on 24.07.2014:

Count-01: 06 months rigorous imprisonment with a fine Rs.2500/- each. In default 03 months simple imprisonment.

Count-02: Sentenced them to death.

Count-03: 02 years rigorous imprisonment with a fine of Rs5000/- each. In default 06 months simple imprisonment.

Count-04: 05 years rigorous imprisonment with a fine of Rs.5000/- each. In default 06 months simple imprisonment.

Count-12: 01-year rigorous imprisonment with a fine of Rs.1000/-each. In default 03 months simple imprisonment. Additionally, each Appellant is directed to pay a compensation of Rs.10,000/- to PW2 Lalitha Wasantha Dissanayake.

The Appellants were not sentenced for counts 05, 06, 07 as those are alternative counts to counts 02, 03 and 04 respectively.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The learned Counsel for the Appellants informed this court that the Appellants have given consent for this matter to be argued in their absence. Also, at the time of argument the Appellants were connected via Zoom from prison.

Background of the Case albeit briefly is as follows:

According to PW1, PW3 and PW5 the Appellants are neighbors who were known to the witnesses in this case. On the day of the incident when the witnesses were in the house, somebody requested the residents to open the door to convey a message supposed to have sent by the husband of PW2, who was in remand for murdering the brother of the 1st Appellant. Although the residents of the house refused to open the door, the Appellants entered the house after breaking the door and windows. A gunshot was reported immediately after the entry of the Appellants. At that time witnesses had observed the deceased fell down with gunshot injuries.

Although PW2 was an eyewitness to the incident, she had failed to identify the Appellants. PW3 who is the son of the deceased had identified the 2nd and 3rd Appellants at that time. Further he had testified that the 1st Appellant (deceased) had shot his father.

Further according to the evidence, the jewelries belonging to PW2 had been taken away by the Appellants after causing damage to household items.

The witnesses had stated that a number of other people were also present along with the Appellants at that time.

PW13, the Judicial Medical Officer had given evidence of the report prepared by PW12. According to the post-mortem examination report, the JMO had noted 12 injuries on the deceased's body, which are consistent with the injuries caused by a firearm. According to the JMO, the death had occurred due to shock resulting from severe bleeding from major organs.

As the evidence presented by the prosecution warranted the presence of a case to be answered by the Appellants, the learned Trial Judge had called for the defence and both Appellants had made statements from the dock. In their

dock statements both had denied any involvement in committing the murder of the deceased.

The grounds of appeal advanced by the Appellants are as follows.

1. Does the judgment conform to the requirements of Section 283 of the Code of Criminal Procedure Act No.15 of 1979.
2. Has the learned High Court Judge wrongfully concluded and determined an unlawful assembly and common intention.
3. Has the defense been wrongfully evaluated or not evaluated and rejected.
4. Has the charge of robbery been properly established by the prosecution.
5. Was evidence given by the prosecution witnesses properly evaluated taking into consideration of per se and inter se contradictions.

As the grounds of appeal raised by the Appellants are inter connected, all grounds will be considered together hereinafter.
In our law the guidance pertaining to Judgement Writing is provided under Section 283 of the Code of Criminal Procedure Act No.15 of 1979 The Section states:

The following provisions shall apply to the judgments of courts other than the Supreme Court or Court of Appeal: -

> *(1) The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*

(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.

(3) If it be a Judgment of acquittal, it shall state the offence of which the accused is acquitted.

(4) When a judgment has been so signed it cannot be altered or reviewed by the court which gives such judgment:

Provided that a clerical error may be rectified at any time and that any other error may be rectified at any time before the court rises for the day.

(5) The judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

(6) The original shall be filed with the record of proceedings.

It is important for the judge who continues the case and pronounces the judgment finally to adhere to this section in relation to Sub Section 283 (1) CPC. Non-compliance with this Section provides a ground of appeal to the Appellant who may then apply to an appropriate court for the delivered judgment to be varied or even set aside.

Further, the mere outline of the case with re-production of the evidence of both parties is not sufficient. Discussion of evidence is quite important as it covers a major part of the judgment. This paves the way to come to a correct conclusion on the question of facts.

In **Thuranya v Pathaimany** 15 CLW 119 the Court held that:

"That a mere outline of the case for the prosecution and defence embellished by such phrases as "I accept the evidence for the prosecution" "I disbelieve the defence" is by itself an insufficient

discharge of the duty cast upon a magistrate by Section 306(1) of the Criminal Procedure code".

In **Jansz v Gregoris** 04 NLR 359 the Court held that:

"That a judgment drawn up under section 306 of the Criminal Procedure Code should specify the offence, the section of the law under which the conviction was had, the name of the accused, and the date of the conviction."

Composing Judgments is seen as an essential part of a Judge's duty and a fundamental aspect of a Judiciary's function. A well-written judgment ensures that justice is delivered fairly and transparently, and provides clarity about the rationale behind the verdict. A good judgment needs to be correct on the facts as well as the law and as such, style and flair becomes merely a secondary aspect. However, on the assumption that the judgment is correct on the facts and the law, the presentation of the judgment is of considerable importance. Therefore, the Judge must be mindful to take effort to do justice in preparing and delivering such an impactful determination.

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."

