

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

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

Complainant

Vs

Court of Appeal Case No:

CA/HCC/293-295/25

High Court of Gampaha

Case No: **238/2004**

1. Sinhadhipathy Manchanayake
Appuhamilage Shantha *alias* Kaluwa
alias Sinhadhipathy Manchanayake
Appuhamilage Sunil Shantha
2. Sinhadhipathy Manchanayake
Appuhamilage Jayaman Ranaweera
3. Samantha Premalal Wijesinghe
Gunawardhane
4. Yapa Appuhamilage Ravindra Nalaka
Priyankara
5. Yapa Appuhamilage Lakshman Anura
Nishantha
6. Agnus Seneviratne (deceased)

7. Lakshman Arachchilage Irin Hemalatha
(deceased)

8. Lakshman Arachchilage Priyanthi
Swarnalatha

9. Lakshman Arachchilage Lalith Pushpa
Kumara

10. Sinhathipathy Manchanayake
Appuhamilage Sumudu Sanjeewa

11. Hetti Thanthirilage Pushpa Kumara

12. Uda Wewala Gedara Nishantha Rohana
Wimalasiri

13. Rajapaksha Pathirannehelage
Munasinghe

14. Uda Wewala Gedara Prasanna
Wimalasiri

15. Lakshman Arachchilage Chandralal
Premasiri

16. Sinhathipathy Manchanayake
Appuhamilage Susantha *alias*
Sinhathipathy Manchanayake
Appuhamilage Susantha
Priyathilake

Accused

AND NOW BETWEEN

1. Sinhathipathy Manchanayake
Appuhamilage Shantha *alias* Kaluwa
alias Sinhathipathy Manchanayake
Appuhamilage Sunil Shantha

2. Sinhathipathy Manchanayake
Appuhamilage Jayaman Ranaweera

3. Sinhathipathy Manchanayake
Appuhamilage Susantha *alias*
Sinhathipathy Manchanayake
Appuhamilage Susantha
Priyathilake

Accused – Appellants

Vs

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

Complainant - Respondent

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

Pradeep Hettiarachchi, J.

Counsel : Sarath Jayamanne, PC, with Prashan Wickramaratne, Sanjeewa
Meegahawatta and Dinindu Rathnayake for the 1st Accused –
Appellant.

: Anil Silva, PC, with Isuru Jayawardene for the 2nd Accused-Appellant.
Saliya Pieris, PC, with Geeth Karunaratna, Manujaya de Silva, and
: Ishan Jayasundara for the 3rd Accused-Appellant.
: Sanjeewa Dissanayake, D.S.G. for the Respondent.

Argued on : 26.03.2026

Decided on : 27.05.2026

Pradeep Hettiarachchi, J

Judgment

1. In the present case, 16 accused were indicted on nine counts before the High Court of Gampaha. The trial was conducted before the Learned High Court Judge without a jury. At the conclusion of the trial, the Learned Trial Judge found the 1st, 2nd, and 16th Accused guilty on Counts 1, 2, 3, 4, and 5, and accordingly convicted and sentenced them to death. The remaining accused were acquitted of all charges.
2. Being aggrieved by the said convictions and sentences, the 1st, 2nd, and 16th Accused (hereinafter referred to as the 1st, 2nd, and 16th Appellants) have preferred the present appeal.
3. On behalf of the 1st Appellant, the following grounds of appeal were advanced.
 - a. The Learned Trial Judge has failed to properly evaluate the evidence relating to the identification of the Appellants;
 - b. The Trial Judge has failed to reconcile the charge with evidence establishing the presence of unknown persons;

