

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(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

CA/HCC/0249-250/2023

High Court of Gampaha Case No:

HC/283/2004

Vs

1. Ethige Danisas Silva
2. Ethige Chandana Silva
3. Ethige Ravisan Nulantha Silva *alias*
Ethige Radisan Silva
4. Ethige Jackson Silva
5. Mahamesthri Priyantha Ajith Jayaratne

Accused

AND NOW BETWEEN

1. Ethige Ravisan Nulantha Silva *alias*
Ethige Radisan Silva
2. Mahamesthri Priyantha Ajith Jayaratne

Accused – Appellants

Vs

Hon. Attorney General,
Attorney General's Department,

Colombo 12.

Complainant - Respondent

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

Counsel : Rienzie Arsecularatne, PC, with Chamindri Arsecularatne for the 1st
Accused – Appellant.

: Neranjan Jayasinghe with Randunu Heellage and Pravindika
Kularathna for the 2nd Accused-Appellant.

: Shanil Kularatne, ASG for the Respondent.

Argued on : 10.03.2026 and 31.03.2026

Decided on : 31.08.2026

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellants (hereinafter referred to as “the Appellants”) have preferred the present appeal against the conviction and sentence dated 27.09.2023 entered by the Learned High Court Judge of Gampaha.
2. The Appellants were indicted on the following counts;
 - a. On or about 08.05.2002, being members of an unlawful assembly at Ragama with the common object of causing injuries to one Morris Paul Fernando and thereby committing an offence punishable under Section 140 of the Penal Code;

- b. At the aforesaid time, place, and during the course of the same transaction, committing the murder of the said Morris Paul Fernando and thereby committing an offence punishable under Section 146 read with Section 296 of the Penal Code;
 - c. At the aforesaid time, place, and during the course of the same transaction, committing the murder of the said Morris Paul Fernando and thereby committing an offence punishable under Section 32 read with Section 296 of the Penal Code.
- 3. Initially, there were five accused. However, prior to the commencement of the trial, the 1st and 4th accused were reported dead. During the course of the trial, on 20.07.2021, the 2nd accused was also reported dead. Accordingly, the charges in the indictment were amended, and the trial proceeded only against the 3rd and 5th accused, who are the 3rd and 5th Appellants, respectively, in the present appeal.
- 4. The trial before the High Court was heard by the Judge of the High Court without a jury. At the conclusion of the trial, the Learned High Court Judge found both the Appellants guilty of Counts 1 and 2 and convicted them accordingly.
- 5. Accordingly, for the first count, the Appellants were sentenced to six months' rigorous imprisonment, and for the second count, they were sentenced to death. Being aggrieved by the said convictions and sentences, the Appellants have preferred the instant appeal.
- 6. The following are the grounds advanced by the 3rd Appellant;
 - a. The High Court Judge failed to consider that the identity of the 3rd Accused was not established beyond a reasonable doubt;
 - b. The High Court Judge misdirected facts when he held that PW2 described the 3rd Appellant by name and therefore erred in holding that they were known to the prosecution;
 - c. The High Court Judge misdirected in fact by disregarding the contradiction V8.
- 7. The following are the grounds advanced by the 5th Appellant;

- a. The evidence of the prosecution witnesses fails the test of credibility;
 - b. The Learned High Court Judge has failed to take into consideration that the prosecution had failed to prove the charges under unlawful assembly; and
 - c. The Learned High Court Judge had rejected the defence evidence on unreasonable grounds.
8. According to PW1, the deceased was engaged in the brokerage business, and all five accused were close friends of the deceased who regularly participated in a *seettu* arrangement together. PW1 further testified that disputes had arisen between the deceased and the accused over delays in the payment of money relating to the said *seettu*. As a result of those disputes, the 1st, 2nd, and 4th accused had threatened the deceased approximately one to two weeks prior to the alleged incident. PW1 also testified that similar threats had been directed at her during the same period.
9. According to the evidence of PW1, on the day of the incident, the deceased left for Colombo at about 10.00 a.m. together with PW1's brother. He returned at about 5.30–6.00 p.m. on a motorcycle and thereafter called out to PW2, the daughter of the deceased, while standing within the premises of PW1's sister's residence. In response to the deceased's call, both PW1 and PW2 proceeded to the place where he was standing. PW1 testified that the deceased informed them that the 1st, 2nd, 4th, and 5th accused had arrived in a three-wheeler, blocked his path, and attempted to kill him.
10. PW1 further testified that she, together with the deceased, PW2, and her brother, proceeded towards her residence. At that time, while she was standing within the premises of her sister's residence with PW2 and PW3, she observed the 1st, 3rd, 4th, and 5th accused arriving in a butter-coloured three-wheeler and entering the compound. She further testified that, at that time, the deceased was alone and was not accompanied by any other person.
11. Evidently, prior to the incident, the 1st, 2nd, and 4th accused had gone to the deceased's house and threatened him with death. Accordingly, PW1 had sufficient opportunity to observe and identify those accused.