In **Chandrasena and Others v. Munaweera** 1998 (3) SLR 94 the court held that: *'The mere outline of the prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a judge by the provisions of S.306(1)".*

In **Karunadasa v. OIC Police Station, Nittambuwa** (1987) 1 SLR 155 the court held that:

> *"Merely reciting the facts and giving no reasons for the judgment is insufficient. The Magistrate must give reasons for his conclusions and scrutinize the evidence led on behalf of the accused. Failure to give reasons can occasion a failure of justice. An outline of the facts embellished with phrases like "I accept the evidence of the prosecution", 'I disbelieve the defence" is insufficient to discharge the duty cast on the prosecution. Section 283 (1) of the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. The Magistrate has said "the evidence of the witness called by the accused does not in any manner help the defence. Therefore, I accept the evidence adduced on behalf of the prosecution'. This shows that the Magistrate has given his decision very largely on the weakness of the defence rather than on the strength of the prosecution. It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt".*

In **CA 34-35/2005** decided on 03/04/2007 Sisira De Abrew, J., held that:

> *"In this case the Learned Trial Judge has merely narrated the evidence of the prosecution witnesses without giving adequate reasons for the conclusion and for the acceptance of the evidence of the prosecution*

witnesses. In our view, a judgment devoid of adequate reasons for the conclusion reached and a mere reproduction of evidence of witnesses is not a judgment in the eyes of the law. We find that the judgment of the Learned trial judge in this case is no judgment and would amount to nullity".

In this case the Appellants were charged and convicted for murder, mischief and robbery in addition to an unlawful assembly charge. Hence, it is the duty of the prosecution to adduce evidence that the five or more accused got together with an unlawful common object and committed the offences. Hence it is the duty of the trial judge to explain in his judgment whether the Appellant were members of an unlawful assembly when they committed the offences depicted in the indictment.

In **K. A. Andrayas and others v The Queen** 67 NLR 425 the court held that:

"Mere membership of an unlawful assembly, without more, does not render each member of that unlawful assembly criminally liable for an offence committed by some other member thereof. Such liability arises at law only when the existence of a certain other element or elements specified in section 146 of the Penal Code has been established.

Merely reading out to the jury the text of section 146 of the Penal Code is inadequate by way of a direction to the jury on the law which renders persons vicariously responsible for the offences of others on the basis of membership of an unlawful assembly.

In a prosecution for being members of an unlawful assembly, the burden of proof is throughout on the Crown to satisfy the jury beyond a reasonable doubt that five or more than five persons got together with an unlawful common object".

In this case nowhere in his judgment the learned Trial Judge explain what an unlawful assembly is and whether the Appellants had a common object to commit the offences they were charged for. In her judgment the learned High Court Judge had merely mentioned that the evidence led at the trial supports an unlawful assembly. (Page 509 of the brief).

In **Banda and others v Attorney General** [1999] 3 SLR 168 the court 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".*

The learned High Court Judge had failed to consider and discover whether the ingredients of the charges against the Appellants have been established beyond a reasonable doubt.

Next, the Appellants argued that the learned Trial Judge has failed to narrate the dock statements of the Appellants thereby causing serious prejudice to the Appellants occasioning a deprivation of a fair trial for the Appellants.

The Appellants have the right to a fair trial to determine whether they are innocent or guilty which is an internationally recognised fundamental human right. Fair trials help establish the justice and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure the development of fair and just societies, and for the limiting of abuse perpetrated by state authorities.

The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

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 the present case upon perusal of the judgment delivered by the trial Judge it is manifestly clear that the learned High Court Judge had failed to fairly analyze the dock statements of the Appellants and thereby had failed to provide a fair trial for them. The importance of considering the dock statement had been discussed in several judgments by the Superior Courts. However, its evidentiary value is less than the evidence given from the witness box by an accused.

In **Queen v. Buddharakkitha Thero** 63 NLR 433 the court held that:

> *"The right of an accused person to make an unsworn statement from the dock is recognised in our law (King v. Vellayan[10 (1918) 20 N. L. R. 251-at 266.].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination'.*

In **Queen v. Kularatne** 71 NLR 529 the court held that:

> *"We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that;*
>
> *a) If they believe the unsworn statement, it must be acted upon.*
> *b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed,*
> *c) That it should not be used against another accused".*

Upon the perusal of the judgment, it becomes evident that the learned trial Judge had only narrated the evidence given by the prosecution witnesses. The learned High Court Judge had failed to adequately analyze and evaluate the evidence and legal principles in her judgment. Therefore, the judgment cannot be considered as a proper judgment. In the absence of a proper judgment delivered by the Trial Courts the only conclusion that could be reached by an Appellate Court is to declare the judgment pronounced by the High Court a nullity.

In **CA/34-35/2005** (Supra) the court correctly held that:

> *"One cannot expect the Court of Appeal to re-write the judgment when the judgment pronounced by the Learned High court Judge is a nullity.*

As the Appeal grounds discussed above have merit, it is certainly sufficient to disturb the outcome of the trial. Therefore, I set aside the conviction and the sentence imposed on the Appellants.

The Appellants are acquitted from all the charges.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree

JUDGE OF THE COURT OF APPEAL