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.

Court of Appeal No:

CA/HCC/414/2019

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

High Court of Tangalle

Case No: THC 07/2016

Geeganage Gamage Amarasiri *alias* Julampitiye Amare

ACCUSED

AND NOW BETWEEN

Geeganage Gamage Amarasiri *alias* Julampitiye Amare

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: U.R. de Silva, P.C. with Savithri Fernando for the Accused-Appellant
	: Wasantha Perera, D.S.G. for the Respondent
Argued on	: 28-08-2024
Written Submissions	: 05-05-2021 (By the Accused-Appellant)
	: 22-05-2023 (By the Respondent)
Decided on	: 18-11-2024

Sampath B. Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Tangalle, where he was sentenced to death among other sentences.

The appellant was indicted before the High Court of Tangalle for committing the following offences.

1. That he being a member of an unlawful assembly together with several others on or about 15-06-2012, at Katuwana within the jurisdiction of the High Court of Tangalle, with the common object of causing injuries

to others, committed the offence of unlawful assembly punishable in terms of section 140 of the Penal Code.

2. At the same time and at the same transaction, the said members of the unlawful assembly caused the death of one Edirimannage Malini in order to fulfill the common object of the said assembly, and the appellant being a member of the said unlawful assembly, committed the offence of murder punishable in terms of section 296 read with section 146 of the Penal Code.
3. At the same time and at the same transaction, the said members of the unlawful assembly caused the death of one Jayasekara Pathiranage Nimantha Heshan in order to fulfill the common object of the said assembly, and the appellant being a member of the said unlawful assembly, committed the offence of murder punishable in terms of section 296 read with section 146 of the Penal Code.
4. At the same time and at the same transaction, the said members of the unlawful assembly caused grievous injuries to one Neththasinghe Liyanage Sujith Tharanga in order to fulfill the common object of the said assembly, and the appellant being a member of the said unlawful assembly, committed the offence of grievous hurt punishable in terms of section 316 read with section 146 of the Penal Code.
5. At the same time and at the same transaction, the said members of the unlawful assembly caused mischief valued at Rs. 52,000/- to property belonging to one Neththasingliyanage Ranjith, and the appellant being a member of the said unlawful assembly, committed the offence of mischief punishable in terms of section 410 read with section 146 of the Penal Code.
6. At the same time and at the same transaction, the appellant together with some others unknown to the prosecution, caused the death of one Edirimannage Malini, and thereby committed the offence of murder punishable in terms of section 296 read with section 32 of the Penal Code.

7. At the same time and at the same transaction, the appellant together with some others unknown to the prosecution, caused the death of one Jayasekara Pathiranage Nimantha Heshan, and thereby committed the offence of murder punishable in terms of section 296 read with section 32 of the Penal Code.
8. At the same time and at the same transaction, the appellant together with some others unknown to the prosecution, caused grievous injuries to one Neththasinghe Liyanage Sujith Tharanga, and thereby committed the offence of grievous hurt punishable in terms of section 316 read with section 32 of the Penal Code.
9. At the same time and at the same transaction, the appellant together with some others unknown to the prosecution, caused mischief valued at Rs. 52,000/- to property belonging to one Neththasingliyanage Ranjith, and thereby committed the offence of mischief punishable in terms of section 410 read with section 32 of the Penal Code.

After trial without a jury, the learned High Court Judge of Tangalle of his judgment dated 07-11-2019 found the appellant guilty as charged.

Accordingly, he was sentenced to a period of 6 months rigorous imprisonment on count 1, and in addition, was ordered to pay a fine of Rs. 5,000/- with a default sentence of 3 months simple imprisonment.

He was sentenced to a period of 7 years rigorous imprisonment in relation to the 4th count preferred against him, and was ordered to pay a fine of Rs. 10,000/- with a default sentence of 6 months simple imprisonment.

In relation to the 5th count, the appellant was sentenced to a period of 2 years rigorous imprisonment, and he was ordered to pay a fine of Rs. 5,000/- with a default sentence of 3 months simple imprisonment.

On the 8th count, he was sentenced to a period of 7 years rigorous imprisonment, and in addition, he was ordered to pay a fine of Rs. 10,000/- with a default sentence of 6 months simple imprisonment.

On count 9, the appellant was sentenced to a period of 2 years rigorous imprisonment, and was ordered to pay a fine of Rs. 5,000/- with a default sentence of 3 months simple imprisonment.