12. It was contended on behalf of the 3rd Accused-Appellant that his identity had not been established beyond reasonable doubt. It was further contended that there were material discrepancies between the evidence of PW1 and PW2. In particular, PW1 testified that PW2 was with her at the time the deceased was being attacked, whereas PW2 stated that she was with the deceased at the time of the attack.
13. Furthermore, it was contended that the precise location where the deceased was attacked, as described by PW1, PW2, and PW3, was not the same location referred to by PW8. It was also contended that the Learned Trial Judge misdirected himself on the facts by disregarding the contradiction marked V8.
14. I shall first consider whether the identity of the 3rd Accused-Appellant was established beyond reasonable doubt. In her evidence, PW1 stated that, although she had seen the 3rd Accused-Appellant at the time of the incident, she did not know his name at that time. She subsequently came to know that his name was Dulantha.
15. PW1's evidence was that she had seen all the accused prior to the incident, as they were friends of the deceased. It is significant to note that the 3rd Accused was not a complete stranger to PW1, and this was not the first occasion on which she had seen the 3rd Accused-Appellant. PW3 also firmly stated that she saw the 3rd Accused-Appellant at the scene of the incident, thereby confirming his presence. She subsequently came to know his name. In these circumstances, I see no reason to entertain any doubt regarding the identification of the 3rd Accused-Appellant by PW1. It is also noteworthy that, at no stage of the trial, did the 3rd Appellant dispute his identification by PW1.
16. It was also contended that the Learned Trial Judge had misdirected himself on the facts by disregarding the contradictions in the evidence. Evidently, the killing of the deceased was carried out with the participation of several accused, all of whom were armed with sharp-edged weapons at the time of the incident.
17. According to the evidence, the entire incident unfolded within a few minutes, and the perpetrators fled the scene shortly after attacking the deceased. Hence, a witness to such an incident cannot reasonably be expected to recount each and every detail with mathematical precision, as though the incident were being replayed from a video

recording. It is inevitable that such testimony may contain some discrepancies, inconsistencies, and infirmities.

18. What is important is to analyze and evaluate those infirmities and determine whether they substantially undermine the credibility of the evidence so as to render the conviction unsafe. If they do not, such discrepancies should not be accorded undue significance. Similarly, in my view, whether a particular accused struck the deceased once or several times, or whether the weapon used was a knife or a sword, does not constitute a material contradiction warranting undue significance.
19. It was contended on behalf of the 3rd Appellant that a 15-inch knife bearing bloodstains had been taken into police custody, but PW1 had failed to identify the said weapon at the trial. It was further contended that, although the Learned Trial Judge had observed in the judgment that this failure was not significant, such failure nevertheless undermined the credibility of PW1's testimony.
20. The alleged incident occurred in May 2002, whereas the weapon was shown to PW1 in October 2010, approximately eight years after the incident. In these circumstances, having regard to the considerable lapse of time, it is not unusual for a witness to be unable to identify the weapon used during the incident. Therefore, in my view, it would be unreasonable to conclude that PW1's failure to identify the weapon, by itself, undermines the credibility of her testimony.
21. On behalf of the 3rd Accused-Appellant, it was contended that the Learned Trial Judge had misdirected himself on the facts by disregarding the contradiction marked V8 in the evidence of PW2. The said contradiction relates to PW2's observation as to whether she had failed to identify the persons travelling in the three-wheeler, other than the 4th accused.
22. A careful examination of the manner in which the contradiction was marked reveals that, during cross-examination, it was not clearly put to PW2 at what stage she had allegedly made a statement inconsistent with her testimony before Court. In other words, the witness was not specifically confronted with the precise portion of her previous statement that was said to contradict her evidence at the trial. In such

circumstances, the evidentiary value of the alleged contradiction is necessarily diminished, as the witness was not afforded a fair opportunity to explain the supposed inconsistency.

23. In this regard, PW2 was questioned as follows:

“ප්‍ර: මේ සාක්ෂි සටහන් වල තියෙන්නේ "ත්‍රිවිල් එකේ ජැක්සන් හිටිය තව අය හිටියා ඒ අය මම හඳුනා ගත්තේ නෑ" කියලා තියෙන්නේ. එතොකොට එක වැරදියි නේ?”

උ: එක වැරදියි.

"ජැක්සන් හිටියා තව අය හිටියා ඒ අය මම හඳුනාගත්තේ නැහැ" යන කොටස වී.8 ලෙස ලකුණු කිරීමට අවසර ඉල්ලා සිටිනවා.” (at vide page 204 of the Appeal Brief)

24. Regrettably, the proper procedure was not followed by the defence when marking the alleged contradictions during the trial before the High Court. It is also significant to note that none of those contradictions was properly proved by the defence at the close of the prosecution case. Accordingly, the contradictions so marked have little, if any, bearing on the credibility of the witness.

25. It was also contended that PW2 had not seen the three-wheeler in which the accused had allegedly arrived at the scene, despite having stated in her statement to the police that she had seen the said three-wheeler. A careful examination of the evidence of PW2 reveals that she had not actually seen the accused arriving in the three-wheeler. Rather, she had heard the sound of a three-wheeler and thereafter seen the accused at the scene, leading her to infer that they had arrived in the said vehicle. Nevertheless, she clearly testified that she saw the accused fleeing from the scene in the three-wheeler after attacking the deceased. Hence, although there are some inconsistencies in the evidence of PW2 in this regard, they do not render her evidence unsafe to act upon, particularly as she has sufficiently explained the circumstances in which she came to state that the accused had arrived in the three-wheeler.

26. In the case of *Mohamed Niyas Nauffer and others vs. Attorney General* (SC. 01/2006 decided on 08/12/2006), the Court observed that;

“When faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.”

27. In ***State of Rajasthan vs. Smt. Kalki & Anr.***, AIR 1981 SC 1390, while dealing with this issue, the Supreme Court observed as under:

"In the depositions of witnesses, there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."

28. *“It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety. “Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions.”* As held by the Supreme Court of India in ***Bhajan Singh alias Harbhajan Singh & Ors. v. State of Haryana***, 2011 (7) SCC 421.

29. In the present case, it has been proved beyond reasonable doubt that the deceased died as a result of injuries caused by sharp-cutting weapons. The testimony of the Judicial Medical Officer in this regard remains intact and inspires confidence. The evidence of PW1 and PW3 is convincing and can safely be acted upon, notwithstanding the presence of some minor inconsistencies which do not go to the root of the case. There were also some uncertainties in the testimonies of PW1, PW2, and PW3 regarding the respective locations of these witnesses at the time of the incident.

30. Thus, it was contended on behalf of the Appellants that these inconsistencies undermine the credibility of PW1, PW2, and PW3. However, having regard to the brutality of the attack and the manner in which it unfolded, it cannot reasonably be expected that PW1, PW2, and PW3 would have remained in the same place throughout the incident as though they were passive spectators. The circumstances may naturally have compelled

them to move from one place to another, particularly while the deceased was being attacked with sharp-edged weapons. Accordingly, the inconsistencies in their respective accounts regarding their locations at different stages of the incident do not, in my view, provide any sufficient basis to undermine their credibility.

31. Nevertheless, when their evidence is considered in its entirety, it establishes beyond reasonable doubt that all three witnesses were in the vicinity of the incident and were in a position to witness what had occurred.
32. Furthermore, having regard to the grave nature of the injuries sustained by the deceased, as described by the Judicial Medical Officer, it is not difficult to appreciate the brutality of the attack. In such circumstances, it would be unreasonable to expect a witness to remember and recount every detail of the incident to the police or before Court in a strict chronological sequence.
33. Therefore, the Learned Trial Judge has adequately analyzed and evaluated the prosecution evidence, particularly the inconsistencies and contradictions arising therein, and has given sufficient reasons for concluding that such infirmities do not render the prosecution evidence unworthy of credit. Hence, there is no basis to interfere with the learned Trial Judge's assessment of the prosecution evidence.
34. The evidence of the police witnesses, together with their observations at the scene, establishes that the scene of the crime was visible from the location where PW1, PW2, and PW3 were present.
35. It was also submitted that, according to the observations made by IP Devasurendra, a patch of blood approximately two feet in diameter was found about ten feet away from the electric post along the five-foot-wide road leading to the residence of the deceased. It was therefore contended that this observation contradicts the evidence of PW1, PW2, and PW3 regarding the place where the deceased was attacked.
36. It can be observed that, in his evidence, PW8 did not produce or refer to any sketch of the scene of the crime. He merely stated that a patch of blood was observed approximately ten meters from the electric post. A careful examination of the evidence

of PW8 does not positively establish that the incident occurred outside the compound of the deceased's residence. Therefore, there is no clear contradiction between the evidence of PW8 and that of the eyewitnesses, namely PW1, PW2, and PW3, as contended on behalf of the 3rd Appellant.

“ප්‍ර: එහි අපරාධ ස්ථානයේ කරපු නිරීක්ෂණයන් අධිකරණයට පැහැදිලි කිරීමක් කරන්න?
උ: ස්වාමිනි මෙම ගානේපාරෙන් පෙන්ව්ව් විල්සන්ගේ පාරට හැරෙන තැන සිට මීටර් 30 ක් පමණ දුරින් තමයි මරණකරුගේ නිවාස පිහිටලා තියෙන්නේ. මෙම සිද්ධිය එම ලයිට් කනුව අසල හැරෙන තැන ඉඳල මීටර් 10 පමණ දුරින් තමයි සිද්ධිය වෙලා තියිනේ ඒ බවට අඩි දෙකක පමණ ඒ වැලි සහිත පොලොව ලේ වලින් තෙත් වෙලා තිබුණා.” (at vide page 322 of the Appeal Brief)

37. Furthermore, at no stage of the trial did the Appellants suggest to any of the eyewitnesses that the incident had occurred at a location different from that described in their evidence. In these circumstances, I see no basis to entertain any doubt regarding the evidence of PW1, PW2, and PW3 as to the place of the incident. Nor do I find any material contradiction or inconsistency between the evidence of PW8 and that of the other eyewitnesses regarding the location where the incident occurred.

38. On behalf of the 5th Appellant, it was contended that the evidence of the prosecution witnesses fails to satisfy the test of credibility, that the prosecution has failed to prove the charges relating to unlawful assembly beyond reasonable doubt, and that the Learned High Court Judge rejected the defence evidence on unreasonable grounds.

39. Since I have already considered the credibility of PW1, PW2, and PW3, I shall now proceed to consider whether the prosecution has established, beyond reasonable doubt, the existence and constitution of an unlawful assembly.

40. The offence of unlawful assembly as described in Section 138 of the Penal Code reads as follows:

An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly

Firstly-To overawe by criminal force, or show of criminal force, the State or Parliament or any public officer in the exercise of the lawful power of such public officer; or

Secondly-To resist the execution of any law or of any legal process; or

Thirdly-To commit any mischief or criminal trespass or other offence; or

Fourthly—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person or the public of the enjoyment of a right of way or of the use of water or other incorporeal right of which such person or public is in possession or enjoyment, or to enforce any right or supposed right; or

Fifthly—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do; or

Sixthly—that the persons assembled, or any of them, may train or drill themselves, or be trained or drilled to the use of arms, or practicing military movements or evolutions, without the consent of the President.

41. Section 139 of the Penal Code which refers to being a member of an unlawful assembly reads as follows:

Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

42. In the case of In **Kulathunga Vs. Mudalihami** 42 NLR 331 the applicability of this section has been well considered as follows:

“That the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concerned it had to prove that he was a member of the assembly which he intentionally joined and he knew the common object of the assembly.”

43. The offence of unlawful assembly imputes vicarious liability to each member of the assembly for acts committed by any other member in furtherance of the common object of the assembly.
44. In terms of the section, for vicarious liability to be imputed on the member of an unlawful assembly, the prosecution must prove either:
- a) That the offence was committed in prosecution of the common objective of the unlawful assembly; or
 - b) That the members of the unlawful assembly knew the offence was likely to be committed in prosecution of the common object (Vide *Andrayes v. The Queen* 67 NLR 425).
45. Dr Gour, in his book Penal Law of India, has discussed the principles applicable in relation to the offence of unlawful assembly in the following terms (Vol II page 1296 – 11th edition)
- “All persons who convened or who take part in the proceeds in an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or by curiosity alone without taking any part in the proceedings are not guilty of the offence even though those persons possess the power of stopping the assembly and failed to exercise it. Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown he has done something or he has omitted to do something, which would make him a member of an unlawful assembly or unless the case fails.”*
46. In the present case, the evidence of the prosecution clearly establishes the presence of five persons who participated in the assault on the deceased. PW3 positively identified all five persons and stated that each of them actively participated in the assault. This evidence demonstrates that they were not mere bystanders but had actively participated in the attack in furtherance of the common object of causing injuries to the deceased, which ultimately resulted in his death.
47. Therefore, the evidence adduced by the prosecution has sufficiently and satisfactorily established the presence of all five accused and their participation in the commission of

the offence, thereby satisfying the requirements necessary to constitute an unlawful assembly.

48. It was also contended that, at page 391 of the judgment, the Learned Trial Judge had reversed the burden of proof by observing that, had the deceased not been killed by the accused, there would have been no reason for the witnesses to give evidence against them. The Appellants contended that this observation amounted to placing the burden of proof on the defence and was therefore fatal to the convictions.

49. It is true that the wording employed by the Learned Trial Judge was not the most appropriate manner in which to address the credibility of the prosecution evidence. Nevertheless, when the prosecution evidence is considered in its entirety, the Learned Trial Judge could not reasonably have arrived at any conclusion other than the guilt of the Appellants. Therefore, although the Learned Trial Judge made the aforesaid observation in the judgment, it did not cause any substantial prejudice to the Appellants or occasion a miscarriage of justice, having regard to the strength of the prosecution evidence.

50. It is also significant to emphasize that minor errors or irregularities in a judgment do not necessarily render it liable to be set aside. The Code of Criminal Procedure Act and the Constitution provide mechanisms for rectifying such errors, omissions, or irregularities, so long as they do not prejudice the substantial rights of the parties.

51. Section 436 of the Code of Criminal Procedure Act No. 15 of 1979, states as follows:

*“Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account- (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or (b) of the want of any sanction required by section 135, **Unless such error, omission, irregularity, or want has occasioned a failure of justice.**” [Emphasis added]*

52. Article 138 of the Constitution of the Democratic Republic of Sri Lanka states:

“The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance: Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice”. [Emphasis added]

53. In this stage, it is desirable to emphasize that the appellate courts are slow to interfere with the findings of a trial judge unless it is demonstrated that the trial judge has manifestly misdirected himself/herself on a material issue, thereby causing prejudice to the Appellant.

54. In *Alwis vs. Piyasena Fernando (1993) 1 Sri. L R 119*, it was held that:

"It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

55. Similar sentiments were articulated in *Dharmasiri vs. Republic of Sri Lanka [2010] 2 Sri. L.R.241*, where it was held that:

“Credibility of a witness is mainly a matter for the trial Judge, the Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the credibility of a witness unless such findings of the trial Judge are manifestly wrong.”

56. In *Ariyadasa V. Attorney General [2012] 1 Sri LR 84*, the Court of Appeal held that;

“Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the Trial Judge has taken such a decision after observing the demeanour and deportment of a witness.....”

57. Therefore, the Appellants' contention that the Learned Trial Judge erred in analyzing the evidence and determining the burden of proof is devoid of merit.
58. Furthermore, the Learned Trial Judge also considered the dock statements made by the Appellants and gave sufficient reasons as to why those statements did not create any reasonable doubt regarding the prosecution evidence. In their respective dock statements, the Appellants merely denied any knowledge of the alleged incident. It is noteworthy that, during the cross-examination of the prosecution witnesses, not a single suggestion was put to any of the witnesses that the Appellants were not present at the scene or had no knowledge of the incident. Instead, the eyewitnesses were mainly cross-examined on the basis that they had not witnessed the incident.
59. In view of the foregoing analysis of the grounds of appeal and the impugned judgment, I find no reason to interfere with the findings of the Learned Trial Judge. Accordingly, I affirm the convictions and sentences imposed by the Learned Trial Judge. Consequently, the appeals are dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal