

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an application for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

**Complainant**

SC Appeal: 192/2017

SC SPL LA No: 123/2013

Court of Appeal Case  
No:180-182/2006

High Court Galle Case No: 1875

Vs.

1. Luwis Hemantha alias Mangala
2. Agampodi Jayalias alias Jayalie
3. Arumadura Sunil alias Malu Sunil
4. Wellage Nandasena alias Adul
5. Kukundura Ranjith
6. Wellage Nandasiri
7. Wellage Wipulasena
8. Wellage Padmasiri
9. Themmadura Prabhath Kumara
10. Agampodi Kapila Kumara alias Ajith
11. Themmadura Ranil Krishantha
12. Agampodi Somawathie
13. Agampodi Nalani alias Navalias Hamy

**Accused**

AND

1. Arumadura Sunil alias Malu Sunil
2. Kukundura Ranjith
3. Wellage Nandasiri
4. Wellage Wipulasena
5. Wellage Padmasiri

3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup>  
Accused -Appellants

Vs.

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

Complainant-Respondent

AND NOW

1. Arumadura Sunil alias Malu Sunil (now deceased)
2. Wellage Wipulasena  
3<sup>rd</sup> and 7<sup>th</sup> Accused-  
Appellant-Petitioners

Vs.

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

Complainant-Respondent-  
Respondent

**AND NOW BETWEEN**

Wellage Wipulasena

**7<sup>th</sup> Accused-Appellant-  
Petitioner-Appellant**

**Vs.**

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

**Complainant-Respondent-  
Respondent-Respondent**

**BEFORE:** Buwaneka Aluwihare PC, J.  
S. Thurairaja PC J.  
E. A. G. R. Amarasekara J.

**COUNSEL:** Anil Silva, PC with Isuru Jayawardane for the 7<sup>th</sup> Accused-  
Appellant-Appellant.  
Rohantha Abeysuriya, PC, ASG for the Hon. Attorney General

**ARGUED ON:** 22. 06. 2020

**DECIDED ON:** 10.11. 2023

## JUDGEMENT

**Aluwihare PC J,**

- (1) Thirteen accused were indicted before the High Court for the commission of several offences and the Accused-Appellant-Petitioner-Appellant stood as the 7<sup>th</sup> Accused before the High Court. Hereinafter, the Accused-Appellant-Petitioner-Appellant will be referred to as the '7<sup>th</sup> Accused'. The prosecution alleged that these offences were committed by the 7<sup>th</sup> Accused and the others who were indicted with him, along with one Wellage Sirisena Prabath Kumara and others unknown to the prosecution.
  
- (2) The offences for which the 7<sup>th</sup> Accused and the others were indicted are as follows;

**Count 1-** Being a member of an unlawful assembly with the common object of causing injuries to Uragaha Siripala, an offence punishable under Section 140 of the Penal Code.

**Count 2-** Being a member of the said unlawful Assembly, caused the death of said Uragaha Siripala, an offence punishable under Section 296 of the Penal Code read with Section 146 of the Penal code.

**Count 3-** Being a member of the same unlawful assembly, caused the death of Uragaha Nadeeka Thushara, an offence punishable under Section 296 of the Penal Code read with Section 146 of the Penal code.

**Count 4-** Being a member of the same unlawful assembly caused mischief to the house of Chandrawathie, an offence punishable under

Section 410 of the Penal Code read with Section 146 of the Penal code.

**Count 5**-Being a member of the same unlawful assembly committed robbery of Rs.75,400/-belonging to Chandrawathie an offence punishable under Section 380 of the Penal Code read with Section 146 of the Penal code.

**Counts 6,7,8 and 9** were based on the substantive counts referred to in counts 2 to 5 above, on the basis that the said offences were committed by the accused in furtherance of a common intention.  
[Section 32 of the Penal Code]

- (3) The trial before the High Court proceeded in the absence of the 5<sup>th</sup> Accused who absconded and the 9<sup>th</sup> Accused who died during the pendency of the trial.
- (4) At the conclusion of the trial, the 1<sup>st</sup>, 4<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and the 13<sup>th</sup> Accused were acquitted on all counts.
- (5) The 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and the 8<sup>th</sup> Accused were convicted by the learned trial judge on counts 1 and 2 on the indictment, namely being a member of an unlawful assembly and the murder of Uragaha Siripala.
- (6) The 3<sup>rd</sup> and the 5<sup>th</sup> Accused were also convicted on count 6 of the indictment, namely, causing the death of Nadeeka Thushara on the basis that the offence was committed by the said accused in furtherance of a common intention.

- (7) The 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and the 8<sup>th</sup> Accused appealed against the conviction and the Court of Appeal by its judgement dated 03.04.2013 affirmed the convictions of all the accused referred to, save for the 8<sup>th</sup> Accused. The appeal of the 8<sup>th</sup> Accused was abated as he passed away during the pendency of the appeal.
- (8) The 3<sup>rd</sup> and the 7<sup>th</sup> Accused moved this court by way of Special leave to Appeal and leave was granted on the questions of law referred to in sub-paragraphs (b) and (c) of paragraph 15 of the petition of the Accused, which are as follows;
- (b) *Did the learned judges of the Court of Appeal misdirect themselves when they held that the doctrine of divisibility of credibility does not apply to the evidence of Sewwa Handi Nanadasiri in the circumstances of this case and thereby occasioned a miscarriage of justice.*
- (c) *Did the learned Judges of the Court of Appeal misdirect themselves in rejecting the evidence of the 3<sup>rd</sup> Accused-Appellant on untenable grounds.*
- (9) As the 3<sup>rd</sup> Accused-Appellant- Petitioner-Appellant is since dead, what is left to be decided is the legality of the conviction of the 7<sup>th</sup> Accused. It is to be observed that the question of law referred to in sub-paragraph (c) of Paragraph 15, on which Special leave was granted relates to the legality of the conviction of the 3<sup>rd</sup> Accused-Appellant who is dead. Hence, answering the said question would not arise now. As such I shall confine to answering only the question of law referred to in sub-paragraph (b) of Paragraph 15.
- (10) Upon an overall consideration of the submissions made by the learned President's Counsel on behalf of the 7<sup>th</sup> Accused, it appears that the main thrust of the argument was that the evidence implicating the 7<sup>th</sup> Accused is

unreliable and cannot be acted upon; as such the prosecution had failed to establish the offences to satisfy the degree of proof required by law, i.e beyond reasonable doubt, hence, the conviction cannot stand.

- (11) It was also contended that if the evidence was evaluated in the correct perspective applying the applicable legal principles, no reasonable court could have come to the conclusion that the 7<sup>th</sup> Accused was guilty. In the circumstances, it was argued that both the learned trial judge as well as the Court of Appeal erred in that respect.
- (12) In view of the nature of the legal issue raised on behalf of the 7<sup>th</sup> Accused, it would be necessary to consider the totality of the evidence led at the trial and to consider whether the courts below have properly evaluated the evidence led at the trial, in particular the material incriminating the 7<sup>th</sup> Accused. In this context, I find the background to the incident would be of utmost relevance.

### **The Factual Background**

- (13) According to the evidence led at the trial, it transpired that two incidents had taken place on the day in question. According to witness Nandasiri, the two deceased happened to be his brother-in law [Siripala] and his nephew [Thushara]. They had lived roughly about 100 meters away from his residence, but the houses are not directly visible to each other. On the morning of the incident, Nandasiri had learnt that his nephew Thushara had shot one Shantha. Around mid-day, while he was at his aunt's place which was in close proximity to his house, he had seen a crowd of people going towards the deceased's house which was followed by a sound of an explosion. Then he had returned home.

- (14) Around the same time, Siripala had come running to Nandasiri's residence, accompanied by his two daughters and son. Siripala had requested Nandasiri to board the two daughters to a bus saying that a crowd came to attack them. Nandasiri had dutifully acceded to the request and had taken the two daughters and seen to it that they boarded a bus. Thereafter Nandasiri has returned home. In the course of the examination in chief, he had said that he identified the 2<sup>nd</sup> Accused, Jayalie as one of the persons who came that day armed with a knife and he saw the deceased Siripala grappling with the 2<sup>nd</sup> Accused. At one point, he says he saw Siripala falling and at that juncture he witnessed the other Accused including the 7<sup>th</sup> Accused surrounding the deceased Siripala and attacking him.
- (15) Under cross examination a contradiction was marked as 'V2', where he had told the police that he did not see Siripala being attacked [“සිරිපාල අපිට කොටනවා දැක්කේ නැත.”] and that due to fear he fled and returned only after the Police and the Magistrate visited the scene. Although this witness had not seen as to how Thushara came about his death, he had seen the two bodies of Siripala and Thushara with multiple injuries. It is also to be noted that the statement of this witness to the Police is somewhat belated in that, he had given the statement the day after the incident. There was no mention in the statement, of him having witnessed the attack on Siripala, which was highlighted as an omission by the defence.
- (16) According to witness Chandravathi who is the wife of the deceased Siripala, while she was in the Galle town, she was informed about the shooting of Shantha and she had rushed home. On the way she had been given the news by one Lucian, that a commotion was taking place near her house. She had said that, instead of going home, she got off the three-wheeler in which she was travelling at Lucian's house. From there she had walked towards home and she says she searched for her son Thushara in the vicinity as he was not



to be found and when she was finally walking towards the house, she heard her sister Ruwani, shouting that a crowd from 'IDH Watte' is approaching.

- (17) It appears that at this juncture this witness had got separated from her other family members and having realised that her house was surrounded, she had fled and had boarded a Matara bound bus. When the bus was passing in front of her house, she had identified the 7<sup>th</sup> Accused along with the several other Accused [the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 11<sup>th</sup>] among the crowd that had surrounded her house. It was this witness who had made the initial complaint to the police and had arrived at the crime scene with the Police.
- (18) Prosecution witness Rosalyn happened to be the mother-in-law and the grandmother respectively of Siripala and Thushara, the two deceased. According to the testimony of witness Rosalyn, the deceased Siripala, had come running in the direction of their house accompanied by his two daughters, saying he had heard a commotion from the direction of their house. After a while a crowd from 'IDH Watte' had come running in their direction and the 2<sup>nd</sup> Accused and Siripala had grappled with each other and others followed by attacking Siripala with knives and clubs. She had said she saw the 7<sup>th</sup> Accused attacking the deceased with an axe. She had also said that the deceased Thushara was hiding under a bed at their residence and she saw both the 3<sup>rd</sup> and 4<sup>th</sup> Accused entering the house having forced open the door. The witness having specifically referred to the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and the 6<sup>th</sup> Accused however had said; "I do not know the names of the others but all of them came." ["මග කට්ටිය සේරම ආවා."] This appears to be a clear reference to the Accused that was standing in the dock. Then, the witness had been asked, of the people who came, who are in court and the response of the witness was "All of them were there" ["මක්කොම උන්නා."]. She had said that several Accused attacked Siripala with knives and in reference to the 7<sup>th</sup> Accused she had said that he attacked Siripala on

his legs with an axe. The Post-Mortem Report of Siripala indicates that he has sustained several injuries to his right leg. In total, the JMO had observed 30 injuries on the body of Siripala.

- (19) It must be noted however, that three omissions were highlighted in the course of the cross examination of Rosalyn to the effect that she had failed to state or mention that the 7<sup>th</sup> Accused was armed with an axe. What is significant is that the omission relates to the weapon the 7<sup>th</sup> Accused alleged to have carried at the time of the attack, but not relating to his presence at the scene when the crimes were committed. Her statement to the Police does not appear to be a belated one.
- (20) It is also to be noted that other than the omissions referred to above, the evidence of Rosalyn is devoid of contradiction *per se*. The learned trial judge having considered the evidence of Rosalyn had observed that there is no reason to reject the evidence of the said witness. As the witness had testified before the predecessor of the learned High Court judge who delivered the judgement, he had not commented on the demeanour or the deportment of the witness. Undoubtedly it would have been a traumatic experience for Rosalyn to witness the attack on her son-in-law and grandchild. Further, she had mentioned that a crowd of about 25 people came there on that day. Under those circumstances, it was quite possible that she would not have been in a fit mental status, not only to absorb every detail of the events that unfolded on that day but also to narrate them in detail. I am of the view that the infirmities in Rosalyn's testimony must be evaluated considering the traumatic experience she had to undergo, having witnessed the incident.
- (21) It was argued on behalf of the 7<sup>th</sup> Accused that, the 'omissions' referred to in the testimony of Rosalyn create a serious doubt about the testimonial trustworthiness of the witness. Although it was contended that the learned

High Court Judge had failed to consider those omissions, in his judgement [at pg 448 of the brief] the learned High Court Judge had observed that her evidence is not tainted by ‘serious contradictions’ which goes to indicate that he had evaluated her evidence. Thus, the failure to state that the 7<sup>th</sup> Accused was armed with an axe, in my view is not sufficiently grave to discredit Rosalyn. Thus, I cannot find fault with the trial judge on relying on the testimony of Rosalyn.

- (22) On the other hand, in evaluating Rosalyn’s evidence, the learned trial judge had considered the evidence given by the police officers who visited the scene and had observed that her evidence is compatible with observations made by the police officers [pg 447 of the brief] in the circumstances aforesaid, the findings of the learned trial judge on the testimonial trustworthiness of Rosalyn cannot be faulted.

### **The Questions of Law**

- (23) The first question that this court is called upon to address is whether the Learned Judges of the Court of Appeal misdirected themselves when they held that the doctrine of indivisibility of credibility does not apply to the evidence of witness Nandasiri in the circumstances of this case and thereby occasioned a miscarriage of justice.
- (24) Giving evidence before the High Court, witness Nandasiri stated that the 8<sup>th</sup> Accused hit the diseased Siripala with a pestle which made him fall to a side and that thereafter the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Accused surrounded Siripala and attacked him with weapons (pg 126 of the High Court Brief), seeing which, he fled the scene. In his statement to the Police, however, he had stated that he did not see the attack on the deceased Siripala. This contradiction was marked as ‘3V1’ and ‘10V3’ (pgs 149 and 183 of ‘P1’).

- (25) Addressing the contradiction referred to above, the Court of Appeal held; “*These omissions are, in my view, vital omissions although the learned trial judge, in his judgment, had concluded that they were not vital. When I consider the said omission, I feel that Nandasiri had not seen Siripala being attacked. Thus, his evidence with regard to the attack on Siripala cannot be accepted as true.*” Considering the nature of the contradiction and its impact on Nandasiri’s evidence the conclusion of the Court of Appeal is correct.
- (26) The Court of Appeal, however, having disbelieved Nandasiri’s evidence before the High Court as to witnessing the attack on Siripala, proceeded to act on the other parts of his evidence, *inter alia*, relying on the decision in *Samaraweera v. The Attorney General* (1990) 1 SLR 256. In the case of *Samaraweera* [*supra*] the verdict of the High Court was challenged before the Court of Appeal mainly on the ground that the same two witnesses who had testified against the 2<sup>nd</sup> Accused who was acquitted had testified against the 3<sup>rd</sup> Accused who was found guilty. It was contended that if the two witnesses were disbelieved as against the 2<sup>nd</sup> Accused the jury should not have believed them regarding the 3<sup>rd</sup> Accused-Appellant, and the maxim *falsus in uno falsus in omnibus* should have been applied. Rejecting the said contention, the Court of Appeal held “*The verdict was supportable in that the acquittal of the 2nd Accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed.*”
- (27) The learned President’s Counsel citing, E.R.S.R. Coomaraswamy’s ‘**The Law of Evidence**’ [Vol II, Book 2, page 753,] emphasized that “*a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of a non-existence of a fact.*” Relying further on Coomaraswamy, it was submitted that it is recumbent on the court to decide whether a particular omission amounts to a contradiction or not by reference to the

facts. The test applicable is whether, it being natural for the person to make the assertion in question, such person has failed to make the assertion. Such conduct is *prima facie* an inconsistency unless cleared by an explanation. It was submitted that witness Nandasiri could not offer an explanation as to why he stated that he did not see the attack on the deceased in the police statement but stated that he did in fact witness the attack when giving evidence before the High court. It was further submitted that due to Nandasiri's personal relationship to the two deceased he is an interested witness. Given these factors it was submitted that there is a reasonable doubt about the evidence of Nandasiri and it should not be acted upon.

- (28) I am of the view that the contradiction referred to, as to whether Nandasiri had witnessed the incident or not, is a vital one and makes his entire testimony unreliable and infirm. Thus, I am of the view that placing reliance on such evidence is unsafe and should not have been acted upon but rejected.
- (29) For the reasons set out above, I answer the question of law referred to in sub-paragraph (b) of Paragraph 15 of the Petition in the affirmative. As referred to earlier the other question of law on which special leave was granted was in respect of the 3<sup>rd</sup> Accused who is now dead; and hence a requirement of answering the said question does not arise.
- (30) The question that needs to be addressed now is, even though the question of law referred to above was answered in favour of the 7<sup>th</sup> Accused whether he would be entitled to an acquittal.
- (31) Although both the learned trial judge as well as the Court of Appeal had misdirected themselves by not rejecting the evidence of witness Nandasiri, the same cannot be said about witness Rosalyn. Even if the evidence of

witness Nandasiri is rejected, I see no reason to reject the evidence of Rosalyn and as such the trial judge cannot be faulted for acting on her evidence. As referred to earlier she had clearly implicated the 7<sup>th</sup> Accused as one of the persons who came with the crowd that day and attacked both Siripala and Thushara, the two deceased.

- (32) In the circumstances referred to above, I am of the view that this is a fit case to apply the proviso to Article 138(1) of the Constitution which reads;  
*Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

Although this court is of the opinion that the question of law raised should be decided in favour of the 7<sup>th</sup> Accused-Appellant, I proceed to dismiss this appeal as no failure of justice has occurred.

*Appeal dismissed.*

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

I agree.

JUDGE OF THE SUPREME COURT