- c. The Learned High Court Judge has erroneously applied the principle of divisibility of credibility;
 - d. The Learned Trial Judge has failed to assess probability and contradictions in the prosecution evidence properly;
 - e. The Learned Trial Judge has erred in law in concluding that the charges against the Appellants have been proved beyond a reasonable doubt; and the Learned Trial Judge has failed to adopt evidence conducted under his predecessor.
4. The 2nd Appellant mainly argued on two grounds, namely;
- a. Since the Learned High Court Judge convicted only three people, the murder charge, coupled with Section 140 of the Penal Code, would fail; and,
 - b. The High Court Judge did not consider the identification of the accused from the correct perspective.
5. The 16th Appellant also urged 7 grounds of appeal as follows:
- a. Whether the identification of the 16th Appellant was properly established during the trial;
 - b. Whether the Learned High Court Judge has failed to evaluate the defence of the 16th Appellant;
 - c. Whether the Learned High Court Judge has failed to evaluate the contradictions and omissions which go to the root of the matter;
 - d. Whether the findings of the Learned High Court Judge are contrary to the evidence adduced during the trial;
 - e. Whether the Learned High Court Judge has failed to evaluate the motive of the 16th Appellant for committing the alleged murder;
 - f. Whether the Learned High Court Judge had failed to comply with the fundamental principles to be followed in a trial; and,
 - g. Whether the sentence imposed by the Learned High Court Judge is erroneous.

6. Some of these grounds are interconnected and will therefore be considered together.
7. One of the pivotal issues arising for determination is whether the conviction of only three accused under Section 296 read with Section 146 of the Penal Code is sustainable in law.
8. The Appellants contended that the charges set out in the indictment do not disclose the involvement of persons unknown to the prosecution. Accordingly, it was argued that the conviction of only three accused is legally untenable, as Section 138 of the Penal Code requires the participation of five or more persons to constitute an unlawful assembly.
9. In determining this issue, it is necessary to consider the significance of Sections 138 and 146 of the Penal Code. Section 138 defines an unlawful assembly as an assembly of five or more persons having a common object as specified therein. Section 146, which deals with rioting, presupposes the existence of such an unlawful assembly.
10. It is well established that, for a conviction under these provisions, the prosecution must prove that at least five persons were acting in concert with a common object. However, it is not a legal requirement that all such persons must be identified, charged, or tried before a court. A conviction may be sustained even where fewer than five accused are before the Court, provided that the evidence establishes that the offence was committed by a group consisting of five or more persons, including unidentified participants.
11. Accordingly, the crucial question is not the number of accused arraigned before the Court, but whether the evidence adduced at trial proves the participation of at least five persons in furtherance of a common object. Where the evidence discloses the involvement of five or more persons, whether named, unnamed, or unidentified, the requirement under Section 138 is satisfied.

12. Conversely, where the prosecution evidence fails to establish the presence and participation of at least five persons, a conviction for an offence predicated upon unlawful assembly cannot be sustained.
13. In the present case, therefore, it is incumbent upon the Court to examine whether the prosecution evidence demonstrates that the offence was committed by five or more persons, including any unidentified individuals, acting with a common object. If such evidence is lacking, the conviction under Section 296 read with Section 146 cannot be maintained in law.
14. The evidence adduced at the trial amply demonstrates the involvement and participation of more than five persons at the scene. In fact, PW1, in his own testimony, stated that there were approximately 35-40 persons gathered outside the gate of the deceased's house, shouting and pelting stones.

“ප්‍ර: කොච්චර විතර පිරිසක් ඔය ස්ථානයේ සිටිනවා දැක්කද?”

උ: 35 ක් 40 ක් වගේ ඉන්න ඇති.” (vide page 420 of the Appeal Brief)

15. The police officer, PW15, Thusitha Jayakodi (Chief Inspector of Police), who visited the scene, also confirmed the presence of more than five persons and stated that, upon the arrival of the police party, the crowd began hooting and subsequently dispersed, rendering it impossible to effect arrests.

“ප්‍ර: ඔබ මෙම පරිශ්‍රයට ඇතුළුවෙන්න කලින් භාහිරින් බලන කොට මොනවද පෙනෙන්න තිබුණේ?”