Since the appellant was convicted for the 2nd, 3rd, 6th and the 7th count, he was sentenced to death in relation to the said counts.

In addition to the above sentences, the appellant was ordered to pay Rs. 50,000/- as compensation to prosecution witness number 03 and Rs. 50,000/- to prosecution witness number 10 in terms of section 28(1) of the Assistance To and Protection of Victims of Crime and Witnesses Act No. 4 of 2015. In default of paying the said compensation, it was ordered that the appellant should serve default sentences of 1 year each rigorous imprisonment.

In addition to the above compensation, the appellant was also directed to deposit Rs. 7,000/- in Court under the terms of the same Act, and in default, he was sentenced to a period of 3 months simple imprisonment, and the learned High Court Judge ordered that the said sum of Rs. 7,000/-, if deposited, shall be forwarded to the fund created under the terms of the above-mentioned Act No. 4 of 2015.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel who represented the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has failed to properly evaluate the identity of the accused-appellant.
2. The learned High Court Judge has rejected the defence evidence without a proper evaluation.

For the purposes of considering the above two grounds of appeal, I find it necessary to draw my attention briefly to the evidence led before the trial Court.

The Evidence in Brief

This is an incident, which occurred on 15-06-2012, around 7.00 p.m. in the night. During the relevant period, the political party Janatha Vimukthi Peramuna (JVP) has been conducting a series of awareness meetings, and this incident has occurred at one of such meetings held in Katuwana area. Dr. Nalinda Jayatissa, a frontline member of the JVP and a member of the Western Provincial Council at that time, has attended the meeting as the Chief Guest. The meeting has been held in front of a house of one of its supporters with a participation of about 65 to 70 people.

The meeting has begun at around 6.30 p.m., and Dr. Jayatissa has commenced his address around 6.45 p.m. About 25 to 30 minutes into his address, a group of persons has arrived in 4 or 5 motorbikes from the direction of Divulampitiya. The participants have seen a tall person carrying a T-56 weapon getting down from one of the bikes. He has commenced firing at the meeting indiscriminately while uttering filth. In the process, he has also shouted that "මම තමයි යකෝ මැදමූලනේ වලව්වේ දඩ බල්ලා. නොපි පුළුවන්නන් වරෙව්. කවුද මේක සංවිධානය කරපු එවුන්."

While this firing was taking place, the persons who gathered for the meeting has fled. PW-01, one of the participants of the meeting, has also gone into hiding, but has observed what was happening. Although he has seen another weapon being used at the time of the incident, neither he nor any of the other eyewitnesses to the incident has been able to identify any of the other members of the group who attacked the meeting.

There had been a flashlight as well as several other bulbs providing sufficient light to the meeting ground, and those who came had come without wearing helmets or any attempt to conceal their identity.

Once the participants fled, those who came has caused damage to the vehicles parked nearby, as well as chairs and other property. PW-01 has seen the tall person, who fired at the crowd, going inside the house as well. He has also seen him bringing together the damaged chairs in one place. The incident has been going on for about 25 to 30 minutes, and PW-01, while in hiding, has seen the tall person receiving a phone call and subsequently, all of them leaving towards Divulampitiya using the same motorbikes they came, while shouting and hooting. While in hiding, although PW-01 has taken several 119 calls and had attempted to call the Katuwana police station, which was about one and a half kilometers away, there had been no response.

After the group left, he has seen three persons with injuries and the police had come about 10 minutes thereafter. The Officer-in-Charge (OIC) of Katuwana police has used filthy language towards the persons who were there, blaming them for organizing the meeting. By that time, two persons had been dead, while a 3rd person was injured. When they went to the police station to lodge a complaint, initially Katuwana police have refused to record their complaint, and it was only after about an hour, the complaint has been recorded.

On the following day, Criminal Investigations Department had taken over the investigations in relation to the incident.

The prosecution has called five eyewitnesses at the trial, namely PW-01, PW-02, PW-03, PW-11 and PW-38. Their evidence has been similar to that of PW-01 with regard to the incident that occurred on that day.

The appellant had surrendered to the High Court of Tangalle several days after the incident, where there was a warrant against him for failing to attend the High Court in relation to an indictment filed against him. Thereafter, he has been remanded in relation to this incident.

At the identification parade held on 22-06-2012, PW-01, PW-03 and PW-11 has identified the appellant as the person who came and fired at the meeting and caused damage to property. PW-03, the person who was injured during the incident, has identified him as the person who caused injuries to him as well. Another eyewitness named Premawathi, who has been called before the identification parade, has failed to identify the appellant.

At the trial, the above-mentioned three eyewitnesses have identified the appellant as the person who fired at the people who were present, caused damage to property, as well as who caused injuries to PW-03.

PW-02, who was another eyewitness to the incident, has identified the appellant while he was giving evidence although he has not participated in the identification parade. PW-38, who was yet another eyewitness, has given similar evidence in relation to the incident and was a person who knew the appellant already. According to his evidence, he has seen the appellant previously when he came to appear in Court in relation to another case.

At the trial, PW-33, the learned Acting Magistrate who conducted the identification parade, has given evidence to substantiate the fact that he conducted the identification parade following the due procedure.

PW-37 has been a 17-year-old schoolboy when this incident occurred, and a relative of the appellant. On the day following the incident, the appellant has come to his house and has given him a mobile phone telling him to obtain a SIM card to the phone using his National ID, for which the witness has obliged. A day after he was given the phone, the appellant has brought a bag with a weapon inside, and had given it to one of his relatives living next door for safekeeping. Since it had a weapon, the wife of the owner of the house, namely Ramani Ishwarage, has asked PW-37 to conceal the gun in their garden.

Few days thereafter, the police officers have come and arrested PW-37 and had recovered the mobile phone and the gun, which was a T-56 weapon.

The earlier mentioned Dr. Nalinda Jayatissa (PW-02), who was the Chief Guest at the meeting, has identified the mobile phone as the one belonging to him, which he lost when he fled the scene of the crime to save his life.

The Government Analyst, namely PW-36, has opined that nine spent cartridges recovered from the scene of the crime had been fired by using the T-56 weapon, which was subsequently recovered subsequently by the police.

Consideration of the Grounds of Appeal

The 1st Ground of Appeal

At the hearing of this appeal, the learned President's Counsel submitted that although several eyewitnesses have allegedly identified the appellant at the identification parade, the learned High Court Judge has failed to consider the way the parade has been conducted, and has failed to properly evaluate the same.

According to the evidence of all the eyewitnesses, all of them have described the person, who came and fired at them, as a tall well-built person. It was contended by the learned President's Counsel that the learned Acting Magistrate, when conducting the identification parade, has only taken seven persons randomly chosen for the parade, and has failed to state that the said persons were of similar height to that of the appellant. It was his view that the failure on the part of the learned Acting Magistrate has led to an obvious disadvantage towards the appellant, and identification under such circumstances cannot be considered as credible.

The learned President's Counsel also pointed out to the statement made to police by PW-11, who was one of the eyewitnesses to the incident, to the effect that if seen, she may find it difficult to identify the perpetrator; "නැවත දුටුවොත් හඳුනාගැනීමට අපහසුයි වගේ."

Commenting on the manner the PW-03 who was the injured person during the incident has identified the appellant, where he has walked around the people who were paraded and stated that the person who caused the injuries to him had an injury on his hand, stating that is the reason why he is identifying the appellant, it was contended that, the said fact has not been considered by the learned High Court Judge. It was his view that such an identity cannot be considered as a positive identity.

The learned President's Counsel contended further that the learned High Court Judge has justified the holding of the parade on the basis that the appellant has failed to object to the parade. It was his view that it was the responsibility of the prosecution to hold a proper identification parade and the due process has not been followed.

It was also his contention that the learned High Court Judge has failed to give reasons as to why he is accepting the evidence of PW-02, who identified the appellant from the dock, and that of PW-38, with whom PW-02 was observing what was happening at the time of the incident, since PW-38, being a person who knew the appellant, may very well have informed PW-02 as to who the appellant was. It was also submitted that the evidence led before the High Court shows that after the incident, there had been a discussion among the people who gathered that it was 'Julampitiye Amare' who came and attacked the crowd, which has obviously caused prejudice towards the appellant and may have helped the witnesses to identify him at the parade.

Although it was claimed at the hearing of this appeal that the learned High Court Judge has failed to consider and evaluate whether the prosecution witnesses had positively identified the appellant when the offence was committed, I find no basis to agree with such a contention.

While summarizing the evidence of the relevant eyewitnesses, the learned High Court Judge has clearly considered whether their evidence, as to the manner they were able to identify the appellant, was cogent enough and probable. It is

clear from the evidence that when the appellant and several others came to the scene of the crime, the appellant has not made any attempt to conceal his identity. When he and the other persons reached there, there had been several lights lit since it was a public gathering, although small in number. The words allegedly uttered by the appellant also show that he and others had come there without fearing any repercussions, believing that law enforcement authorities will not pursue them. That may be the very reason why he has boldly remained at the scene of the crime for nearly 30 minutes. He has only left the scene after receiving a phone call, which shows that he was instructed by somebody from outside to leave. The fact that the OIC of Katuwana police, who came after the incident, using filthy language towards the victims of the crime for holding the meeting, rather than pursuing the criminals who orchestrated the crime, and also the reluctance of the police to record a complaint in that regard, establishes further proof as to the reasons for the disregard the appellant has shown for his identity being exposed.

I am unable to find anything wrong in the manner the learned Acting Magistrate has conducted the identification parade or the manner in which the witnesses were able to identify the appellant. The learned Acting Magistrate has made the relevant notes as to the conduct of the parade, where the appellant has also informed that he agrees with the conduct of the parade. There is nothing to show that the height or the built of the appellant was the reason for the eyewitnesses to identify him at the parade. The evidence led at the trial amply provides that since the appellant has not made any attempt to conceal his identity, with the aid of the light available at that time, the witnesses have identified him positively based on their observations of the person.

PW-03, the person who was assaulted by the appellant, has had the advantage of observing him from a close range. That may be the very reason why he has gone behind the persons who were at the parade looking for an obvious clue, where he has observed as to the injury mark the appellant had.

PW-02 and PW-38 has admitted that they were together while observing what the appellant and the persons who came with him were doing at the scene of the crime. PW-38 in his evidence has stated that he has seen the appellant previously, but it was obvious that there was no way for him to give his name to PW-02 or even if for argument's sake it is believed that PW-38 has informed the name of the appellant to PW-02, that would not have helped PW-02 to identify him. Some of the witnesses stating there was another person with the appellant who shot at the people would not have altered the evidence of the eyewitnesses.

It is clear from the eyewitness's account that some of them has seen another person with a gun. However, their consistent evidence had been that it was the appellant who fired at the people gathered for the meeting and caused the deaths of two of them.

It needs to be noted that this is not an incident where the witnesses have had a fleeting glance at the perpetrator of the crime under difficult light conditions where Turnbull Guidelines should play a part.

In the judgment of **Regina Vs. Turnbul and Another (1977) QB 224**, it was held:

> *"Where the case against an accused depends wholly on the correctness of the identity of the accused, the judge should warn the jury of the special need to for caution before relying on the correctness of the identification by the witness."*

The said Turnbull Guidelines stated in the case of **Regina Vs. Turnbull (supra)** reads as follows.

> These require a trial judge to be mindful that;
>
> - *Caution is required to avoid the risk of injustice.*
> - *A witness who is honest may be wrong even if they are convinced, they are right.*
> - *A witness who is convincing may still be wrong.*

- *More than one witness may be wrong.*
- *A witness who recognizes the defendant even when the witness knows the defendant well maybe wrong.*

Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- *The length of time the accused was observed by the witnesses.*
- *The distance the witness was from the accused.*
- *The state of the light.*
- *The length of time elapsed between the original observation and the subsequent identification.*

The case of **Sigera Vs. The Attorney General (2011) 1 SLR 201** was a case the question of the identity of the accused had been discussed. It was held:

> "*The identification was not in a difficult circumstance or in a multitude of persons in a crowd or in a fleeting moment. To apply the Turnbull principles, the identification had to be made under difficult circumstances. In this case, although the incident took place during night, there was ample light shed by the bulb of the lamppost that was burning. There was no congregation of multitude of persons in a crowd but only the accused appellant and the deceased. In order to inflict the injuries on the deceased, the assailant had to come very close to the deceased.*"

E.R.S.R. Coomaraswamy in his book **'The Law of Evidence' Volume 1 at page 663** discusses the mistaken identity in the following manner.

> *"A fundamental requisite in a criminal case is to establish the identity of the accused as the guilty party. The text-books abound with instances of what were supposed to be clear identifications which proved to be fallacious and defective. These include the case where an honest witness was deceived by the broad glare of sunlight, (R. Vs. Wood and Brown [Ann-Reg. 1784])…*

…Much of the value of direct evidence of identification will depend on the personal appearance of the subject of identification. Many persons cannot be easily distinguished from others. The liability mistake is greater where the questionable identity is a matter of deduction and inference and the expression of an opinion than where it is the subject of direct evidence. (Wills, op. cit., 7th edition., pp 197-200)"

Apart from the evidence relating to the identity of the appellant as the person who committed the crime along with several others, the prosecution has led evidence of PW-37, who was a relative of the appellant. It is clear from his evidence that it was the appellant who came and gave a mobile phone to him. It has been established during the trial that the phone belongs to Dr. Nalinda Jayatissa, who was the chief guest at the meeting. It is clear that he has misplaced his phone when he fled for his life, and it is obvious that the appellant who spent nearly 30 minutes at the scene of the crime had taken it and given it to PW-37.

Apart from the above, PW-37's evidence also establishes the fact that soon after the crime, the appellant had kept a gun at the house of his relative, which has been recovered by the police after they arrested PW-37. The expert opinion of the Government Analyst, who examined the gun and the spent bullet cartridges found at the scene of the crime, clearly establishes that the said gun, which is a T-56 automatic weapon, had been used in the crime. The eyewitness's account also speaks about a T-56 like gun being used to shoot at them.

I am of the view that the uncontradicted evidence of PW-37, and the discovery of the mobile phone and the gun used in the crime, has provided further circumstantial grounds, apart from the eyewitness accounts of the incident.

For the reasons as considered above, I am of the view that the learned High Court Judge has evaluated the identity of the appellant with the relevant legal principles in mind, and that his identity has been established before the trial Court without any reasonable doubt. I find that the learned High Court Judge

has also considered and evaluated the circumstantial evidence in its correct perspective, and had considered the evidence in its totality in reaching his findings.

Accordingly, I find no basis to agree with the 1st ground of appeal urged.

The 2nd Ground of Appeal

In the 2nd ground of appeal, the learned President's Counsel submitted that the learned High Court Judge has rejected the defence evidence without proper evaluation. There again, I find no basis to agree with such a contention.

When the trial Judge called upon the appellant for his defence, he has chosen to give evidence under oath.

He has called two witnesses to give evidence on his behalf, including Ramani Ishwarage, whom PW-37 mentioned during his evidence as his relative.

The position taken up by the appellant had been that on the day of the incident, namely 15-06-2012, he went to the house of one Sugathadasa situated in Middeniya area around 7.00 p.m., and since the said Sugathadasa was an impromptu poet (හිටිවන කවි), he recited some poems with him. The appellant has claimed that he left that house in his motorbike at around 7.30 in the night, and travelled to Thanamalwila where he has a property and a small house, in order to collect some Copra, which he had laid to dry at the house.

According to him, he has returned to his father's elder brother's house situated at Embilipitiya at around 1.00 – 2.00 in the morning. After sleeping there for a while, he has returned to Divulampitiya where his own house is situated, and has gone to Middeniya town at around 12.00 noon to sell copra. While in the town, he has come to know about this incident and has come to know further that his name has been mentioned as the person who committed the crime. After this news went public, he has decided to surrender before the High Court of Tangalle as he had a warrant of arrest issued by the said High Court in relation to another case. He has surrendered to the Court either on the 18th or 19th of

June. He has claimed that while was being escorted out of the Courthouse after surrendering, several persons videoed him being escorted, and the identification parade was held on the 23rd. He has claimed that the identification parade was not held properly and all the participants were persons shorter than him, as well as younger than him. He has also claimed that he could not obtain legal assistance because he did not know until he was brought to the Court on the day of the parade that the identification parade was going to be held. He has pleaded that he had no connection to the crime committed.

It is clear from the judgment that the learned High Court Judge has considered his stand together with the evidence of the witnesses called on his behalf in order to find out if the defence has created a reasonable doubt against the evidence of the prosecution witnesses, or it has created a reasonable explanation in that regard.

It is trite law that in a criminal case, an accused person has no burden of proof and it is the duty of the prosecution to prove the charge or charges against the accused beyond reasonable doubt.

It was observed in SC Appeal No. 99/2007 decided on 30.07.2009

> *"What needs consideration now is when the evidence led for the prosecution in this case is closely scrutinized, whether it could be satisfied that prosecution had discharged the burden of proving the case beyond reasonable doubt. If not, the Appellant is liable to be acquitted of the charges. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence, and when the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right and not as matter of grace or favour."*

E.R.S.R. Coomaraswamy in his book, ***Law of Evidence,*** **Volume1 at page 21** has observed in this regard as follows:

"*The recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances, though the failure that is commented on is the failure of the accused to offer evidence and not to give evidence himself. A party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. Whether prima facie evidence will be converted into presumptive evidence by the absence of an explanation depends on the strength of the evidence and the operation of such rules as that requiring a specially high standard of proof on a criminal charge*."

It is also well-settled law that once the prosecution establishes a strong *prima facie* case against an accused person, there is a duty cast upon the accused to explain the evidence against him.

In the case of **Sumanasena Vs. The Attorney General (1999) 3 SLR 137,** It was held:

"When the prosecution establishes a strong and incriminating cogent evidence against the accused, in those circumstances, it was required in law to offer an explanation of the highly incriminating circumstances established against him."

It is often stated that Lord Ellenborough has held in the case of **Rex Vs. Lord Cochrane and others (1814) Gurneys Reports 479,**

"No person accused of crime is not bound to offer any explanation of his conduct or of circumstances of suspicion which attached to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out and when it is in his own power to offer evidence if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion he refrains from doing so only from

the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

Abott J. in Rex Vs. Burdett (1820) B & Ald 161 at 162 observed that:

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation to contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to it the prima facie case tends to be true and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

Although the appellant has attempted to show that he was elsewhere during the time relevant to this offence, the learned High Court Judge has correctly evaluated his claim and has determined that it does not create a doubt as to the evidence of the prosecution. The two witnesses called by the appellant for his defence has also not created a reasonable doubt or has provided a reasonable explanation as to the charges against the appellant.

Evidently, Ramani Ishwarage, who has been called by the appellant as one of his witnesses, has clearly attempted to distance herself from the incident for obvious reasons.

Apart from above, other than claiming that he was elsewhere on the day of the crime, the appellant has failed to provide a reasonable reason as to why his own relative PW-37 has given evidence about him handing over the mobile phone belonging to Dr. Nalinda Jayatissa, which was lost at the time of the incident, to him as well as the appellant handing over the gun later recovered by the police. It has been clearly established by the expert evidence of the Government Analyst that it was the gun, which was used in the crime.

It is abundantly clear when considering the evidence as a whole that the prosecution has proved its case beyond reasonable doubt against the appellant.

I am of the view that the learned High Court Judge has convicted the appellant for the counts preferred against him after having considered the evidence placed before him and analyzing the same as he should have with the relevant legal principles in mind.

Hence, I find no reason to interfere with the judgment of the learned High Court Judge.

Accordingly, the appeal against the conviction is dismissed for want of merit.

However, it is quite apparent from the indictment that the nine counts preferred against the appellant had been based on one and the same incident.

Count No. 1 to 5 had been on the premise that the appellant was a member of an unlawful assembly and that he committed the mentioned offences while being a member of the said assembly in order to fulfill its common object.

Count No. 6 to 9 has been formulated in terms of section 32 of the Penal Code on the basis that the appellant acted in fulfilling a common intention.

The only difference between counts 1 to 5 and counts 6 to 9 would be that, to establish counts 1 to 5, the prosecution has to prove that there were 5 or more persons involved in the crime with a common object, whereas in order to prove the charges in terms of counts 6 to 9, there was no necessity to prove the number of persons involved in the crime, but only that there were two or more persons with a common intention.

Although I find nothing wrong in convicting the appellant on both sets of counts based on the common object and also on the common intention, I find that sentencing the appellant for all the counts was a misdirection.

I find that when it comes to sentencing, the learned High Court Judge should have considered 6th to 9th counts as alternative counts to that of 1st to 5th counts. If otherwise, it would have the effect of sentencing a person twice for the same offence he has committed, which is not permitted under the law.

Accordingly, I set aside the sentence imposed upon the appellant in relation to the 6th, 7th, 8th and the 9th count as it cannot be allowed to stand.

The sentence imposed upon the 1st, 2nd, 3rd, 4th, and the 5th count affirmed.

With the variance to the sentence as stated above, the appeal against the sentence is also dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal