

**IN THE SUPREME COURT OF THE**  
**DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

*In the matter of an application for  
Special Leave to Appeal under  
Article 128 of the Constitution from  
a Judgement of the Court of Appeal.*

SC Appeal No.: 60/ 2013

SC (SPL) LA Application No.:  
88/ 2011

CA No.: 36- 40/ 2007

HC Colombo Case No.: 111/  
2000

The Attorney General of the  
Democratic Socialist Republic of  
Sri Lanka.

Vs.

1. Pettiyawattege Anurudha Perera  
Samarasinghe
2. Panagoda Liyanage Don Tissa  
Seneviratne alias Lal
3. Priyantha Anura Siriwardena  
alias Kotiya
4. Samasundara Mohotti  
Arachchige Nimal alias Kaluwa
5. Egodawattege Kamal Perera
6. Samasundara Hettiarachchige  
Hemachandra alias Dayananda  
alias Sudha

**ACCUSED**

AND

1. Pettiyawattege Anurudha Perera  
Samarasinghe

2. Panagoda Liyanage Don Tissa  
Seneviratne alias Lal
3. Priyantha Anura Siriwardena  
alias Kotiya
4. Samasundara Mohotti  
Arachchige Nimal alias Kaluwa
5. Egodawattege Kamal Perera
6. Samasundara Hettiarachchige  
Hemachandra alias Dayananda  
alias Sudha

**ACCUSED-APPELLANTS**

Vs.

The Attorney General of the  
Democratic Socialist Republic of  
Sri Lanka.

**RESPONDENT**

AND NOW BETWEEN

Samasundara Mohotti Arachchige  
Nimal alias Kaluwa

**4<sup>th</sup> ACCUSED-APPELLANT-  
APPELLANT**

Vs.

The Attorney General of the  
Democratic Socialist Republic of  
Sri Lanka

**RESPONDENT-RESPONDENT**

**BEFORE** : **P. PADMAN SURASENA, J.**  
**JANAK DE SILVA, J.**  
**K. PRIYANTHA FERNANDO, J.**

**COUNSEL** : Saliya Pieris, PC with Ruwan Udawela and  
Anjana Rathnasiri for the 4<sup>th</sup> Accused-  
Appellant-Appellant.

Rohantha Abeysuriya, PC, ASG for the Hon.  
Attorney General.

**ARGUED &**  
**DECIDED ON** : 04<sup>th</sup> October 2023

**P. PADMAN SURASENA, J.**

Court heard the submissions of the learned President's Counsel for the 4<sup>th</sup> Accused-Appellant-Appellant and also the submissions of the learned Additional Solicitor General, PC for the Hon. Attorney General and concluded the argument.

The Attorney General has indicted the 4<sup>th</sup> Accused-Appellant-Appellant along with five others under fifteen counts.

*Count No. 01 has alleged that the Accused had committed the conspiracy to commit the attempted murder of Pattiyawattage Nimal Perera Samarasinghe who is the prosecution witness No. 01 listed in the*

*indictment, an offence punishable under section 300 read with sections 113 B and 102 of the Penal Code.*

*Count No. 02 has alleged that the Accused had been members of an unlawful assembly, the common object of which was to cause the death of Deepthi Champa Samarasinghe, an offence punishable under Section 300 of the Penal Code.*

*Count No. 03 has alleged that the Accused had committed an offence punishable under Section 296 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of murder by causing the death of said Deepthi Champa Samarasinghe in furtherance of the common object of the said unlawful assembly.*

*Count No. 04 has alleged that the Accused had committed an offence punishable under Section 300 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of attempted murder of said Pattiyawattage Nimal Perera Samarasinghe (who is the prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.*

*Count No. 05 has alleged that the Accused had committed an offence punishable under Section 380 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of robbery of cash, gold jewellery and wrist watches from the possession of said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.*

*Count No. 06 has alleged that the Accused had committed an offence punishable under Section 443 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of criminal trespass on the house of*

*said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.*

*Count No. 07 has alleged that the Accused had committed an offence punishable under Section 445 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had trespassed on the house of said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in order to commit the attempted murder of said Pattiyawattage Nimal Perera Samarasinghe in furtherance of the common object of the afore-said unlawful assembly.*

*Count Nos. 08, 09, 10, 11 and 12 are counts framed under Section 32 of the Penal Code corresponding to the same incidents set out respectively in afore-mentioned counts 3-7.*

*Count No. 13 has alleged that the 03<sup>rd</sup> Accused had committed robbery while being armed with a pistol, an offence punishable under Section 383 of the Penal Code.*

*Count No. 14 has alleged that the 04<sup>th</sup> Accused had committed robbery while being armed with a pistol, an offence punishable under Section 383 of the Penal Code.*

*Count No. 15 has alleged that the 05<sup>th</sup> Accused had committed robbery while being armed with a knife, an offence punishable under Section 383 of the Penal Code.*

*The 14<sup>th</sup> and 15<sup>th</sup> counts are in relation to the offence of robbery punishable under Section 383 of the Penal Code. (Counts 13, 14 and 15 are only against 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Accused respectively)*

At the conclusion of the trial, the learned High Court Judge had acquitted the 6<sup>th</sup> Accused from all the counts and proceeded to convict the 1<sup>st</sup>-5<sup>th</sup> Accused on Count Nos. 1-12. The learned High Court Judge had also convicted the

3<sup>rd</sup> Accused on Count No. 13; the 4<sup>th</sup> Accused on Count No. 14; and the 5<sup>th</sup> Accused on Count No. 15 respectively.

Although the learned High Court Judge had also convicted the 1<sup>st</sup>-5<sup>th</sup> Accused on the remaining counts framed under Section 32 of the Penal Code (i.e., the *Count Nos. 08, 09, 10, 11, 12*), he had not passed any sentence on the 1<sup>st</sup>-5<sup>th</sup> Accused in respect of those counts.

Being aggrieved by the judgement dated 04-06-2007 pronounced by the High Court, the 1<sup>st</sup>-5<sup>th</sup> Accused had appealed to the Court of Appeal. The Court of Appeal after the argument by its judgment dated 25-03-2011, had decided to acquit the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Accused from all counts framed against them. However, the Court of Appeal had proceeded to affirm the conviction and sentence imposed on the 1<sup>st</sup> and 4<sup>th</sup> Accused on counts 8-12 and the conviction and the sentence imposed on the 4<sup>th</sup> Accused in respect of count Nos. 1, 8-12 and 14. The Court of Appeal had proceeded to acquit the 4<sup>th</sup> Accused from count Nos. 2-7.

The main complaint made by the learned President's Counsel who appeared for the 4<sup>th</sup> Accused-Appellant-Appellant in this case is against the two different decisions made by the Court of Appeal respectively in respect of the 3<sup>rd</sup> Accused and the 4<sup>th</sup> Accused. He pointed out to the evidence of witness No. 01, Pattiyawattage Nimal Perera Samarasinghe who is the sole eye witness in this case. The said witness is the only person who had identified the Accused at the subsequently held identification parade. It is not disputed by the learned Additional Solicitor General that the evidence against the 3<sup>rd</sup> and 4<sup>th</sup> Accused is similar. Wherever and whenever the prosecution witness No. 01 had narrated the incident pertaining to this case, what he had stated was that he had identified both the 3<sup>rd</sup> and 4<sup>th</sup> Accused. He had always mentioned the names of the 3<sup>rd</sup> and 4<sup>th</sup> Accused together. This is apparent from pages 116, 118, 129 and 130 of the Appeal Brief. It is appropriate to re-produce those parts of his evidence in this regard.

ප්‍ර: ඔය දෙවෙනි වතාවටත් තමන්ලව ඔය තමන්ගේ කාමරයට ගෙනී ගියාට පසුව එතන සිට තමන් කොහොටද ගියේ

උ: කෑම කන කැල්ලට ගෙන ගියා.

ප්‍ර: තමන් සමග තවත් කවුරුහරි ගෙනාවද

උ: මම මගේ භාර්යාව සහ දරුවා.

ප්‍ර: කවිද එක්කගෙන ආවේ

උ: පිස්තෝල අතේ තිබුණු දෙදෙනාම. (3 සහ 4 විත්තිකරුන්.)

Page 118

උ: ඒ අවස්ථාවේදී නිකල් සහ කළපාට පිස්තෝල ඇති දෙදෙනාම කාමරයට ඇතුල් වුනා.

ප්‍ර: ඒ කාමරය ඇතුළට ආවේ කොයි විත්තිකරුවන්ද?

උ: 3, 4 විත්තිකරුවන්.

ප්‍ර: ඇවිල්ලා තමන්ලට මොකක්ද කලේ ඉස්සෙල්ලම?

උ: ඒ අවස්ථාවේදී ඔවුන් ඔවුන්ගේ හිස් ආවරන ගලවා ගත්තා.

ප්‍ර: ඒ දෙදෙනා ම ගැලෙව්වද?

උ: ඔව්. මුහුණු ආවරන ගැලෙව්වා.

Page 129,

ප්‍ර: කවුද එම වුදිනයිත් දෙදෙනා?

උ: එන්නි කුඩුවේ සිටින 3, 4 වුදිනයිත්.

Page 130,

ප්‍ර: ඔබ භාර්යාව සමඟ කාමරය ඇතුළට යනකොට 3, 4 එන්නිකරුවන් එම කාමරය ඇතුළේ සිටියා?

උ: ඔව්.

Thus, it is not disputed and is indeed clear from the above portions of evidence recorded in the trial that it is one and the same evidence that could be used either to convict or acquit the 3<sup>rd</sup> and 4<sup>th</sup> Accused as far as the evidence in relation to their facial identities are concerned.

According to the judgement dated 25-03-2011, the Court of Appeal has stated as follows-:

*The 3<sup>rd</sup> Accused was sentenced to death and rigorous imprisonment ranging up to 15 years. The evidence against the 3<sup>rd</sup> accused was his identification at a parade and joint representation by Counsel. The 3<sup>rd</sup> accused is said to have worn a facemask during the commission of the offences and the virtual complainant claims to have identified him when the 3<sup>rd</sup> accused had occasionally removed/lifted the mask. In any event his identification alone by a single witness unaccompanied by other evidence does not warrant a conviction on the charges as such evidence is insufficient to convict him on the charges. For the reasons, I am satisfied that the verdict against the 3<sup>rd</sup> Accused was unreasonable and against the weight of the evidence, and that a verdict of acquittal should be entered in his case. Hence, I feel constrained to think that the convictions of the 3<sup>rd</sup> accused and*



*sentences passed on him should be set aside and the 3<sup>rd</sup> accused be acquitted on all the charges.*

Therefore, it is clear that the Court of Appeal was not convinced that the identity of the 3<sup>rd</sup> Accused was established to the satisfaction of Court through the evidence of prosecution witness No. 01. It is on that basis that the Court of Appeal had set-aside the conviction of the 3<sup>rd</sup> Accused and proceeded to acquit him from all counts in the indictment.

The Court of Appeal as regards the 4<sup>th</sup> Accused had stated as follows:-

*The case against the 4<sup>th</sup> accused mainly depended on the evidence relating to the identification parade, dock identification and section 27 discovery of the firearms and an opinion expressed by a ballistic expert regarding the use of the firearms in the commission of the offences. The conviction of the 5<sup>th</sup> accused was based on mere identification, at a parade followed by dock identification. The Counsel for the 4<sup>th</sup> accused contended that the evidence adduced against their clients is hardly sufficient to bring home a conviction while the State argued the contrary.*

Therefore, it appears that the Court of Appeal was satisfied about the identity of the 4<sup>th</sup> Accused on the same evidence that it rejected as regards the 3<sup>rd</sup> Accused, in the presence of evidence of a recovery of a revolver subsequent to ‘Section 27 statement’ made by the 4<sup>th</sup> Accused. It appears that the learned Judges of the Court of Appeal had also taken in to consideration that joint representation entered by a single counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused and the fact that counsel is a junior of the learned President’s Counsel who had appeared for the 1<sup>st</sup> Accused. This is apparent from the following extract taken from the Court of Appeal judgement.

*In the circumstances, it could safely be assumed that the 1<sup>st</sup> accused has indirectly admitted the stand of the prosecution that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused were concerned with the commission of the crime. In that frame of mind, it is difficult to understand as*

*to the basis on which the 1<sup>st</sup> accused could have reposed confidence in his Counsel who had also taken instructions to defend the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused. This is a grave incriminating circumstance that should have been taken into consideration as an item of evidence against the 1<sup>st</sup> accused.*

*The joint representation entered by a single Counsel applies to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused vice versa. In this background, the prosecution has invited us to take notice of this unusual arrangement made to represent the accused by one single Counsel, as a relevant fact against them as well in determining their degree of responsibility in the commission of the crimes. Considering the extreme unusual conduct of the 1<sup>st</sup> accused and others, I am of the opinion that it constitutes strong incriminating evidence falling into the category of subsequent conduct of the accused.*

*I have stated that a President's Counsel had appeared for all the accused in the High Court until 08.09.2005. It is thereafter that the appearance had been marked separately for the 1<sup>st</sup> accused and others. After this date until the conclusion of the trial, the same President's Counsel continued to enter his appearance for the 1<sup>st</sup> accused and quite surprisingly his junior in the case, ceased to be his Junior Counsel and took over case of the other accused. This clearly shows that the cure provided was even worse than the disease. The conspiracy between the 1<sup>st</sup> accused and the others, particularly the 4<sup>th</sup> accused is quite apparent from this arrangement. This being relevant to the fact in issue, cannot be ignored in determining the degree of culpability of the accused. As this is borne out by the record of the Magistrate Court and High Court none can say that it is not proved to the required standard.*

We see no basis for such conclusion. Moreover, since this conclusion has been categorically repeated in more than one place in the judgment, we have no reason to reject the submission made by the learned President's Counsel for the 4<sup>th</sup> Accused-Appellant-Appellant that this erroneous conclusion had

influenced the mind of the Judges of the Court of Appeal. This factor appears to have ultimately prompted them to arrive at a different conclusion in respect of the 4<sup>th</sup> Accused which had resulted in a different treatment meted out to the 4<sup>th</sup> Accused as against the 3<sup>rd</sup> Accused despite the fact that the evidence against each one of them remains the same.

Let me now deal with the conclusion arrived at by the learned Judges of the Court of Appeal about the presence of evidence of a recovery of a revolver subsequent to 'Section 27 statement' made by the 4<sup>th</sup> Accused. Admittedly, the 4<sup>th</sup> Accused had surrendered with an Attorney-at-Law to the police station at 9.00 pm, fifteen days after the incident. We also observe that the police officer had recorded the statement from the 4<sup>th</sup> Accused at 9.15 pm, just fifteen minutes after the time he had surrendered to Maharagama police station. It is this statement which had contained the 'Section 27 statement' which is alleged to have led to the recovery of a revolver from a particular place. Having regard to: the time at which the 4<sup>th</sup> Accused had surrendered to the Police Station; the time at which his statement had been recorded; the background of the evidence regarding the identity of the Accused coming from a solitary witness who says at one point of time that the 4<sup>th</sup> Accused was wearing a mask, it is highly questionable as to whether it is right for the Court of Appeal to place that much of reliance on the 'Section 27 statement' and the subsequent recovery of a revolver to come to a conclusion that the identity of the 4<sup>th</sup> Accused has been established beyond reasonable doubt. In any event, as pointed out by the learned President's Counsel for the 4<sup>th</sup> Accused, even if the evidence of a recovery of a revolver subsequent to 'Section 27 statement' made by the 4<sup>th</sup> Accused is accepted, it is clear that the effect of the 'Section 27 statement' and the subsequent recovery is limited only to the inference that the 4<sup>th</sup> Accused had knowledge of the particular revolver concealed or placed at that particular location. That would be an independent item of evidence. Moreover, although the learned Judges of the Court of Appeal in their judgment at page 50, had stated that "*According to the evidence of the government analysts P3 is a revolver and it is a gun within the meaning of the law and the two bullets recovered from the body of the deceased may have been fired from the said revolver*". It is clear that this is also not a correct conclusion.

The relevant Government Analyst's report dated 26-02-1990 was tendered to this Court by the 4<sup>th</sup> Accused-Appellant-Appellant by way of motion dated 09-09-2011. This has been produced in the High Court marked **P9**. What the Government Analyst report has stated is as follows-:

“පැ1 සහ පැ2 උණ්ඩ බරින්, ප්‍රමාණයෙන් සහ ධර්ණයෙන් ආමානය 9×19mm පතරොම් වල දක්නට ලැබෙන උණ්ඩ වලට හා අනුරූප විය. මෙම උණ්ඩ මත වූ ගිනි අවි ලකුණු පරීක්ෂාකිරීමේදී හෙළිවූයේ ඒවාට වඩා විශාල ආමානයකින් යුත් කානුවක් ඇති තුවක්කුවකින් වෙඩි තබා ඇති බවයි. පැ1 සහ පැ2, පැ3 රිවෝල්වරයෙන් වෙඩි තැබූවා වියහැක. පැ1 සහ පැ2 තවදුරටත් පරීක්ෂාකිරීමේදී හෙළිවූයේ ඒවා මත සැසඳීමට තරම් ප්‍රමාණවත් ගිනි අවි ලකුණු නොතිබුණ බවය.

We observe that පැ1 and පැ2 referred to in the Government Analyst's report are spent bullets. පැ3 is the revolver. Therefore, what the learned Judge of the Court of Appeal has stated in his judgement does not appear to be a conclusive opinion expressed by the Government Analyst. We observe that this fact also has influenced the mind of the learned Judges of the Court of Appeal to come to the conclusion that the identity of the 4<sup>th</sup> Accused-Appellant has been established.

As the Court of Appeal has held that the evidence of witness No. 01 relating to the identity of the 3<sup>rd</sup> Accused is not satisfactory, the Court of Appeal had acquitted the 3<sup>rd</sup> Accused. Hon. Attorney General had not appealed against that finding. Therefore, to date, the Court of Appeal's conclusion on that matter has survived. The question before us is whether there is any additional material to affirm the conviction of the 4<sup>th</sup> Accused in view of the fact that it was on the witness No. 01's evidence that the prosecution had sought to establish the identity of the 4<sup>th</sup> Accused also. We are unable to see any such additional material against the 4<sup>th</sup> Accused which is capable of independently establishing the identity of the 4<sup>th</sup> Accused. Thus, we are compelled to take the view that there is a clear disparity in the judgment pronounced by the Court of Appeal which had opted to treat the 4<sup>th</sup> Accused in a way different to that of the 3<sup>rd</sup> Accused.

Going by the Court of Appeal conclusion with regard to the 3<sup>rd</sup> Accused we are of the view that there had been no basis before the Court of Appeal to have enabled it to arrive at a conclusion that the identity of the 4<sup>th</sup> Accused is nevertheless established.

Although this Court has granted Special Leave to Appeal in respect of several questions of law set out in paragraph 15 of the petition dated 06-05-2011 we are of the view that it would suffice to provide an answer to the following question of law which is set out in paragraph 15 (c) of the petition dated 06-05-2011.

*Did their Lordships err when they concluded that the Petitioner was clearly identified while at the same time acquitting the 3<sup>rd</sup> and 5<sup>th</sup> Accused whose convictions were also based on substantially the same evidence?*

We answer the above question of law in the affirmative. Therefore, we proceed to set aside the conviction and the sentence imposed on the 4<sup>th</sup> Accused and direct that the 4<sup>th</sup> Accused be acquitted and discharged from all counts in the indictment.

Judgment of the High Court in so far as the 4<sup>th</sup> Accused is concerned, is set aside. The judgement of the Court of Appeal in so far as the 4<sup>th</sup> Accused is concerned, is set aside.

Registrar is directed to forward the copy of this judgement to the relevant High Court as soon as the judgment is ready.

Appeal is allowed.

**JUDGE OF THE SUPREME COURT**

**JANAK DE SILVA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**K. PRIYANTHA FERNANDO, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

Mhd/-