උ: මෙදීන සාමාන්‍ය අඩ අදුර සහිත වැසි බර කාලගුණයක් තිබූ දවසකි. මම ජීප් රථයෙන් මෙම අතුරුමර්ගයේ මෙම නිවාස දෙසට ගමන් කරමින් සිටියදී ජීප් රථයේ ආලෝකයෙන් දුටුවා විශාල පිරිසක් මෙම නිවාස අවට සහ වටපිටාවේ එක් රැස් වී ගල්, මුල්, පොලු සහ පිහිකැනි සහිතව කෑ කෝ ගසමින් සිටින ආකාරයක් දුටුවා.” (vide page 721 of the Appeal Brief)

16. The testimonies of PW1 and PW15 likewise confirm the participation of more than five persons, and this aspect of their evidence remained unchallenged.
17. In these circumstances, the fact that only three accused were ultimately convicted, while the remaining accused were acquitted, does not, in my view, constitute an error of law. The evidence clearly establishes, beyond a reasonable doubt, that more than five persons were involved in the incident, thereby satisfying the essential elements of an unlawful assembly.
18. More importantly, the prosecution's evidence established unarguably that the crowd gathered at the scene used to shout and pelt stones, damaging the deceased's property. Thus, it establishes beyond a reasonable doubt that they were acting in furtherance of the common object of committing the offences stipulated in the indictment, which further evidences that the necessary components of an unlawful assembly were present. Therefore, the Trial Judge's conclusion that the 1st, 2nd, and 16th Appellants were present together with other unidentified members of the said unlawful assembly and had committed the offences stipulated in the indictment is legally sustainable. Accordingly, the conviction under the relevant provisions is legally sustainable.
19. For the foregoing reasons, I find no merit in the contention advanced by the Appellants that the conviction is vitiated by the fact that only three accused were convicted under Section 296 read with Section 146 of the Penal Code. The evidence clearly establishes the existence of an unlawful assembly consisting of more than five persons acting with a common object, and the conviction of the Appellants is therefore legally sound. Accordingly, this ground of appeal is dismissed.
20. I shall now proceed to consider the remaining grounds of appeal advanced by the Appellants. Since all the Appellants have extensively addressed the issue of identification, I shall now consider whether the evidence relating to the identification of the Appellants by the prosecution witnesses is credible and reliable.

21. It is well settled that identification evidence must be approached with caution, particularly where the conviction of an accused depends wholly or substantially on such evidence. The Court must carefully examine the circumstances under which the identification was made and assess whether it is free from the possibility of error.
22. In evaluating identification evidence, several factors assume importance, including the opportunity the witness had to observe the assailant at the time of the incident, the duration of such observation, the lighting conditions, the distance between the witness and the assailant, and whether there existed any prior acquaintance between them. The conduct of the witness immediately after the incident and the promptness with which the identification was made are also relevant considerations.
23. It is also incumbent upon the Court to consider whether there are any material discrepancies or inconsistencies in the identification evidence which may cast doubt on its reliability. However, minor discrepancies that do not go to the root of the prosecution's case would not, by themselves, render such evidence untrustworthy.
24. Applying these principles to the facts of the present case, the Court must assess whether the identification of the Appellants by the prosecution witnesses is sufficiently reliable to be acted upon, and whether such evidence, when considered together with the other material placed before the Court, establishes the guilt of the Appellants beyond a reasonable doubt.
25. In the present case, PW3 was the sole eyewitness who claimed to have identified the Appellants. In view of the fact that all the Appellants have challenged the identification made by PW3, it becomes necessary to closely examine whether the evidence of PW3 relating to such identification is sufficiently reliable to be acted upon.
26. In assessing the reliability of PW3's identification, it is necessary to examine the circumstances under which the Appellants were observed at the time of the incident. Particular attention must be paid to the opportunity PW3 had to observe the

assailants, the duration of the encounter, the lighting conditions, the distance from which the observation was made, and whether PW3 had any prior familiarity with the Appellants. The conduct of PW3 immediately after the incident, including whether a prompt description of the assailants was given to the authorities, is also of considerable relevance.

27. Accordingly, the probative value of PW3's testimony must be determined in light of these factors, bearing in mind that the ultimate question is whether such identification is sufficiently reliable to establish the guilt of the Appellants beyond a reasonable doubt.
28. The Appellants contended that, due to the poor lighting conditions, and in particular the contradictory nature of PW3's evidence regarding the availability of light at the time he allegedly identified the Appellants, such identification is unreliable and doubtful. Accordingly, it is submitted that it would be unsafe to base a conviction solely on the evidence of PW3. It was further contended that, in view of the infirmities discernible in the testimony of PW3, it would be unsafe to allow the conviction to stand.
29. The following authorities provide valuable guidance in assessing the reliability and credibility of identification evidence under varying lighting conditions.
30. In the *R vs. Turnbull (1977) 1977 QB 224*, the Court of Appeal laid down important guidelines for judges in trials where identification evidence was disputed. Warning that has to be given to juries in identification cases:

"a) Amount of time the suspect was under observation by the witness

b) Distance between suspect and witness

c) Visibility at the time the witness saw the suspect

d) Obstructions between suspect and witness

e) Knows suspect or has seen him/her before

- f) Any particular reason for the witness to remember him suspect*
- g) Time lapse since witness saw suspect*
- h) Error or material discrepancy in the description given by witness.”*

31. In ***Pruthviraj Jayantibhai Vanol vs. Dinesh Dayabhai Vala_Criminal Appeal No. 177 of 2014*** it was held:

“There is evidence about the availability of light near the place of occurrence. Even otherwise, that there may not have been any source of light is hardly considered relevant in view of the fact that the parties were known to each other from earlier. The criminal jurisprudence developed in this country recognizes that the eye sight capacity of those who live in rural areas is far better than compared to the town folks. Identification at night between known persons is acknowledged to be possible by voice, silhouette, shadow and gait also. Therefore, we do not find much substance in the submission of the respondents that identification was not possible in the night to give them the benefit of the doubt.”

32. ***M. G. Eshwarappa vs. State of Karnataka_AIR 2017 Supreme Court 1197***

“As to the source of light it is argued that it is not clear as to how PW-1 Rajeshwari recognized the accused. Had the accused been unknown persons, we would have accepted this argument. But the accused were close relatives living in the house of the witness, as such, it cannot be said that it was difficult at all for her to recognize them when they assaulted her brother at 7.30 p.m. on the way back from Honnali to Marigondanahalli.”

33. It is to be noted that PW3 testified before the High Court, 22 years after the alleged incident. In such circumstances, the presence of certain inconsistencies or contradictions in his testimony is inevitable. Accordingly, the credibility and reliability of PW3’s evidence must be assessed within that context. So long as such infirmities do not go to the root of the matter, the testimony of PW3 may be safely relied upon.

34. Nevertheless, if such inconsistencies go to the root of the matter and render the testimony unreliable and untrustworthy, thereby casting doubt on the prosecution's case, the benefit of that doubt must be extended to the Appellants.
35. According to the evidence of PW3, on the day of the incident, he and several of his friends had a scuffle with a group of individuals while returning from a tuition class, arising out of a dispute relating to a love affair involving PW3's cousin, who resided with them.
36. Upon returning home, PW3 and his friends were discussing the incident with his mother and two of his uncles, who were present at the time. A short while later, PW3 heard someone shouting from the direction of the gate. Thereupon, PW3, together with the deceased, proceeded towards the gate to ascertain the cause of the commotion.
37. Near the gate, PW3 observed the 1st Appellant together with his two brothers and their mother. The 1st Appellant was known to PW3 for a period of eight to ten years, as he resided in close proximity. PW3 also identified the 2nd and 16th Appellants as brothers of the 1st Appellant.
38. The deceased suggested that the dispute be resolved amicably. However, when stones were hurled at them, PW3 and the deceased retreated back into the house. At that point, the Appellants, along with others who had gathered, broke open the gate and entered the premises, some of them being armed with clubs and knives. They proceeded to damage the windows and set fire to a three-wheeler parked within the compound.
39. PW3, together with his uncle and the deceased, attempted to extinguish the fire by throwing water; however, the mob set it ablaze once again.

40. At that moment, PW3 observed the 16th Appellant struck the deceased with a weapon resembling a sword, and the 1st Appellant also assaulted the deceased, causing an injury to her neck. Thereafter, the deceased was taken inside the bedroom by PW3's uncle and Jinendra, a friend of PW3.

“ප්‍ර: අම්මට කඩුවෙන් කෙටුවේ කවුද?

උ: ශාන්තගේ අයියා.

ප්‍ර: ශාන්තගේ අයියලා දෙන්නෙක් සිටියා කිව්වා නේද?

උ: ඔව්.

ප්‍ර: කවුද කෙටුවේ?

උ: 02 වෙනි විත්තිකරු නෙවෙයි. 16 වෙනි විත්තිකරු බව කියා සිටි.

(16 විත්තිකරු පෙන්නෙයි)

ප්‍ර: ඒ වෙලාවේ ශාන්ත ලග මුකුත් තිබුනද?

උ: පොල්ලක් හෝ පිහියක් තිබුණා. මොකක්හර් අතේ තිබුණා. නිශ්චිතව දන්නේ නැහැ. මොකක් හර් අතේ තිබුණා.

ප්‍ර: ශාන්ත ඒ වෙලාවේ අම්මට මුකුත් කලද?

උ: එයා බලාගෙන හිටියා. මොකකින් හර් ගහනවා දැක්ක. මට හරියට කියන්න බැහැ.

ප්‍ර: ශාන්ත අම්මගේ කොහොටද ගැනුවේ?

උ: බෙල්ල පැන්නට ගැනුවා.” (vide page 511 of the Appeal Brief)

41. The mob continued to pelt stones, and approximately 20 minutes later, the police arrived at the scene, upon which the crowd fled. The deceased was thereafter taken to the hospital by the police.

42. In evaluating the reliability of PW3's identification, it is significant that the 1st Appellant was well known to PW3 for a considerable period of eight to ten years, as they resided in close proximity. This prior familiarity substantially reduces the likelihood of mistaken identity. PW3 has also identified the 2nd and 16th Appellants

as brothers of the 1st Appellant, indicating that his identification was not that of strangers observed fleetingly, but of persons known within the neighborhood.

43. Further, PW3 identified the 16th Appellant, who owns a bakery from which they purchased bakery items, and stated that there had been no dispute between the Appellants and themselves.

“ප්‍ර: මේ 16 වැනි විත්තිකරු තමන් දන්නවද?

උ: දන්නවා.

ප්‍ර: 16 වැනි විත්තිකරු මොනවද ඔහු ඒ කාලේ කලේ?

උ: බේකරියක් කලා.

ප්‍ර: බේකරියේ කෑම හදලා වික්කද? බේකරියක වැඩ කලාද?

උ: බේකරියේ කට්ටියට බේකරිය තිබුණා මෙයාල පාන් ගෙනාවම පානුන් ගන්නවා.” (vide page 551 of the Appeal Brief)

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“ප්‍ර: අමනාපයක් තිබුණේ නැහැ නේද?

උ: නැහැ අමනාපයක් තිබුණේ නැහැ.” (vide page 552 of the Appeal Brief)

44. Further, the incident did not occur in a sudden or momentary manner. The sequence of events, from the initial confrontation at the gate, the pelting of stones, the forced entry into the premises, and the subsequent acts of violence, extended over a period of time, thereby affording PW3 a sufficient opportunity to observe the assailants. The proximity at which the events unfolded, particularly at the gate and within the premises, would have enabled clear observation.

45. I have considered this contention from all its perspectives. Even assuming that the lighting conditions at the time were not ideal, the surrounding circumstances must be carefully evaluated. The close proximity at which PW3 encountered the Appellants at the gate and within the premises, the duration over which the incident unfolded, from the initial confrontation to the subsequent acts of violence, and the

likelihood of at least some degree of ambient light are all relevant factors in determining whether there was sufficient visibility for accurate identification.

46. More importantly, the Appellants were not strangers to PW3. The 1st Appellant had been known to PW3 for several years, and the 2nd and 16th Appellants were identified as his brothers. Thus, the identification was based not on a fleeting glance at unknown persons, but on the recognition of individuals well known to the witness.

47. In these circumstances, I am unable to accept that the conditions were such as to render identification unreliable, or that there existed a real possibility of mistaken identity.

48. Although PW3, in his testimony, stated that he saw the Appellants at the time of the incident, it was revealed in cross-examination that he had not mentioned seeing the 1st, 2nd, and 16th Appellants at the gate in his statement to the police. This omission was further confirmed by PW10, Samarakoon Mudiyansele Nimal Mahinda, who recorded the statement of PW3.

49. However, in his statement to the police, PW3 clearly stated that the 1st Appellant, together with his two brothers, had entered the house, and that it was the 16th Appellant who attacked the deceased with a weapon resembling a sword.

50. It is true that PW3 did not mention the names of the Appellants as being among those present at the gate. However, in the same statement, PW3 expressly identified the Appellants as the persons who entered the house and attacked the deceased.

51. In these circumstances, the omission to name the Appellants as being at the gate does not, in my view, affect the credibility of his testimony, particularly when he has clearly implicated them in the actual attack.

52. However, the issue of cardinal importance to be determined is whether PW3 was present to witness the incident and whether his testimony regarding the

identification of the Appellant is reliable, particularly in light of certain infirmities discernible in the testimony of PW1.

53. PW1 is the brother of the deceased. According to his evidence, when he arrived at the scene, a number of persons had gathered outside the deceased's house, shouting and pelting stones. When PW1 entered the house, the deceased was inside, and it was dark as there was no light due to the electricity meter having been damaged. Thereafter, the crowd broke open the gate and entered the premises while continuing to pelt stones. Subsequently, they broke open the main door and entered the house. According to PW1, the deceased suddenly leaned towards him with injuries, and he held her. However, PW1 did not see who caused the injuries and was unable to identify anyone, as it was dark.

54. It is significant to note that PW1 was not a resident of the area in which the deceased resided and, consequently, had limited familiarity with the individuals living in that locality. In such circumstances, the identification of those persons under poor lighting conditions would naturally have been difficult for PW1. In contrast, PW3 had resided in the said area for a considerable period of time and was well acquainted with the Appellants, whose residence was situated in close proximity to that of PW1. Accordingly, PW3 was in a far better position to identify the Appellants despite the prevailing poor lighting conditions.

55. For the reasons stated earlier, PW3 had sufficient opportunity to identify the assailants despite the darkness.

56. Since the Appellants placed considerable emphasis on PW3's omission to name them in his statement to the police, it is necessary to examine that statement to ascertain whether PW3, in fact, failed to mention the Appellants' names when making his statement on the following day.

57. In perusing statements of witnesses recorded by the police, the Court must be mindful of the limited extent to which such statements may properly be relied upon. In this regard, the following authorities are of assistance.

58. In *Dharmasiri vs. Republic of Sri Lanka [2010] 2 SRIL.R 241*, it was held *inter alia*:

“The Appellate Court has no authority to peruse statement of witness recorded by the Police in the course of their investigation (statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise Section 122 (3) of the Criminal Procedure Code which enables such statements to be sent for to aid a Court is applicable only to Court of Inquiry or trial.

Per Sisira de Abrew, J. “Court of Appeal has power to peruse the Information Book only when contradiction or omission was brought to the notice of the trial Court, and this power too should be exercised in order to check the correctness of the omission of contradiction marked at the trial and not to come to a conclusion with regard to his credibility upon the contents of this statement made to the Police.”

59. The extent to which such statements can be used by Trial Judges was considered by His Lordship Ninian Jayasuriya J in *Keerthi Bandara Vs. Attorney General 2002 (2) Sri. L. R. 245 at page 261*. Having considered the relevant provisions of law, Jayasuriya J laid down the following principle:

“We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his

direction on the law in this respect is binding on the members of the jury. Thus, when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point.”

60. Justice Ninian Jayasuriya, while emphasizing that the perusal of statements recorded in the Information Book, for the purpose of determining the existence or absence of omissions, is a personal duty of the Trial Judge, also held that the Court of Appeal, when hearing an appeal in such a case, has an undoubted right to undertake the same exercise. This position is reflected in the following passage from the said judgment:

“If the trial Judge has an undoubted right to do so, certainly the Judges in the Court of Appeal hearing an appeal would also have the undoubted right to peruse such statements for such limited purpose in the interest of justice and in determining whether there is an omission on a vital point or not. The Judges would in this exercise only be concerned with the issue of the credibility of the witness and they would not in that exercise be using the contents of the statement as substantive evidence to arrive at an adjudication on the main issues in the case. That is the significant distinction between the process indulged in by the High Court Judge in Sheela Sinharage's case and the issue that arises upon this appeal relating exclusively to the province of credibility.”

61. In ***Iddagodage Sarath Kumara vs. Attorney General SC Appeal No. 228/2014*** decided on 08.02.2023, P. P. Surasena J (as he then was) cited the above case with approval and observed:

“Thus, I am of the view that the contents of the above paragraphs of the Court of Appeal judgment which is impugned by the learned counsel for the 1st Accused-Appellant are paragraphs merely setting out how their Lordships of the Court of Appeal had exercised their undoubted right and the fervent duty to personally peruse the previous versions of the statements recorded at various stages of the case to interpret and determine the existence or non-existence of the omission alleged by the 1st Accused-Appellant. Their Lordships in the Court of Appeal just like the trial judges are under a duty to examine such previous statements when such complaint is made before them.”

62. On a perusal of the statement dated 18.03.1997 of PW3, it is evident that he had mentioned the names of the Appellants as the persons who entered the house and attacked his mother. Accordingly, there is no belatedness or omission on his part in naming the Appellants as those involved in the main incident.
63. Therefore, the evidence of PW3 does not, in my view, disclose any material omissions or contradictions so as to render his testimony unreliable or unworthy of credit. As noted elsewhere in this judgment, PW3 testified 22 years after the alleged incident. It cannot reasonably be expected that his testimony would be precise, entirely accurate, or free from contradictions and omissions. With the passage of time, some degree of infirmity is inevitable; accordingly, PW3’s evidence must be analyzed and evaluated in that context.
64. So long as such infirmities do not undermine the substratum of the prosecution’s case, I see no reason to disbelieve the evidence of PW3 regarding the identification of the Appellants.
65. Further, as contended by the 1st Appellant, it was argued that the Learned High Court Judge had erroneously applied the principle of divisibility of credibility by relying solely on the testimony of PW3 to sustain the convictions against the 1st, 2nd, and 16th Appellants, whilst acquitting all other accused based on the same testimony.

The following authorities are of considerable relevance in discussing and applying the principle of divisibility.

66. Citing **Gardiris Appu vs. The King**, 52 NLR 344, in **Vithanalage Anura Thushara De Mel vs. Attorney General**, SC/TAB/2A-D/2017, held;

“When false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth.”

67. In **State of Uttar Pradesh vs. M.K. Anthony**, AIR 1985 SC 48, held;

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. ... Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals...”

68. In *Samaraweera vs. Attorney General*, (1990) 1 Sri L.R.257, held;

“..... When such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true.

69. It is significant to note that the identification of the 1st, 2nd, and 16th Appellants and their active participation in the said unlawful assembly in the furtherance of its common object remained clear and consistent throughout the testimony of PW3, including his statements given to the Police and at the inquest.

70. However, the identification of other accused persons in the said unlawful assembly was not properly explained by PW3, as he was unable to identify them or did not know their names at the material time. Therefore, in light of the clear and cogent evidence pertaining to the identification and active participation of the 1st, 2nd, and 16th Appellants, the Learned Trial Judge’s decision to sustain their convictions is legally tenable, and the acquittal of the remaining accused on the basis of the same testimony of PW3 is equally legally sustainable.

“ප්‍ර: ඒ ගේට්ටුව කඩාගෙන ඇතුළට අපු අය අතරින් තමාට හදුනා ගන්න පුළුවන් වුන අය හිටියද?

උ: ඔව්

ප්‍ර: කවුද ඒ?

උ: 01, 02 විත්තිකරුවන් හිටියා. 03 වෙනි එක්කොනාගේ මුහුණ මතක නැහැ ඒ දවස්වල කොහොම තිබුනද කියල. දැන් මුහුණ වෙනස් වෙලා තියෙන්නේ. 04, 05 ලාලට මතකයි. කවුද කියන්න නම මතක නැහැ 15, 16 හිටියා, අනිත් අයගේ මුහුණවල් වෙනස් වෙලා

නියෝජ්‍ය මට හොයා ගන්න බැහැ. 06,08 හිටියා. එයාලගේ පුතාල දෙන්නන් ඇති මෙනත. මට මුහුණුවලින් කියන්න බැහැ.” (vide page 507 of the Appeal Brief)

71. In these circumstances, I am, in view of that, of the Learned Trial Judge’s conclusion to acquit the remaining accused on the basis of the weak and doubtful identification evidence against them, thereby rendering it unsafe to sustain convictions against such accused, is legally well-founded.

72. Finally, it was contended on behalf of the 16th Appellant that the Learned High Court Judge had failed to properly evaluate the defence advance by the 16th Appellant. In the course of his evidence, the 16th Appellant, for the first time, raised a defence of alibi, stating that he, together with his two brothers, namely the 1st and 2nd Appellants, and his sister, had been working late at the bakery at approximately 9.30 p.m. on the date of the alleged incident. He further stated that, while returning home in a van, they observed a large crowd gathered near the house of the deceased. According to the 16th Appellant, they merely proceeded past the location without alighting from the vehicle or making any inquiry regarding the deceased’s house.

73. However, during the cross-examination, it was revealed that the statement made by the 16th Appellant to the Police on 19.08.1998 contained no reference whatsoever to the presence of the 1st and 2nd Appellants, who were his brothers and were allegedly together with him at the time of the alleged incident.

“ප්‍ර: නමුත් පොලීසියට කොයිම හරි දවසක කිව්වද අනේ මගේ මල්ලි දෙන්නා ඔය සිද්ධිය වූ වෙලාවේදී මාත් සමග කඩේ සිටියේ කියල නමුත් පොලීසි ප්‍රකාශයේදී කිව්වා?

උ: නැහැ

ප්‍ර: නමුත් පිලිගන්නවා නෙහැ පොලීසියට කිව්වේ නැහැ කියල?

උ: එහෙමයි.” (vide pages 772-773 of the Appeal Brief)

74. It is a well-established principle of law that a defence of alibi, being a specific and preliminary defence, must be disclosed at the earliest possible stage of the proceedings. The belated introduction of such a defence further undermines its credibility.

75. Further, the 1st and 2nd Appellants, in their dock statements, stated that they had alighted from the van to ascertain what had transpired at the deceased's house and thereafter returned to their residence. These dock statements are inconsistent with the version advanced by the 16th Appellant, thereby casting serious doubt on the credibility of the evidence adduced by the 16th Appellant.

Dock Statement of the 1st Appellant

“අපි රැ 9.30 ට කඩේ වහලා ගෙදර එන විට වැන් එකේ අවේ. එතොකොට අපේ තුන්මන්හන්දියේ විශාල පිරිසක් හිටියා. ඒ කියන්නේ 100 කට වැඩිය ප්‍රමාණයක් හිටියා. අපින් පොඩ්ඩක් වෙලා එනන නතර කරන හිටියා.” (vide page 746 of the Appeal Brief)

Dock Statement of the 2nd Appellant

“එනකොට වැන් එකේ හතරමන්හන්දියේ එනකොට කට්ටිය රැස් වෙලා ගොඩක් වෙලා හිටියා, ඊට පස්සේ අපි එනන පොඩ්ඩක් වෙලා බලල අපි ගෙදර ගියා.” (vide page 746 of the Appeal Brief)

Evidence of the 16th Appellant

“ප්‍ර: එතොකොට තමන් මොකක්ද නිරීක්ෂණය කළේ ඒ ස්ථානය පහු කරනකොට ඒ වෙලාවේ?”

උ: එතැනදී අපි ඇසුවා අපිට ඊට කලින් ආරංචි වූන මෙහෙම ගමේ කෝලාහලයක් වෙලා එහෙම කියල සිද්ධියක් ආරංචි වුණා. එනන කට්ටිය ගොඩක් හිටියා වාහන යන්න බැරි ගානට. ඊට පස්සේ අපි එනන නැවතුනේ නැහැ, අපි කිව්වා අනුන්ගේ දේවල් අපට වැඩක් නැහැ අපි යන් කියල.” (vide page 756-757 of the Appeal Brief)

76. Upon consideration of the foregoing factual and legal context, I find no reason to depart from the findings of the Learned Trial Judge. In the circumstances, the convictions of the 1st, 2nd, and 16th Appellants on counts 01,02,03,04, and 05 are affirmed.

77. Accordingly, the appeal is dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal