IN THE SUPREME COURT OF THE DEMOCATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of section 451 of the Code of Criminal Procedure Act No. 15 of 1979, Act No.21 of 1988, against the judgment dated 08.09.2016 in the Trial-at-Bar bearing No. 7781/201

Supreme Court
Case No: SC/TAB/2A – D/2017

High Court
Trial-at-Bar Case No: 7781/2015

Vithanalage Anura Thushara De Mel

1st Accused - Appellant

Srinayaka Pathiranalage Chaminda Ravi Jayanath

2nd **Accused – Appellant**

Kowile Gedara Dissanayaka Mudiyanselage Sarath Bandara

3rd Accused - Appellant

Arumadura Lawrence Romelo Duminda Silva

4th Accused -Appellant

Vs.

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

Complainant-Respondent

Before	:	Priyasath Dep PC, CJ
	:	Buwaneka Aluwihare, PC, J
	:	Priyantha Jayawardena, PC, J
	:	H.N.J. Perera, J
	:	Vijith Kumara Malalgoda, PC, J
Counsel	:	Anuja Premaratne, PC with Iromie Jayarathna, Ms. Nayana Dissanayake, Ms. Naushalya Rajapaksha and Ms. Imasha Senadeera for the 1st Accused-Appellant.
		Anura Meddegoda, PC with Ravindra de Silva and Saranga Wadasinghe for the 2nd Accused-Appellant.
		Saliya Pieris, PC with Anjana Rathnasiri and Ms. Harindrini Corea for the 3rd Accused-Appellant.
		Anil Silva , PC with Shavindra Fernando, PC, Shanaka Ranasinghe, PC and Nisith Abeysuriya, for the 4th Accused-Appellant.
		Thusith Mudalige, DSG with Mrs. Nadee Suwandurugoda, SC for the Attorney General.
Argued on	:	27.11.2017, 26.03.2018, 27.03.2018, 08.05.2018, 10.05.2018, 14.05.2018, 18.05.2018, 04.06.2018, 20.06.2018, 21.06.2018, 03.07.2018, 12.07.2018,18.07.2018, 20.07.2018 and 25.07.2018.
Decided on	:	11.10.2018

The Hon. Attorney General forwarded indictment against the Accused for committing offences described in the indictment. On an application made by the Attorney General the Chief Justice ordered a trial-at-bar. The case commenced before a Trial at Bar consisting of Hon. A.L. Shiran Gunaratne (Chairman), Hon.

Mrs. Padmini N. Ranawaka and Hon. M.C.B.S Moraes. The following Accused were indicted. They are:

1. Vithanalage Anura Thushara De Mel
2. Hetti Kankanamlage Chandana Jagath Kumara
3. Srinayaka Pathiranalage Chaminda Ravi Jayanath
4. Kodippili Arachchige Lanka Rasanjana
5. Wijesuriya Aarachchige Malaka Sameera
6. Vidanagamage Amila
7. Kowile Gedara Dissanayaka Mudiyanselage Sarath Bandara
8. Morawaka Devage Suranga Premalal
9. Chaminda Saman Kumara Abeywickrema
10. Dissanayaka Mudiyanselage Priyantha Janaka Bandara Galaboda
11. Arumadura Lawrence Romelo Duminda Silva
12. Rohana Marasinghe
13. Nagoda Liyanaarachchi Shaminda

Charges

1. That the Accused, with persons unknown to the prosecution on or about the 8th day of October 2011 at Angoda, Mulleriyawa and Himbutana within the jurisdiction of this court were members of an unlawful assembly, the common object of which was criminal intimidation of voters with the use of firearms at the local government elections held on the said date, and thereby committed an offence punishable under section 140 of the Penal Code.

2. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, by continuing to be members of the said unlawful assembly by using force and violence on the crowd at the Angoda Rahula Vidyalaya polling station committed the offence of intimidation and rioting and which offence was committed in prosecution of the common object

of the said assembly or knew to be likely to be committed in prosecution of the common object of the said assembly and therefore the Accused being a member of such unlawful assembly at the time of committing that offence has committed an offence punishable under section 144 to be read with section 146 of the Penal Code.

3. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, committed criminal intimidation on Hewpathirannahalage Thivanka Madushani Pathirana in prosecution of the common object of the same assembly and as the Accused as a member of the said unlawful assembly knew that such offence could have been committed in the prosecution of the common object of the of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence has committed offences of Criminal Intimidation punishable under section 486 to be read with section 146 of the Penal Code.

4. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge committed criminal intimidation on Police Constable 87075 Madadenidurayalage Damith Suranga Kumara who was on guard duty at Rahula Vidyalaya, Angoda by threatening the said Madadenidurayalage Damith Suranga Kumara by using a pistol in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence has committed criminal intimidation, punishable under section 486 to be read with section 146 of the Penal Code.

5. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, with one or more members of the said unlawful assembly caused the death of Bharatha Lakshman Premachandra and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code

6. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa that one or more of the members of the said unlawful assembly caused the death of Gusmithinadura Damitha Darshana Jayathilake and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

7. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa, that one or more of the members of the said unlawful assembly caused the death of Jalabdeen Mohammed Azeem and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that

assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

8. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Mulleriyawa, that one or more of the members of the said unlawful assembly caused the death of Maniwel Kumaraswamy and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence committed offences of murder punishable under section 296 to be read with section 146 of the Penal Code.

9. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, and continuing to be members of the same unlawful assembly that one or more Accused shot at Rajapurage Gamini and caused injures to him with intention or knowledge under such circumstances that if he by that act caused death, the Accused would be guilty of murder and thereby committed the offence of attempt to Murder in prosecution of that object and as the Accused or a member of the said unlawful assembly knew that such offence could have been committed in the prosecution of the common object of the unlawful assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object and the Accused continuing to be members of the same unlawful assembly at the time of committing such offence of Attempted Murder punishable under section 300 to be read with section 146 of the Penal Code.

10. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, by using force and violence on the crowd at the Angoda Rahula Vidyalaya polling station committed the offence of rioting and thereby committed offences punishable under section 144 to be read with section 32 of the Penal Code.

11. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Bharatha Lakshman Premachandra and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

12. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Gusthinadura Damitha Darshana Jayathilake and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

13. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Jalabdeen Mohammed Azeem and thereby committed an offence punishable under section 296 read together with section 32 of the Penal Code.

14. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge with others unknown to the prosecution, caused the death of Maniwel Kumaraswamy and thereby committed an

offence punishable under section 296 read together with section 32 of the Penal Code.

15. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge, at Angoda with persons unknown to the prosecution committed the offence of criminal intimidation on Hewpathirannahalage Thivanka Madushani Pathirana and thereby committed an offence punishable under section 486 read together with section 32 of the Penal Code.

16. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Angoda, with persons unknown to the prosecution committed the offence of criminal intimidation on Police Constable 87075 Madadenidurayalage Damith Suranga Kumara who was on guard duty at Rahula Vidyalaya, Angoda by placing a pistol on his chest and thereby committed an offence punishable under section 486 read together with section 32 of the Penal Code.

17. That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Mulleriyawa with persons unknown to the prosecution jointly possess an unlicensed automatic T-56 firearm and thereby committed an offence punishable under section 22(3) read with section 22(1) of the Firearms Ordinance No 33 of 1916 as amended by Act No. 22 of 1996.

The prosecution led evidence under Section 241 of the Code of Criminal Procedure Act No. 15 of 1979 and satisfied the Court that the 10th Accused is

absconding and obtained an order to try him in his absence and the trial against him proceeded in his absence.

The indictment was read over and all the Accused other than the 10th Accused pleaded not guilty.

The Prosecution led the evidence of several witnesses and closed the prosecution case. The prosecution case is briefly as follows:

Background

The present appeal revolves around two well-known politicians of the previous regime who are namely Duminda Silva, the11th Accused in the High Court (4th Accused – Appellant) and Bharatha Lakshman Premachandra, one of the deceased. At the time relevant to this incident the said Bharatha Lakshman Premachandra had been a trade union advisor to His Excellency, the President and he was also a former member of the Parliament. In the past he has served as the UPFA organizer for the Kolonnawa electorate and had been engaged in active politics.

The 11th Accused (4th Accused – Appellant) had started his political career from the UNP and thereafter became a member of the UPFA. He had been elected to the Parliament for the first time in 2010. At the time relevant to this application, he had been serving as the UPFA Organizer for the Kolonnawa electorate.

Kotikawatta – Mulleriyawa Pradeshiya Sabha is situated within the Kolonnawa electorate and one Prasanna Solangaarachchi was its Chairman prior to the local government elections held on the 8th of October 2011. Said Solangaarachchi contested for the same position at the said local government elections. The evidence revealed that the deceased Bharatha Lakshman supported said Solangaarachchi during the election period by attending his rallies and speaking on behalf of him.

The 11th Accused (4th Accused – Appellant) supported one Sumudu Rukshan who also contested for the same Pradeshiya Sabha from the same party. Consequently there was a strong competition between the said two contestants and their supporters, since the contestant who obtained the highest number of votes would be elected as the Chairman of the Pradeshiya Sabha.

The events pertaining to this application unfolded on the 8th of October 2011 on which day the said local government elections were held in the country to elect members to the local government bodies. Kolonnawa electorate, the electorate pertinent to the present application comprised of Mulleriyawa-Kotikawatta Pradeshiya Sabha and Kolonnawa Urban Council.

Prosecution Case

Three main witnesses for the Prosecution namely Priyantha Dissanayake (PW2) Kalubadanage Hemantha Kumara (PW3) and Lasantha Wanasundara (PW4) gave evidence regarding events that occurred on 8th of October 2011. Priyantha Dissanayake had been a MSD officer in-charge of the security contingent of the 11th accused. Lasantha had also been an officer attached to the MSD who was providing security to the 11th accused. Hemantha(PW3) had been an officer attached to the Mirihana police station at the time.

The events at "Tamilnadu Watta"

The 11th Accused who had been the UPFA Organizer for the Kolonnawa electorate had left his residence on the 8th of October 2011 at about 6.30 am and had gone to "Tamilnadu Watta" polling booth.

Priyantha Dissanayake had gone to Tamilnadu Watta with some other security officers after the 11th Accused arrived at the said place. According to Hemantha Kumara, the 11th Accused had been seated on a chair close to the road and had been speaking to the voters and had advised them to vote only for PA and if they

were going to vote for the UNP to refrain from voting. 11th Accused had been interfering with the voters in the said manner at Tamilnadu Watta from 7.30 am to 11.30 am and he had been later asked to leave the place by ASP Priyantha.(The witnesses Priyantha Dissanayake and Lasantha Wanasunera did not refer to the fact that the 11th Accused was interfering with the voters at Tamilnadu watte)

Thereafter 11th Accused had gone to Ramesh's house for lunch (a supporter of the 11th Accused) where he had also consumed intoxicating beverages which had been confirmed by Prosecution Witness No.137 Dr. Shehan.

The 3rd Accused had arrived at Tamilnadu Watta around 12 noon along with some supporters.Thereafter at or about 2.45 the whole group along with the 11th Accused had left Tamilnadu Watta..

The Appellants' position was that the group together with the 11th Accused had intended to go to Ambatale, where the residence of one Sumudu Rukshan (a contestant for local government elections supported by the 11th Accused) was situated. Evidence led by the Prosecution also revealed that two security officers of the 11th Accused had been sent to the said Sumudu's residence prior to the arrival of the 11th Accused.

Incident near 'Kande Vihare'

On the way to said Sumudu's house, the vehicle procession of the 11th Accused had stopped at a place called 'Kande Vihare.' The 11th Accused's vehicle procession consisted of a pilot vehicle (i.e. a defender jeep) that carried the security contingent of the 11th Accused which was followed by the vehicle in which the 11th Accused travelled. This vehicle was followed by another Pajero jeep in which the private security officers of the 11th Accused travelled. When the vehicle procession was stopped at the said Kande Vihare, the 1st Accused was given a T56 by the 3rd Accused at the behest of the 11th Accused. The 11th Accused had ordered to stop the jeep and had asked the 3rd Accused to get down from the

jeep and hand over the T56 to the 1st Accused who was in the Pajero jeep behind the 11th Accused's vehicle.

Incident near 'Rajasinghe Vidyalaya'

After the said incident, while the vehicles were travelling to Ambathale, the vehicle procession has again stopped at a place called Rajasinghe Vidyalaya where the 11th Accused had assaulted a youth who happened to be a supporter of Solangaarachchi.

Incident near 'Rahula Vidyalaya'

Once again the vehicle procession had stopped near a place called Rahula Vidyalaya where the 11th Accused had intimidated one Madushani Pathirana (PW 57) who happened to be the wife of Prasanna Solangaarachchi. Prosecution Witnesses Priyantha, Hemantha Kumara and Lasantha had stated that 11th Accused had gone up to said Madushani and had asked who she had voted for. She had stated that she voted for her husband.

According to Witness Madushani Pathirana the 11th accused came up to her and asked certain questions about to whom she voted. Thereafter her position is that the 11th accused advanced towards her and a person named "Pinky Akka" who was close to her dragged her to the Anura Boutique

Thereafter a commotion had taken place near the said place after the said conversation in the course of which one Damith Suranga (PW101) had also been intimidated with the use of a pistol. According to said Damith Suranga, a jeep that had followed the jeep of the 11th Accused had carried people who were displaying around eight T56 weapons.

Incident near 'Himbutana Junction'

The procession of vehicles of the 11th Accused then met with the vehicle of deceased Bharatha Premachandra. The Jeep of the said Bharatha Lakshaman had approached from the opposite direction and the 11th Accused's vehicle had blocked the said jeep from moving forward. Thereafter there had been a verbal argument between the 11th Accused and the deceased Bharatha Lakshman which was followed by the 11th Accused assaulting the deceased. At this moment, one Rajapurage Gamini (PW119) who was the PSO of the deceased Bharatha Lakshman had shot the 11th Accused in the exercise of his right of private defence. Afterwards the 10th Accused who was in possession of the pistol of the 11th Accused had open fired at the PSO causing him critical injuries. Then an illegal T56 had been used to shoot the said Bhratha Lakshman and persons who accompanied him which resulted in the death of three more people who are namely Damitha Darshana Jayathilake, Mohammed Azeem and Maniwel Kumaraswamy.

The said illegal T56 had been recovered pursuant to a statement made by the 3rd Accused under Section 27 of the Evidence Ordinance which had been marked and produced as X1. As per the report of the government analyst, all 27 spent cartridges recovered from the crime scene had been fired from this weapon.

The Defence case.

After the close of the prosecution case .The Learned Judges of the Trial at Bar called upon the Accused for their defence. Whereupon all the accused made statements from the dock.

3rd accused called a number of witnesses on his behalf and on behalf of the 11th accused his father Premalal Silva gave evidence.

It is the position of the defence that the prosecution failed to establish that there was an unlawful assembly. As there are serious contradictions and inconsistencies in the evidence of the prosecution witnesses the Court should

not act on their evidence. In any event it was submitted that the prosecution failed to prove the case beyond reasonable doubt.

The judgment and sentence

After the recording of evidence was concluded oral submissions were made by the prosecution as well as the defence. Thereafter written submissions were filed.

On 08.09.2016 Hon. Padmini N. Ranawaka delivered a judgment which will be referred to as the majority judgment. Hon. M.C.B.S Moraes agreed with that judgment. By the said Majority Judgment the 2nd, 4th, 5th, 6th, 8th and 9th Accused were acquitted from all the charges levelled against them. The Prosecution at the end of the case submitted that there was no evidence against the 12th and 13th accused. Accordingly 12th and 13th accused were also acquitted from all the charges levelled against them.

In the indictment the prosecution included charges based on unlawful assembly and common intention. Charges 1-9 based on unlawful assembly (section 140/146) and Charges 10, 11, 12, 13, 14, 15 and 16 were based on common intention(section 32). Charge 17 is for joint possession of a firearm against all accused, an offence punishable under Firearms Ordinance. In the Majority Judgment it was held that charges based on Section 32 of the Penal Code cannot be proved .

By the Majority Judgment the 1st accused was convicted of charges 1, 5, 6, 7, 8, 9 and 17 of the indictment. The 3rd, 7th, 10th 11th accused were convicted on charges1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 of the Indictment.

Sentence

The court imposed the following sentences on the accused who were convicted.

The 1st accused: -

Count 1 : 6 months RI and a fine of Rs. 10,000/= (default of which 3 months simple imprisonment)

Count 5-8 : Death Sentence

Count 9 : 20 years RI

Count 17 : Life Imprisonment

The 3rd 7th, 10th and 11th accused:-

Count 1 : 6 months RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 2 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 3 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 4 : 2 years RI and a fine of Rs. 10,000/= (default of which 3 months SI)

Count 5-8 : Death Sentence

Count 9 : 20 years RI

Count 17 : Life Imprisonment

Hon. A.L. Shiran Gunaratne the Chairman of the Trial at Bar delivered a separate judgment and acquitted all the accused of all the charges.

Being aggrieved by the said convictions and sentences the 1st, 3rd, 7th and 11th accused appellant appealed to the Supreme Court to have the said convictions and sentences set aside.

The Accused -Appellants raised the following grounds of appeal which are common to all the appellants. They are broadly divided into several grounds.

1. There was no valid or proper Judgment within the law.

2 The prosecution failed to establish beyond doubt that there was an unlawful assembly and the accused -appellants are members of the unlawful assembly.

3. The evidence of the witnesses were not properly assessed and evaluated. There is a serious doubts of their testimonial trustworthiness.

4.. There were serious mis directions on the facts as well as law which not only occasioned a miscarriage of justice and a denial of a fair trial.

5 There is a serious doubt that the investigation was biased, manipulated , flawed and unreasonable and a trial and convictions based on such an investigation cannot be sustained.

. Whether the Judgment is valid in law

The learned President's Counsel who appeared for the 11th Accused-Appellant made extensive submissions on the validity of the Judgment. The learned President's Counsel who appeared for the other accused -appellants associated with the submission made on behalf of the 11th Accused-Appellant.

In this case the judgment was not unanimous but a divided judgment referred to as majority judgment. Hon. M.C.B.S Moraes who did not write a separate judgment agreed with the judgment of Hon Padmini Ranawaka . Hon. Shiran Gunaratne wrote a separate judgment and he acquitted all the accused of all charges.

The question is whether a trial at bar requires a unanimous judgment or not. The learned President's Counsel submitted that the law does not contemplate a divided judgment. It was submitted that whenever a divided judgment is considered to be valid there should be provisions in the Constitution or in the Code of Procedure Act.

The learned President's Counsel referred to Article 132(4) of the Constitution which deals with Judgments of the Supreme Court. It states that "the Judgment of the Supreme Court shall when it is not a unanimous decision be the decision of the majority."

It was pointed out that a similar provisions have been made in respect of the Judgments of the Court of Appeal in Article 146(4) of the Constitution.

In the High Court, the trials are held by a Judge sitting alone or trial by a Jury. Provisions have been made regarding acceptable verdicts returned by a Jury in Section 209(2) of the Code of Criminal Procedure Act No. 15 of 1979. The

acceptable verdicts are unanimous or 5 to 2. The jury can bring a verdict of 4 to 3 but it is not an acceptable verdict and a re- trial has to be ordered.

It should be noted that no such provisions are found in the Code of Criminal Procedure Act No. 15 of 1979 regarding Judgments of the Trial at Bar.

The learned President's Counsel submitted that in the light of the above legislative scheme it is necessary that there should be at least consultations among the three judges who may after consultations arrive at different decisions if it becomes necessary. He had referred to the cases of Paskaralingam Vs P.R.P. Perera and others 1998(2) SLR pg 169, Wijepala Mendis Vs. P.R.P. Perera and others 1999(2) SLR 110, which deals with findings of the Special Presidential Commissions. Case of Wijerama Vs. Paul 76 NLR 241. Deals with principles of administrative law.

It was submitted that according to the minute made by Hon. M.C.B.S Moraes it is clear that he has not even read the judgment of the Hon. Shiran Gunaratne, the Chairman of the Trial at Bar. It is a basic principle that the accused are entitled to a considered decision. The learned President's Counsel further submitted that in this case the accused were deprived of that basic right to a fair trial as the reasoning of the Chairman of the Trial at Bar has not been considered by Hon. M.C.B.S Moraes.

Although the record may not indicate it does not necessarily mean that the Judge M.C.B.S.Moraes did not consider the separate judgment of Hon. Shiran Goonerathne. As a matter of practice judges do consult other judges hearing the case.

It is the submission of the learned President's Counsel that the Accused were deprived of a substance of a fair trial and therefore the convictions and the sentences including the sentence of death imposed is bad in law and should be set aside.

In section 450 of the Code of Criminal Procedure Act which deals with trial-at-bar or in the Constitution there is no requirement that the judgment of the trial at bar should be a unanimous judgment . In a bench comprised of three judges the possible decisions are either unanimous or 2 to 1 decision which is referred to as majority decision. There is nothing to indicate that a majority decision is unacceptable. If that is so there should be provision to order a re-trial if the

decision is not a unanimous decision. The purpose of constituting a three member bench is to arrive at a decision to avoid a stalemate. Therefore I am of the view that a decision made by the majority is a valid decision.

2 The prosecution failed to establish beyond doubt that there was an unlawful assembly and that the accused -appellants are members of the unlawful assembly.

The Accused -Appellants were convicted on the basis that they were members of an unlawful assembly. The unlawful assembly is described in section 138 of the Penal Code. Ist Count in the Indictment states that the accused were members of an unlawful assembly and thereby committed an offence punishable under section 140 of the Penal Code. Section 140 states:

'Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

2nd Count is for committing rioting being members of the unlawful assembly , an offence punishable under section 144 of the Penal Code.

Section 143 states:

'Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting'

Section 144

Whoever is guilty of rioting shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counts 3 and 4 of the indictment is for being members of an unlawful assembly and committing criminal intimidation an offence punishable under section 486 read with 146 of the Penal Code) Counts 5-8 is for being members of the unlawful assembly and committing murder an offence punishable under section 296 read with 146 of the Penal Code. Counts 9 is for being members of the unlawful assembly committing attempted murder an offence punishable under section 300 read with 146 of the Penal Code.

Section 146 imposes vicarious liability on members of the unlawful assembly .It states:

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.

Count 10 -16 based on common intention a principle like unlawful assembly which imposes vicarious liability. Section 32 refers to common intention. It states:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone"

Count No. 17 is for joint possession of a firearm an offence punishable under section 22 of the Firearms Ordinance.

In this case the Accused-Appellants were found guilty of Charges 1-9 based on unlawful assembly and charge 17 based on joint possession. In order to prove charges based on unlawful assembly the prosecution has to prove that there was an unlawful assembly beyond reasonable doubt.

The existence of and criminal liability under Unlawful Assembly

The first requisite for imposing liability under section 146 of the Penal Code is that the person sought to be held liable for the act of another should have been at the time of the commission of the offence a member of the unlawful assembly. The liability will extend not only to offence committed in prosecution of the common object but also to offences which the members of the assembly knew to be likely committed in prosecution of that object.

During the Appeal, it was contended on behalf of the 11th Accused that on account of the near-fatal injuries he received, the 11th Accused withdrew and ceased to be

a member of the Unlawful Assembly before the final act of shooting took place and therefore cannot be held liable for the offence of murder. The 11th Accused having suffered damage first was unaware of what transpired afterwards. His physical presence at the scene was no physical presence as he was unconscious. It was contended that the 11th accused ceased to be a member of the unlawful assembly almost immediately as he suffered injuries to his head.

In same vein it was also argued that the act of shooting was unforeseen as it was brought about by the sudden altercation that took place between the parties. This altercation, according to the defence was a supervening incident which fundamentally altered the course of events which took place thereafter.

The Prosecution is required to establish that there existed a unlawful assembly with the common object averred in count1 of the Indictment. The question of whether the 11th Accused was a member of the unlawful assembly or not at the time of the shooting occurred needs to be considered only if the Court comes to a finding that there existed an unlawful assembly.

While inference as to the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used and the behavior of the assembly at or before the scene of occurrence, the prosecution will not succeed in discharging its burden by simply demonstrating circumstances which align with the common object. Conversely, it is their burden to not only establish the common object but also prove that the existence of common object is the only conclusion consistent with the facts and circumstances existed at that point.

In my view it would be artificial to focus exclusively only on the events that took place concerning the group led by the 11th Accused and the entourage of the deceased Baratha Lakshman Premachandra. This last scene must be examined in the background of all the peripheral events that took place throughout the day, a day on which local government elections were held and at a time voting was

taking place. The bitter political rivalry between the 11th Accused and the deceased Baratha Lakshman Premachandra is undisputed. It is in evidence that ASP Priyantha had called on Baratha Lakshman Premachandra to warn him against harm being caused to the deceased at the behest of the 11th Accused. Furthermore, the Court is justified drawing an inference under section 114 of the Evidence Ordinance that in this country, it is expected that rivalry among candidates and their supporters run high on an election day. To ensure elections are conducted in an orderly manner, statutes have put in place provisions for the peaceful conduct of elections. These Statutes specify the prohibited conduct and the restrictions imposed on individuals on such days.

Section 81A of the Local Authorities Elections Ordinance No. 53 of 1946 as amended specify a series of conduct that are prohibited on the election day which include, *inter alia*,

"*1) No person shall, on any date on which a poll is taken at a polling station, do any of the following acts within a distance of a quarter of a mile of the entrance of that polling station:-*

> *(a) canvassing for votes;*
>
> *(b) soliciting the vote of any voter;*
>
> *(c) persuading any voter not to vote for a candidate of any particular political party or independent group. […]*

(2) No person shall, on any date on which a poll is taken at any polling station-

> *(b) shout or otherwise act in a disorderly manner within or at the entrance of a polling station or in any public or private place in the neighbourhood thereof, so as to cause annoyance to any person*

> *visiting the polling station for the poll or so* as to interfere with the work of the officers and other persons on duty at the polling station.

Owing to the seriousness of such conduct, the said Act also empowers;

"Any police officer may take such steps, and use such force, as may be reasonably necessary for preventing any contravention of the provisions of subsection (2) and may seize any apparatus used for such contravention."

Section 82C (1) of the same also prohibits persons from using violence on behalf of any other person to influence voters;

> "(1) *Every person who directly, or indirectly by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting or on account of such person having voted or refrained from voting or on account of such person having voted or refrained from voting at an election under this Ordinance, or who by abduction duress, or any fraudulent device or contrivance impedes or prevents the free exercise of the franchise of any elector, or thereby compels induces or prevails upon any elector either to give or refrain from giving his vote at such election shall be guilty of the offence of undue influence*"

In a democratic society ensuring that the voter is free to exercise the franchise freely is of paramount importance and in this context some of the provisions referred to are salient, in that they are geared towards maintaining public tranquility—the very essence of the concept of vicarious liability under unlawful assembly. Dr. G. L Peiris in his book Offences under the Penal Code of Ceylon states *"These offences have as their aim the protection of society against certain*

risks which may arise from gathering of a large number of persons……..An assembly of persons becomes the concern of the criminal law only ***when objects of the assembly are incompatible with the maintenance of social order and peace".*** (Emphasis added)

It is reasonable to presume that at least the 11th Accused who happened to be a member of a Parliament was alive to these restrictions. By and large, he was expected not only to adhere to these restrictions but also to lead by example and reflect the importance of abiding by the law.

In this factual backdrop, the presence of political stalwarts accompanied by their associate armed with fire arms, to my view, is sufficient to kindle a fear psychosis in the minds of the average voter. Such a scenario would certainly have an intimidating effect on the minds of a voter, the common object alleged in count No.1.

I am also of the view that in deciding as to whether there exists an unlawful assembly or not, the incident that is altogether have taken place on the day must be considered cumulatively and not in isolation. It is then and only then, one could appreciate the objective of the group of people and by extension direct their mind to appreciate whether what ultimately took place was within the foreseeability of the unlawful assembly.

The counsel for the 11th Accused takes up the position that the 11th accused along with the convoy was merely visiting from one polling center to the other. It was but a customary act of showing support and keeping vigilantism, in their opinion.

The fact that the convoy led by the 11th Accused travelled from Thamilnadu watte to Himbutana is not disputed. The 11th Accused was interfering with voters at Thamilnadu watte near a polling booth. He remained in the vicinity of that polling booth from 7.30 am till about 11.30 am until he was asked by an Assistant

Superintendent of Police to leave the premises. It is an indication that the police officer had viewed the presence of the 11th Accused and his group near the polling booth as inappropriate under the circumstances. This confirms that on the said date, the 11th Accused embarked on a prohibited journey. He was flouting the Elections Laws and lingering around the polling booth with his group. When he was asked to leave by the ASP, he went to one Ramesh's place, which was in the vicinity, to have lunch where he also intoxicated himself. The evidence given by PW 137, Dr. Shehan that the 11th Accused was intoxicated has not been controverted. Around 12 noon, the 3rd Accused arrived at Thamilnadu watte and thereafter after lunching and intoxicating themselves, the convoy left the area around 2. 45 pm. I find the events that took place within a span of 1hour and 15 minutes from the time the 11th accused and his group leaving the house of Ramesh (2.45 p.m) and the incident of shooting that happened in Himbutana(4.00pm) are vital to decide the issues in this matter. On their way, they stopped at Kandey Viharaya where the 1st Accused was given a T56 at the behest of the 11th Accused. Up until this exchange, it is common ground that the 1st Accused did not carry a T56 gun. After receiving this gun from the back of the 11th Accused vehicle and carrying it with him, the 1st Accused has also uttered "මේකෙන් මම තියන්නේ නැහැ. මගේ වෙපන් එකෙන් තියන්නත් එපා. කිසිම හේතුවකට වෙඩි තියන්න එපා. අපිට නඩු කන්න බෑ". The context in these words were suddenly uttered further reinforce the illegal nature of the entire transaction. After the exchange of guns, the group had again stopped at the Rajasinghe Vidyalaya and assaulted a supporter of Solangaarachchi. Around 3 pm, the group, fully armed and showcasing weapons, arrived at Rahula Vidyalaya which was again a Polling station. It is there that the11th Accused and his convoy intimidated and caused a riot.

Concisely, the 11th Accused and his convoy commenced the day by lingering near a polling station—which was clearly a conduct unwarranted and prohibited by

the law. He stayed there up to the point where the Assistant Superintendent of Police of the area had to ask him to leave. At 12 O' clock, he led his convoy to have lunch. They finish their lunch around 2.45 pm and set their course to visit another Polling station. It was just a couple of hours ago that the 11th Accused was asked to leave one polling station, clearly communicating to him that his presence near a polling station is undesirable. Despite the warning, the11th Accused continued to audaciously defy the law and proceed to another polling station. Mid way, he asked his convoy to stop and ordered the 3rd Accused to handover a fully loaded T56 gun to the 1st Accused without having any ostensible reason to do so. Shortly afterwards, the convoy assaulted a supporter of Solangaarachchi and finally arrived at the Rahula Vidyalaya, where his weapon power were fully displayed against the voters.

Starting from the time the polling commenced and till the time it was drawing to an end, the 11th Accused spent his day, marauding between polling stations with weapons, defying officials discharging their duties, and assaulting and victimizing people associated with Solangaarachchi. The only time they were not seeing intimidating people were when the group was having lunch. No sooner than they finished their lunch, the group was seen assaulting, threatening, chasing people and flaunting their fire arms near Rahula Vidyalaya. Their conduct both before and after lunch revolved around intimidating voters by directly and indirectly showing their power near polling stations.

The final act of confrontation that took place around 4 pm between the deceased and the 11th Accused undoubtedly influenced by these events that took place on that day.

PW 57 Madushani Pathirana, PW 101 Damith Suranga, PW 102 Suminda Kumara, PW 64 Wimalawathie have all given evidence to this effect. The evidence given by PW 101 and PW 102 who are STF officers executing their duty

on that day, is consistent that it was pursuant to the arrival of the 11th Accused's convoy that violence took place at Rahula Vidyalaya. They confirm that the group of people who arrived with the 11th Accused used obscene and filth language and intimidated the crowd gathered there. The evidence of PW 101 Damtih Suranga that the occupants of the van that came behind the 11th Accused vehicle displayed around 8 T-56 guns remains unchallenged.

The defence argued that the 11th Accused merely asked a question as to who PW 57 voted for, and that this cannot amount to intimidation. Admittedly, taken in isolation, a single question of 'who did you vote for' would not raise any alarms. But, the same question when asked by a well-known politician on an election day surrounded by a group of people who arrived in brazenly carrying weapons could acquire a completely different hue. No sooner than she answered, the 11th Accused has advanced towards her which forced PW 57 to retreat to a room for safety. Persons who came with the 11th Accused's convoy assaulted people gathered there, threatened certain others using fire arms and chased after several others as well. PW 101 Damith Suranga who was a Special Task Force Officer discharging his duties near the polling station has given evidence that he was threatened with a firearm being pressed to his chest. All these overwhelmingly indicate that the sudden escalation of tension took place with the arrival of the 11th Accused and the convoy. The scare, the threatening and arms-display took place quite boldly while an election was being held on the other side of the road in the polling station.

If as contended by the defence, the conduct of the 11th Accused was to show support and monitor the area, there could not have been any necessity for him to travel with an entire battalion of people in 10-15 vehicles, flaunt T56 guns, use obscene language, threaten the civilians and interfere with the officials who were stationed there to maintain peace. If the 11th Accused only asked an innocent question as to 'who did you vote for', there would not have been any reason for

females gathered in that area to erupt into a commotion, shout "ගැහැණුන්ට ගහන පිරිමි උඹලා පොන්නයෝ, කොන්ද පණ නැති පිරිමි" and run for safety. The conduct and the reaction it generated is wholly incompatible with showing support and unrelated to the purported vigilantism. When the arms and the conduct of the accused persons are factored in, there can be no doubt that they had the illegal objective of intimidating the voters in the area.

The encounter between the deceased Baratha Lakshxman and the 11th Accused takes place shortly after the tense situation at Rahula. It is important to note that the distance between the two places was around 500 meters and the time difference was not more than 5 minutes between the two incidents. All these factors are relevant for determining whether the act of shooting was a fundamentally different act which the 11th Accused could not have foreseen.

The fact that the deceased changing his course and deciding to come to Himbutana may have been an unaccounted factor. However, it is only tangential to the foreseeability of the actions of the unlawful assembly. The prosecution is not called to establish that the 11th Accused possessed clairvoyance in predicting the trajectory of his adversary to the last detail. It is only required to show that objectively there were grounds that veritably suggested to the 11th Accused that death could be caused in prosecution of their common object. The question is to assess whether the members of the unlawful assembly in a tense situation would have resorted to use their firearms which they brazenly carried.

There is evidence to hold that the 11th accused obstructed the vehicle of the deceased Baratha Lakshman. And there are clear signs that when fire broke out, the deceased Baratha Lakshman, understanding the difference of fire arm power, attempted to retreat and flee the scene. is also evidence that the 11th Accused's pilot vehicle proceeded forward without any hindrance which could only mean that the 11th Accused's obstruction of the deceased's convoy was deliberate. I

could only construe that this act of deliberate obstruction was an attempt by the 11th Accused to mark his territory by showcasing his man power. The altercation that took place between the two parties was the immediate result of the said vehicle obstruction.

It is also relevant that this group led by the 11th Accused possessed illegal weapons. All the 27 spent cartridges that were found at the crime scene had been fired by only one T56 gun and they had been traced back to "XI". According to PW 114, Brigadier Gamage, this illegal weapon that had been lost by the Army on 22. 04. 2000 in Elephant Pass. All this evidence remains unchallenged. This gun was fully loaded and ready to be used. There could not have been any necessity for the group led by the 11th Accused to carry "X1" with them. There were10 police officers from MSD with pistols and 3 officers with 2 T-56 guns from the Mirihana Police authorized to guard the 11th Accused. He had more than sufficient gun power at his disposal to protect himself. If not for an insidious purpose, there could not have been any reasonable ground for the 11th Accused and his group to possess and pass around a fully loaded illegal "X1". It was carried by the unlawful assembly to use it when the necessity arose.

On an election day which holds significance for both parties—whose enmity is widely known—it is untenable that a seasoned politician of the 11th Accused's caliber would not foresee that his act of obstructing the deceased's journey and pushing him, would escape without a serious reaction from the other side. He was fully apprised of the firearm capacity of his side. He was undoubtedly the central figure of that assemblage. Starting from deciding the itinerary to the places where he should stop to talk and stop to have lunch, almost every action of that assemblage centered on his presence. The arms detentors were not merely showcasing their weapons. They were bearing the arms to use them when it is necessary to use them. No person in the position of the 11th Accused would be so misguided to believe that the weapon bearers would throw away the weapons and

resort to bare hands when the necessity arises. It was just 500 meters beyond and less than 5 minutes ago that the 11th Accused caused a riot at Rahula Vidyalaya. Undoubtedly, this display of power and authority remained fresh in the members' minds. It may even translate into providing encouragement to pursue and achieve their criminal objectives. In such a volatile context, when the 11th accused blocked the vehicle convoy, got down and tried to assault the deceased, ordinary reason would have well forewarned him of the likely escalation of violence which could result in causing death. In my opinion, there was nothing in that sequence of events which could be deemed as 'supervening' that 'fundamentally' altered the results of their actions.]

The evidence clearly establish the existence of an unlawful assembly which continued and existed at the time of shooting.

Involvement of the 11th Accused

Nevertheless, the learned counsel for the 11th Accused was at pains to point out, that the 11th Accused did not take part in the subsequent shooting. That owing to the injuries to his head, he withdrew and ceased to be a member of the unlawful assembly. The learned counsel urged that at least insofar as the 11th accused is concerned, he could not be held liable for the murders that took place.

It was further argued that the 11th Accused took no active participation in the incident after he suffered the head injury. The Counsel submitted that the law of vicarious liability under Section 146 of the Penal Code is crystal clear that only an active presence with an active mind could make a person vicariously liable for the acts of the unlawful assembly. In the event where it is proven that a person was in a circumstance which deprived him of the ability to physically withdraw

or expressly disavow his association with the unlawful assembly, he must be presumed to have withdrawn from the unlawful assembly.

The Appellant has brought to our attention **Nawab Ali v the State of Uttar Pradesh 1974 AIR 1128** and **Akbar Sheikh and others v State of West Bengal [2009] INSC 884 (5 May 2009)** in support of this position. In my opinion, these cases do not completely tally with the present factual matrix. In Nawab Ali case, there was clear evidence that the accused had physically left the house before the murder took place where as in Akbar Sheikh case, the question for determination was whether some of the appellants were mere bystanders or actual members of the unlawful assembly. Both these situations do not squarely address the issues raised in the present appeal.

On the other hand, Justice Dayal's decision in **Rex vs Sadla And Ors AIR 1950 All 418** is a case on point: "*The question whether Sadla can be said to have been a member of the unlawful assembly after he had fallen down and been beaten depends on the determination of the fact whether he, who formed a member of the unlawful assembly from the beginning, had withdrawn himself from the unlawful assembly and had thus dissociated himself with any further membership.* ***It does not solely depend on the fact that he became incapable of taking part in the attack. His withdrawal from the unlawful assembly could be either actual and voluntary, which would be if be removed himself from the assembly and went away, clearly indicating that he was averse to taking any further part in the incident.*** *If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless in assaulting the victim. He can, however, in such a position disavow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is*

also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly and that he had withdrawn himself from the unlawful assembly." This has been cited verbatim by Dr. Gour in Penal Law of India (11th Edition) at page 1336.

It is therefore seen that where a person has been incapacitated to render any physical assistance, and at the same time is in a liminal state which makes it difficult to ascertain whether he disavowed the common object, the benefit of that doubt accrues to the accused. There can be no difference of opinion that where the evidence shows that the accused was placed in a predicament which virtually rendered his participation an impossibility, the burden of proving that he continued to be a member still remains with the prosecution. If he could neither move, nor express himself, it would be fair to presume that he was incapable of both taking part and of sharing the object of the unlawful assembly and that he had withdrawn himself from the unlawful assembly.

Even still, in my opinion, this presumption is not a truism which has to be applied irrespective of the facts and the circumstances of the case. It can be rebutted where there is sufficient evidence to hold that the probability of a person continuing to be a member of that assembly is greater than its converse. In simple terms, the question that arises for determination in all these cases, is simply as follows;

"*Where there is clear evidence that a person who is the leader of a group commits the first act in a criminal offence and thereby triggers retaliation, and during the course of that retaliation which he himself triggered, ends up receiving the first injury, should he escape the liability for his actions and intentions*?".

In my opinion, the aspect of withdrawal should not be examined in a complete vacuum. Particularly, if there is evidence that a man who has lent himself to a criminal enterprise, knowing that the weapons they carried will be used with an intent sufficient for murder, suffers the first injury in the course of that transaction he initiated, the Court must carefully weigh the circumstance surrounding the incident to see whether it was more probable than not that he continued to be a member of that enterprise. As Dr. Gour and Justice Dayal themselves concur '*It does not solely depend on the fact that he became incapable of taking part in the attack*.' In order to give a finding on that point, all evidence on the record, direct, indirect or circumstantial has to be carefully appraised keeping in view the normal course of human conduct.

Justice Ahmed's observation in **Bindeshwari Singh And Anr. vs The State AIR 1958 Pat 12**. decided 9 years after the Sadla case is most illuminating in this regard.

"*Normally and more particularly, when in the course of a single transaction many acts are committed by different members of the unlawful assembly in quick session within a short time, the rule of inference should be in favour of his continuing to be the member of that assembly till the close of that transaction. For if the interval between the different acts is short the probabilities are more against the inference that any of these members retired in the midst of the transaction and did not continue to be present till the time the transaction lasted. Otherwise the very application of constructive liability as contemplated by section 149 of the IPC will fail*."

This observation is in fact not inconsistent with the decision in **Rex v Sadla**. The Court in the Sadla's case drew the presumption in favor of the accused because the circumstances surrounding his injury and participation left a doubt about his membership in the unlawful assembly. Sadla was presumed to have withdrawn

because there was ample time for him to get back on his feet and render support to assembly. It was therefore the opinion of the judges that a man who ostensibly entered the scene with the object of killing a person, after having suffered and injury and in a dazed situation which prevents him from openly disavowing the object, but still having ample time to get back on his feet to rejoin, should be given the benefit of the doubt. For in such an instance, it is up to the prosecution to show in unequivocal terms that his continued presence amounted to a form of support. If the prosecution stops their case at the point of the accused receiving injury and fails to explain the reason as to why the accused remained there for the remainder of the time without rendering assistance, he must be taken to have disassociated himself with the assembly.

In present appeal, the unchallenged evidence of PW 4 Lasantha Wanasundara is to the effect that **the entire incident in Himbutana lasted only a little more than a minute.** 4 eye-witnesses (PW 4, PW 2, PW 3, PW 47) whose presence was most natural on the spot, have supported the prosecution that the shooting took place almost immediately after the 11th Accused assaulted the deceased. **And up to the very minute he was shot in his head, the 11th Accused was leading the unlawful assembly. This means that there could only have been a millisecond difference in time between the first shot and the retaliation.**

Now had there been a significant difference between in time and space between the parties and the commission of the crime, or that the act of shooting was of fundamentally a different character, it could be argued that the 11th Accused may have retired from the unlawful assembly and dissociated himself with the actions. But as I have discussed earlier, causing death using firearms was very much a foreseeable consequence of their criminal enterprise. It is also true that the 11th Accused was a member of that assembly when the transaction—which lasted for fleeting 60 or more seconds—commenced. At the same time, there is no evidence to suggest that, at any time prior to that, the 11th Accused showed a tendency to

disassociate himself with the object of the assembly. The deceased's fatal injuries were inflicted imminently after the 11th Accused's injury. His presence continued to be assistive and operative on the actions of the unlawful assembly. Therefore criminal liability could be imposed on the basis of unlawful assembly. Therefore his conviction and sentence is in accordance with the law.

Involvement of 3rd Accused- Chaminda Ravi Jayanath alias Dematagoda Chaminda

(1) The 3rd Accused had been present at Tamilnadu Watte and was seen by PW 3 Hemantha Kumara near Ramesh's house around 12.00 noon. (Vol II A page 607). The 3rd Accused was known to this witness as a person who used to visit the 11th Accused in order to meet him. According to witness Hemantha Kumara the 3rd accused had arrived with a group of about 15 to 20 people in several vehicles (page 608). When the group left Ramesh's house at Tamilnadu watte, the 3rd accused had travelled in the same vehicle in which the 11th Accused travelled. (10th accused Galaboda had also been in the same vehicle). The 3rd Accused in fact had admitted in his dock statement that he joined and accompanied the 11th accused in one of the vehicles up to Himbutana. Thus, he was very much a part of the group of people who travelled along with the 11th Accused on the day in question.

(2) The next stop had been at a polling booth at Kande Viharaya.: According to witness Hemantha Kumara at this location one of the persons (Tharindu) who was in the 11th Accused's group had an altercation with a bystander and there had been a near exchange of blows. Witness had said " අර තරිඳු කියන එක්කෙනා එනන කොල්ලට , අර එහා පැත්තේන් කතා කරපු එක්කෙනාට බැනපු හින්ද එනන කට්ටිය ඇ

විස්සුනා .....එතන හිටපු පිරිස ගහගන්න ගියා" (page 630) and further the witness had added that " අර තරිඳු කියන කෙනා එතැන හිටපු පිරිමි කෙනෙකුට කුණුහරපයෙන් බැන්නා ". At this juncture this witness along with others had swiftly removed the 11th accused to the vehicle as he felt the situation would lead to a commotion "කොලහලයක් ඇති වෙන්න යන හින්දා අපි එහෙම කිව්වා". When this incident happened, the 3rd accused also had been present there and the witness had seen a revolver tucked in the 3rd Accused's waist.

(3) The next stop was the polling booth at Rajasinghe Vidiyalaya:
According to witness No.2 sergeant 14573 Dissanayake who also in the security contingent of the 11th accused, when the convoy of vehicles arrived at Rajasinghe Vidiyalaya, apart from witnessing the 11th Accused assaulting a youth this witness also had witnessed the 3rd accused assaulting the same youth who had taken to heels due to the assault.

According to this witness, he had seen the 3rd Accused getting into the vehicle that took the injured 11th accused to the hospital and even at the time the 3rd accused had been armed with a revolver.

(4) Next stop was near the polling booth at Rahula vidiyalaya:
According to witness Suminda Kumara who was attached to the Special Task Force (STF) who was on duty on this day and had been assigned to patrol the area where two polling booths were established, one at Rahula Vidiyalaya and the other at a temple near the Mulleriyawa police, presumably the polling booth that was established at Kande Viharaya.

The witness being new to the area had no familiarity with the area. His team had been given specific instructions to ensure that people do no congregate or hang around the polling stations and to remove such persons from the vicinity of the polling booths. Witness says between 2 and 2.30 pm about 15 to 20 vehicles approached the polling station. About 15 to 20 people had got down from the vehicles and had started speaking to the voters. He had specifically identified the 11th accused, among the crowed. Witness had said they created a commotion and people started running. In order to control the situation two other police teams were summoned to the scene. The witness had said that the villagers were infuriated by this incident, hooted and attacked the police jeep that arrived. Even at Rahula vidiyalaya, witness no 2 sergeant Priyantha Dissanayake, had seen the 3rd Accused armed with a revolver.

(5) According to witnesses, the 3rd also had been present armed with a revolver when the shooting took place at Himbutana, and when the firing started, he had shouted to the effect "open fire".

The evidence referred to above has clearly established that the 3rd accused had been an active member of the group led by the 11th Accused and conducted himself in furtherance of achieving the common object of the assembly.

The involvement of the 7th Accused Sarath Bandara:

Witness PW2 Priyantha Dissanayake who took part in an identification parade had identified the 7th Accused who was not known to him before the incident, as a person who was in the group led by the 11th Accused. His evidence as far as the 7th Accused is concerned was that, he was seen for the first time by the witness when they were at Ramesh's house and he had come to know him as

one of the 11th Accused's supporters. The 7th Accused had also been seen by this witness when they were at Rajasingha Vidiyalaya. The 7th Accused had been in close proximity to where a youth was assaulted. 7th accused also had been witnessed near the location where a woman was assaulted at Rahula Vidiyalaya. According to Witness Hemantha Kumara, the 7th accused had been known to him before the incident, though he did not know his name. As to the shooting incident at Himbutana, this witness had said that he saw the 7th Accused grabbing the firearm from the 1St Accused Anura and opening a burst of fire in the direction of the jeep of the deceased Baratha Lakshman Premachandra.

In his own words this witness had said "'"මම දැක්කේ ස්වාමිනි අනුර නිලදාරියගේ අතේ තිබ්බ අවිය සරත් කියන කෙනා අරගෙන බාරත මහත්මයාගේ ජීප් එක පැත්තට වෙඩි තියාගෙන යනවා දැක්කා ස්වාමිනි ".

Involvement of the 10th Accused.

The 10th Accused also had been identified by witness Hemantha Kumara as one of the persons who opened fire at Himbutana. The 10 th accused, according to witness Hemantha Kumara, was armed with the firearm of the 11th Accused when the initial firing occurred. Witness Hemanatha Kumara had said that he saw the 10th Accused Galaboda shooting towards the direction where the 11th Accused had fallen and also in the direction where the jeep of the deceased Baratha Lakshman was parked.

Considering the degree of involvement of the 3rd, 7th and the 10th Accused in this incident, it would be reasonable to infer beyond reasonable doubt that they were members of the unlawful assembly and ought to have foreseen these events, considering the propensity towards violent behaviour they displayed.

The liability of the 1st Accused

The 1st Accused had been found guilty for counts 1, 5 to 9, and 17. Counts 5 to 8 are for committing offences punishable under Section 296 of the Penal Code read with Section 146 of the Penal Code.

Count 9 for attempted murder under Section 300 read with Section 146 of the Penal Code.

Evidence reveals that the 1st Accused was one of the Police Officers who was sent from the Mirihana Police Station attached to the contingent, which was in charge of the security of the 11th Accused-Appellant. It is also a fact that the 1st Accused was also armed with an official T 56 weapon. (It is to be noted that although two police officers had been assigned to the 11th Accused, only one T56 gun was issued to both. At the time the entourage reached Kande Vihare, the T56 officially issued, was not with the 1st accused, but was with the other police officer who came from Mirihana police. (Page 68,74,351-V0l.II K)

The evidence led in this case reveals that at Kande Vihare that the 1st Accused was given another T 56 weapons by the 3rd Accused at the instance of the 11th Accused in this case. (Page 75 Vol. II-K) presumably because the 1st accused had no firearm with him at the time. It was this firearm that was grabbed by the 7th accused and opened fire. (Evidence of witness Hemantha).

It was submitted by the State in their written submissions that someone had grabbed the said T 56 weapon from the 1st Accused and shot at the deceased Bharatha Laxman.

Evidence of witness No.4 Wanasundera is to the effect that the 1st Accused was given a T 56 weapon by the 3rd Accused at the instance of the 11th Accused at Kande Vihare. It was submitted by the State that this evidence given by the witness Wanasundera remains unchallenged and the evidence that the said

witness Wanasundera had promptly made notes in his Pocket Note Book (PNB) was untouched.

The witness No.2 Dissanayake had also given evidence to the effect that a member of the unlawful assembly who came from behind the vehicles grabbed the T 56 weapon from the 1st Accused and shot at the scene. This piece of evidence too remains unchallenged. The said witness has also said that he saw only Galaboda firing and the 1st and 3rd Accused carrying weapons in their arms. It is not in dispute that the 1st Accused did carry a T 56 a weapon officially issued to him by the Mirihana Police this day. Therefore, there was nothing special about the 1st Accused carrying a T56 weapon at the time of the incident.

The learned Trial Judge had considered the dock statement of the 1st Accused and held that a mere denial from the 1st Accused does not explain the events which led to the four murders and the 11th Accused being shot. The learned Trial Judge had rejected the said dock statement of the 1st Accused.

The evidence led in this case establish that there was one official T 56 weapon in the pilot jeep which was in the possession of witness No.3.Hemantha.

Witness No 101 Damith Suranga clearly explained that he saw about eight (8) T 56 weapons being carried by the group- the rest of the T 56 weapons that was with the group were therefore illegal.

Witness No.2 Dissanayake has stated that he saw a member of the unlawful assembly who came from behind, grabbing the T 56 from the 1st Accused fire

towards deceased B. Laxman. And the witness Hemantha says that it was the 7th Accused who took the said T 56 from the 1st Accused and ran towards the deceased Baratha Lakshman having opened fire.

This clearly establishes that the 1st Accused did not fire or use the said T 56 weapon which was given to him by the 3rd Accused but someone else (according to witness Hemantha the 7th Accused) grabbed the said weapon from the 1st Accused and fired at the deceased B. Laxman.

If this evidence is accepted, it shows that although he 1st accused was armed with a T 56 weapon he did not use it or make an attempt to use it, at that time, but the 7th Accused grabbed the said weapon from the 1st Accused and shot at the deceased B. Laxman.

The evidence led in this case, therefore establishes that the 1st Accused who was a member of the security contingent attached to the 11th Accused had in his possession a T 56 weapon given to him by the 3rd Accused in this case.

11th Accused was a member of Parliament and the 1st accused was a police officer from the Mirihana Police Station attached to the security contingent of the 11th accused. The members of the said security contingent, including the 1st Accused had to accompany the 11th Accused wherever he went. The 1st Accused was one of the officers who's duty it was to look after the security of the 11th Accused. He was one of the officers who was assigned for the protection of the 11th Accused on that day. Therefore, he was compelled to accompany the 11th Accused wherever he went. In fact Witness Wanasundera had stated that the 3, 1,2,6.9, 12 and 13 Accused armed with weapons accompanied and followed the 11th

Accused where ever he went. Strictly speaking, he was on official duty as a member of the security contingent. Therefore, it is important to find out whether continued in the capacity of a member of the said security contingent until the end or whether he, during the course of the day commit any act to indicate that he too entertained the same object entertained by the other members of the unlawful assembly. Did the evidence led in this case establish, that the 1st Accused committed any act which showed that he too entertained the object of the other members of the unlawful assembly and was a member of the unlawful assembly himself?

Was there any evidence to show that at any given time of the day, the character of the 1st Accused of being a member of the official security contingent of the 11th Accused changed to that of a member of the unlawful assembly?

The evidence led in this case clearly shows that the 1st Accused did not refuse to take possession of the said T 56 weapon from the 3rd Accused. It is also very clear he himself did not ask for this weapon from the 3rd Accused. He had continued to possess the said weapon until the time of the incident-until it was grabbed from his possession by the 7th Accused. There is no evidence to show that the 1st Accused willingly gave the said weapon to anyone in the unlawful assembly to use it for commission of an offence.

He had also told the witness Wanasundera not to worry about it and that he is not going to use it.

The main question is whether there is evidence to show that the 1st Accused too entertained the same common object the other members of the unlawful assembly entertained.

Does the conduct of the 1st Accused indicate that he was prepared to achieve the desired result /common object at any cost?

Was the 1st Accused fully aware that considering the nature of the weapon he was armed that murder was likely to be committed in their attempt to achieve the common object?

The learned Trial Judge has acquitted the 2,4,5,6,8 and 9th Accused on the basis that although they were members of the private security of the 11th Accused and that there was no evidence to show that they have actively participated in the unlawful assembly. It is also not in dispute that the 1st Accused was at the scene of the crime as a member of the security contingent of the 11th Accused and that he had the official weapon issued to him in his possession on this day.

In his dock statement the 1st Accused had stated that he had in his possession the T 56 weapon which was officially issued to him on that day. He had denied shooting from the said weapon and also had stated that he took steps to take the 11th Accused to the hospital immediately after he was injured on that day.

On a perusal of the judgment of the learned Trial Judge, it is very clear that the 1st Accused had been convicted on the basis that he had possession with him the T 56 weapon given to him by the 3rd Accused at the instance of the 11th Accused. The evidence indicates that the 1st Accused had a T 5 weapon issued to him officially that day and there is no evidence to show that he used the said weapon on this day.

The evidence clearly establishes the fact that the 1st Accused did not use his weapon which was in his possession to shoot anyone. The T 56 weapon which was given to the 1st Accused by the 3rd Accused had been taken away by the 7th Accused.

As stated earlier the 1st Accused was a member of the security contingency attached to the 11th Accused on this day, and the 1st Accused had to be with the other security members and accompany the 11th Accused where ever he went. He too had been looking after the security of the 11th Accused like any the other

private security officer. The learned Trial Judge had acquitted the other accused who had served as private security officers on the basis that there was no evidence to show that they had actively taken part in the incidents that took place on this day. Except for the fact that the 1st Accused was made to carry or keep another T 56 weapon by the 3rd Accused at the instance of the 11th Accused at one point, there is no evidence to show that the 1st accused actively taken part in the incidents that took place on that day.

The prosecution has failed to prove the charges against the 1st Accused beyond reasonable doubt. Therefore he is acquitted of all charges.

Whether the evidence of the witnesses are properly assessed and evaluated.

It is the position of the defence that there are serious inconsistencies, contradictions and omissions in the prosecution case. It affected testimonial trustworthiness of the witnesses and due to that reasons the Court should have rejected the evidence and acquitted the accused. Therefore this Court has to consider whether the trial judges have correctly assessed and evaluated the evidence. Indian and Sri Lankan cases have considered question of credibility of witnesses and how to evaluate it. Therefore reference will be made to Indian and Sri Lankan authorities.

In *State of Bihar vs. Rada Krishna*- AIR, 1983 SC. 684 it was held that "One of the most difficult tasks of a Judge is to assess and evaluate the evidence of a witness and decide whether to believe or disbelieve it.

In *Bhoj Raj vs. Seetha Ram* – AIR 1936 PC. 60 , it was held that real test for either accepting or rejecting evidence are how consistent is the story with itself, how it stands the test of cross examination, how far it fixing with the rest of the evidence and the circumstances of the case.

In AG. Vs. Visuvalingam 47 NLR 286 discuss as to how to reject the evidence in view of the contradictions. It held that :

> *"Before the evidence of a witness is rejected on the ground of contradictions it is very important that the tribunal should direct its*

mind as to what contradictions matter and what do not and that the witness should be given an opportunity of explaining those that matter." "

R Vs. Julis., 65 NLR 505 at 519 deals with the question as to whether the evidence of a witness should be totally rejected if it is proved that he had given false evidence on one point.

In this case a reference was made to the well known maxim 'Falsus in Uno Falsus in Omnibus' (he who speaks falsely in one point will speak falsely upon all). It held that "In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment , must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses…. "

Gardiris Appu vs. The King 52 NLR 344 deals with divisibility of credibility.

It was held that "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."

Bhoginbhai Hirjibhai V State of Gujarat AIR 1983 SC 753 is a case very often cited in our criminal courts in dealing with contradictions and discrepancies. The relevant portion of the judgment is cited below.

Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of

surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
5. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.
6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
7. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance.

More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

The majority judgment had considered the judgment in Bhoginbhai Hirjibhai V State of Gujarat AIR 1983 SC 753 and other cases. The question is whether they followed the principles enunciated in the judgments.. or not. The defence submitted that the majority judgment disregarded the major contradictions, inconsistencies, omissions and other discrepancies and therefore the judgment should be set aside. This Court will have to examine the evidence and come to a conclusion whether the trial judges had properly examine and evaluated the evidence.

In this case the main witnesses namely Priyantha Dissanayake, Lasantha Wanasundera and Hemanth Kumara are Police personnel attached to the security of the 11th Accused. Throughout the incident they were present with the members of the unlawful assembly. However they were not treated as accomplices. Therefore their evidence could be evaluated as that of other witnesses. It was alleged that they were belated and reluctant witnesses. They were initially reluctant to implicate the 11th Accused and their colleagues. They would had a fear that being present with the offenders there is a possibility of them being involved or implicated in the incident. Similarly the other police personnel present at the time of the incident were reluctant to come forward and give evidence.

The case Queen V Liyanage 67 NLR 193 is relevant to these witnesses.

“ The degree of suspicion which will attach to an accomplice’s evidence must vary according to the extent and nature of the complicity. Sometimes the accomplice is not a willing participant in the offence but a victim of it. Sometimes the accomplice acts under a form of pressure which it would have required some firmness to resist, as for instance when he is a subordinate Police Officer who

receives orders from his superior in the Force and finds it difficult to disobey such orders. The explanations to Section 114 of the Evidence Ordinance, show that "the force of the presumption to be drawn (against the evidence of an accomplice) varies as the malice to be imputed to the deponent". Whatever attenuates the wickedness of the accomplice tends at the same time to diminish the presumption that he will not acknowledge and confess it with sincerity and truth. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous.

There is a serious doubt that the investigation was biased, manipulated , flawed and unreasonable and a trial and convictions based on such an investigation cannot be sustained.

It was alleged that the investigation was partial and the investigators did not conduct an independent investigation. Defence alleged the CID went to the extend of fabricating evidence. It was alleged that CID wanted to fabricate a case against the 11th Accused. It was also suggested that CID disregarded the fatal injuries sustained by the 11th Accused and build up a case against the 11th Accused.

I am of the view that there is no motive for the CID to falsely implicate the 11th Accused who is a MP of the ruling party an advisor to the Defence Ministry.

The learned President's Counsel for the 11th Accused referred to the case of Victor Ivon vs. Sarath Silva 1998)1) SLR at 340 at 349 where Supreme Court held as follows.

> "A Citizen is entitled to a proper investigation- one which is fair, competent, timely and appropriate of a criminal complaint whether it is by him or against him. The criminal law exist for the protection of his righ,t property and reputation and lack of due investigation will deprive him the protection of the law."

This case is a quadruple murder case which requires the Police to vigorously conduct investigations irrespective of personalities involved and bring the offenders to justice. Accordingly Police have performed their task.

The learned President's Counsel submitted that when there are serious doubts about the conduct of the investigations an accused is entitled to be acquitted. We cannot accept this proposition. The Court acts on the evidence placed in court and independently consider the evidence of the witnesses and come to a finding. The fact that the investigation conducted by the police is partial and flawed will be considered by a trial Court and this is in itself is not a ground to set aside the conviction and acquit the accused.

Joint Possession

The Count 17 of the indictment is based on Joint possession and filed under Firearms Ordinance. The charge reads thus:

That the Accused did at the same time, same place and in the course of the same transaction as in the 1st charge at Mulleriyawa with persons unknown to the prosecution jointly possess an unlicensed automatic T-56 firearm and thereby committed an offence punishable under section 22(3) read with section 22(1) of the Firearms Ordinance No 33 of 1916 as amended by Act No. 22 of 1996.

All the accused were charged under count 17 for being jointly possessing an illegal firearm. They were charged based on joint possession. The general concept of possession is conscious and exclusive possession . This concept of joint possession is an exception to concept of exclusive possession.

In this case the accused who formed part of an unlawful assembly was moving with weapon . Some of them are security officers attached to MSD and Mirihana

Police who are authorized to carry firearms .Other than the police officers there were number of private body guards of the 11th Accused and his associates. There was evidence to prove that at various points members of the unlawful assembly were carrying firearms. The charge of joint possession is based on this evidence.

In the course of the investigations, police recovered a T-56 weapon and a revolver. This is in consequent to a statement made by the 3rd Accused. According to the Government Analyst the cartridges found at the scene were fired from T-56 .It was proved that it is a weapon used for the purpose of shooting at the scene.

According to the prosecution this weapon is an illegal weapon. The prosecution led the evidence of Brigadier Gamage. According to this witness the weapon X1 is an illegal weapon. His inquiries revealed that the weapon was lost by the army on 22.04.2000 when the Elephant pass camp was overrun by the LTTE.

Prosecution alleged that this weapon was brought to the scene by a member of the unlawful assembly and used by one or more members of the unlawful assembly. Therefore prosecution submits that all the members of the unlawful Assembly possessed this weapon.

In support of this position prosecution cited South African case of Bhekamacele cele and others v State- Case No. AR 237/2001:

1. The group had the intention (animus) to exercise possession of guns through the actual detentor and
2. The actual detentors had the intention to hold guns on behalf of the group.

It was submitted by the prosecution that the two ingredients referred to above are proved by the prosecution according to the required standard of proof.

I am of the view that it will be difficult to establish that members of the unlawful assembly jointly possessed this firearm. As some of the police personal possessed T56 weapons and there is a doubt whether members knew that this particular weapon was a stolen weapon or not.

The next question is whether individual liability could be attached to any member of the unlawful assembly. According to the police investigations, consequent to a statement made by the 3rd Accused T-56 weapon and a revolver were recovered. T-56 weapon is the weapon used at the scene of crime. However, these items were not recovered from the exclusive possession of the 3rd Accused. The effect of a statement made under section 27 of the Evidence Ordinance is that the Accused had the knowledge of the place where the item was kept or hidden. Solely on that evidence individual liability could not be established. The accused cannot be convicted of jointly possessing a firearm. Therefore, we are of the view that joint possession was not established .Therefore all the accused are acquitted on count 17.

Decision

We accept the evidence given by the main prosecution witnesses namely Priyantha Dissanayake, Hemantha Kumara and Lasantha Wanasundera. Prosecution proved beyond reasonable doubt the existence of an unlawful assembly. The offences were committed in furtherance of the common object and that the 11th Accused, 3rd Accused, 7th Accused and 10th Accused were members of an unlawful assembly at the time of the incident and liable for the commission of offences.

For the reasons set out in the judgment we acquit the 1st Accused (Ist Accused-Appellant) Vithanalage Anura Thushara De Mel of all charges. His appeal is allowed.

All the accused are acquitted of count 17 for joint possession of a weapon.

Convictions and sentences imposed on 11th Accused (4th Accused -Appellant), 3rd Accused (2nd Accused-Appellant), 7th Accused (3rd Accused- Appellant)10th Accused affirmed (except on count 17).

Appeals of 11th Accused, 3rd Accused, 7th and 10th Accused are dismissed.

Chief Justice

Buwaneka Aluwihare P.C., J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena P.C., J.
I agree.

Judge of the Supreme Court

H.N.J. Perera, J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda. P.C., J.
I agree.

Judge of the Supreme Court