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

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of Articles 128 and 154(p) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 9 of the High Court of the Province (Special Provisions) Act No.19 of 1990.

SC APPEAL NO.118/2010

High Court of Badulla No. 26/2007 (Appeal)

Magistrate Court Badulla Case No. 9245.

The Officer in Charge,
Crimes Investigation Division,
Police Station,
Badulla.

Complainant

Vs

1. Thangavelu Chandran.
   No. 22/180/2,
   Mahathenna Division,
   Sarniya Estate,
   Kandegedara.

2. Kande Naidalage Sumith.
   "Nimal Sevana",
   Nilmalpotha,
   Kandegedara.

3. Jayaweera Mudiyanselage
   Gunathilaka.
   No.232/2,
   Badulla Road,
   Bandarawela.

Accused

AND

Jayaweera Mudiyanselage Gunathilaka.

No.232/2,

Badulla Road,

Bandarawela.

3rd ACCUSED-APPELLANT

vs.

1. The Officer in Charge,
   Crimes Investigation Division,
   Police Station,
   Badulla.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Jayaweera Mudiyanselage Gunathilaka.

No.232/2,

Badulla Road,

Bandarawela.

3rd ACCUSED-APPELLANT-APPELLANT

vs.

1. The Officer in Charge,
   Crimes Investigation Division,
   Police Station,
   Badulla.

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

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE: **S. THURAIRAJA, PC, J;**

A.H.M.D. NAWAZ, J &

ACHALA WENGAPPULI, J.

COUNSEL: Anil Silva, PC with Amaan Bandara for the 3rd Accused-Appellant-Appellant.

Ms. Lakmali Karunanayake DSG for the Complainant-Respondents-Respondents.

WRITTEN SUBMISSIONS: 3rd Accused-Appellant-Appellant on 21st December 2010.

Complainant-Respondents-Respondents on 30th April 2013 and 28th July 2016.

ARGUED ON: 16th May 2023.

DECIDED ON: 23rd November 2023.

S. THURAIRAJA, PC, J.

The 3rd Accused-Appellant-Appellant (hereinafter referred to as the "Appellant") preferred this appeal against the judgment of the High Court of Badulla (hereinafter referred to as the "High Court") dated 15th July 2010. The matter was taken up for Argument on 16th May 2023, and the Counsel for the Appellant submitted that he will be confining this appeal to two questions of law stated as follows:

(i) Whether the evidence of witnesses was led contrary to Section 192 of the Criminal Procedure Act No.15 of 1979?

(ii) Whether all Accused were acquitted on Counts No. 2, 3 and 4, and can the Appellant be convicted on Count No.1, namely under Section 140 of the Penal Code?

I find it pertinent to set out the material facts of the case prior to addressing the question of law before us.

The 3rd Accused-Appellant-Appellant (hereinafter referred to as the "Appellant") and two others were charged in the Magistrates Court of Badulla on four counts, namely,

1. At Mahathanna Division, Kandegedara within the jurisdiction of this court on 23rd December 1999 you being a member of an unlawful assembly with the common intention of causing unjust harm or other criminal act to Marimuttu Tirruppan of No. 13/1, Mhathenna Division, Sarniya Estate, Kandegedara committed an offence punishable under Section 140 of the Penal Code.
2. In the same transaction you with some other people being members of the unlawful assembly described in charge 1 to carry out the common intention or intentions of the said unlawful assembly did

cause hurt by assaulting with hands, stones and sticks and thereby committed an offence punishable under Section 146 of the Penal Code.

3. In the same transaction you did commit robbery of the properties worth Rs. 92700/- belonging to Marimuttu Tirupathy and thereby committed an offence punishable under Section 382 read with Section 146 of the Penal Code.
4. In the same transaction you with the common intention of causing unjust harm or loss to the properties of Marimuttu Thirupathy and knowing the same will happen did pelt stones to the house of Marimuttu Thirupathy and thereby committed mischief to the properties of the said house worth Rs. 500/- an offence punishable under Section 140 read with Section 146 of the Penal Code.

The 1st and 2nd Accused and the Appellant pleaded not guilty, and the case proceeded to trial. On 18th September 2002, the prosecution concluded the evidence in chief of prosecution witness No. 1 Marimuttu Murugayya. In giving evidence the witness stated that, on 23rd December 1999 the 1st and 2nd Accused and the Appellant arrived at his house with several others and attacked his house with clubs; that he ran outside and hid in the vegetable plot and watched the activities of the mob; that he identified the 1st and 2nd Accused and the Appellant as they were previously known to him; that after the crowd left he went inside the house and realised that some jewellery and few household items were missing; and that he informed the police that night itself and the police arrived and commenced investigations. On this day of the trial, the 1st and 2nd Accused and the Appellant were present and represented and moved for a date to cross-examine the witness. As a result, Court re-fixed the matter for cross-examination and further trial was on 22nd January 2003.

When this case was called on 22nd January 2003 for trial, only the 1st Accused was present in court, and the 2nd Accused and the Appellant were absent, and as such,

warrants were issued on them, and their sureties were noticed. The matter was re-fixed for trial on 2nd December 2003 and then again on 24th February 2004. However, on 24th February 2004, the 2nd Accused and the Appellant were absent again, and warrants were re-issued.

On 27th February 2004, the Appellant appeared in court and got the warrant recalled. However, as the 2nd Accused was absent, the matter was fixed for steps under Section 192 of the Code of Criminal Procedure Act on 13th July 2004. On 13th July 2004, the 1st Accused and Appellant appeared in Court and were represented. The police had led evidence under Section 192(1) of the Criminal Procedure Code and had informed the court that the 2nd Accused was not found in his village, and the same was confirmed by the Gramasevaka of the said village. After this evidence was led, the court permitted evidence to be led in the absence of the 2nd Accused, and the matter was fixed for trial on 9th December 2004.

On 9th December 2004, only the 1st Accused was present before the Court, and the Appellant was absent. Court observed that although the Appellant was present before the Court on 27th February 2004, he had been absent on 22nd January 2003, 24th February 2004 and 9th of December 2004. Therefore, the learned Magistrate issued a warrant on the Appellant and his sureties were noticed of the same. The matter was re-fixed to be tried on 21st April 2005, and on that date, too, only the 1st Accused had appeared, and the Appellant had neither been present nor represented. Therefore, the learned Magistrate had decided to proceed against the Appellant *in absentia* as provided under S.192(1) of the Code of Criminal Procedure Act.

After making this observation, the Learned Magistrate had called witness No. 1, and he had been cross-examined by the counsel for the 1st Accused. On the same day, witness No. 2 had given evidence, and he had identified the 2nd Accused as a person who came and mobbed Marimuttu's house. The trial had been concluded on this day with the evidence of witness No. 9, who was a police officer. The case was then fixed for judgment on 23rd June 2005. On 23rd June 2005, the case was re-fixed for judgment

on 02nd September 2005. On 02nd September 2005, only the 1st Accused was present and the matter was re-fixed for judgment on 18th November 2005. However, as the Presidential Election was held on 18th November 2005, the case was not called on the said day and was called again on 25th November 2005 and fixed for judgment on 10th February 2006. The matter was called against on 10th February 2006, and the judgment was pronounced: the 1st and 2nd Accused and the Appellant were convicted for all 4 counts. On this day also, the 2nd Accused and Appellant were absent and unrepresented. The matter was called again on 10th March 2006 and on 21st April 2006 for sentencing, but still, the 2nd Accused and the Appellant were absent and unrepresented on all of these days. Since the 2nd Accused and the Appellant were absent court issued warrants on them. After these days, this matter was called on several days, namely, 25th April 2006, 30th May 2006, 25th July 2006, 30th July 2006, 11th August 2006, 15th August 2006 and 12th September 2006, but no application was made on behalf of the Appellant.

On 26th September 2006, the 1st and 2nd Accused and the Appellant were present in court, and an application was made under Section 192 (2) of the Code of Criminal Procedure Act. The counsel informed Court that the Appellant came to Court on 18th November 2005 and as the case was not taken up due to the Presidential Election being held, he had no notice of the next date of this case. He had stated that on 29th November 2005, the case had been taken up for trial in the absence of his client.

Having heard this application, the learned Judge had fixed the matter for order on the said application and for sentencing on 28th November 2006. On this day, the 1st and 2nd Accused and the Appellant were present in Court, and the matter was re-fixed for sentencing on 30th January 2007. The 1st and 2nd Accused and the Appellant were absent on 30th January 2007, and the learned Magistrate, who had been specially appointed by the Judicial Services Commission to sentence the 1st and 2nd Accused and the Appellant, had observed their absence, and had proceeded to convict all three Accused on each count in the following manner. For the first count, imposed a

sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. For the second count, imposed a sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. For the third count, imposed a sentence of 24 months Rigorous imprisonment for each accused with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. In addition to the above, directed to pay a compensation of Rs. 100,000/- to the victim by each Accused and in default of the said payment, 6 months Rigorous Imprisonment. For the fourth count, imposed a sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment.

Being aggrieved by the said conviction and sentence, the Appellant appealed to the Provincial High Court of the Uva Province holden at Badulla. The Learned High Court Judge, having considered the said appeal, delivered her judgment on 15th July 2010. The High Court judgment set aside the convictions and sentence imposed on the Appellant on charges 2, 3 and 4 but affirmed the conviction and sentence imposed on Count 1 and suspended the term of imprisonment imposed on Count 1 for five years. Subject to this variation, the appeal of the Appellant was dismissed.

Being aggrieved by the said judgment of the Learned High Court Judge, the Appellant filed a Leave to Appeal application, and this Court granted Leave to Appeal on 16th September 2010. As mentioned above, the first question of law is as follows: whether the evidence of witnesses was led contrary to Section 192 of the Criminal Procedure Act. Section 192(1) of the Code of Criminal Procedure Act No.15 of 1979 reads as follows:

"Section 192 (1) Where the accused-

(a) is absconding or has left the island; or

(b) is unable to attend or remain in court by reason of illness and either had consented to the commencement or continuance

of the trial in his absence of such trial may commence and proceed or continue in his absence without prejudice to him; or

*(c) by reason of his conduct in court is obstructing or impeding the progress of the trial, the Magistrate may, **if satisfied** of these facts, commence and proceed with the trial in the absence of the accused."*

(Emphasis added)

In the present case, the Appellant was present at the initial stage in Court when the trial proceeded against him but was absent during the latter stages of the trial. Therefore, the relevant part of the provision is Section 192 (1)(a) of the Code of Criminal Procedure Act. This Section only requires the learned Magistrate to be satisfied with the situation and it does not specify the course of action that must be adopted by the Magistrate to satisfy himself. This Section has given the discretion to the Magistrate to proceed with the trial if he is satisfied that the accused is absconding. As discussed earlier, in the present case, the Appellant was present at the time of the trial commenced on 18th September 2002. After the evidence in chief of PW1 concluded, the Counsel for the Appellant had moved for a date for cross-examination and based on this application Court re-fixed the matter for cross-examination on 22nd January 2003. However, on this date and on several subsequent dates, namely 2nd December 2003, 24th February 2004 and 9th December 2004, the Appellant was absent and unrepresented. On 21st April 2005, the learned Magistrate had proceeded on the basis that the Appellant was knowingly absconding and observed (page 124 of the appeal brief) as follows;

"3 වන විත්තිකරු අද දින අධිකරණය මග හැර විභාගයට පෙනී සිටීමෙන් වැලකී ඇත. ඔහු මීට පෙරද අවස්ථාවන් කීපයකදී විටින් විට අධිකරණය මග හැර ඇත. අවසන් විභාග දිනය වන අද දින 3වන විත්තනිකරු නොපැමිණීමෙන් ඔහු මෙම නඩු විභාගයට පෙනී සිටීමෙන් වැලකී මෙම අධිකරණය මගහැර තිබෙන බවට

මම සැහීමකට පත්වෙමි. එබැවින් අපරාධ නඩු විධාන සංග්‍රහ පනතේ 192(1) විධිවිධාන පරිදි ඔහු නොමැතිවද ඔහුට විරුද්ධව සාක්ෂි ඉදිරිපත් කිරීමට පැමිණිල්ලට අවසර දෙමි. මෙම නඩුව මෙම අධිකරණයේ පවතින ඉතා පැරණි නඩුවකි. මෙම නඩුව 1999 වරෂයේ පවරා ඇති නඩුවක්ද වේ. "

An approximate translation would read as follows;

"The 3rd Accused has avoided appearing in court today. He has missed Court on several occasions before. I have observed that the 3rd Accused has avoided the Court by not appearing today too, which is the last day of hearing. Therefore, I allow the prosecution to adduce evidence against him without him as per the provisions of 192(1) of the Code of Criminal Procedure Act. This case is a very old case in this court. This case is also a case assigned in 1999."

Section 192 is there to proceed in the absence of an accused, and it empowers the Magistrate to continue the trial in the absence of an accused. If the Magistrate is satisfied that the accused is absconding, Section 192, as discussed earlier, empowers the Magistrate to commence and proceed with the trial in the absence of the accused. The learned Counsel for the Appellant submits that, there was no inquiry was held under Section 192(1) of the Code of Criminal Procedure Act therefore, in terms of the law, the learned Magistrate had caused a fundamental error by this. I am of the view that although an inquiry was not held under Section 192(1) of the Code of Criminal Procedure Act, a determination was made under the said section. There were sufficient reasons for the Learned Magistrate to satisfy himself that the Appellant was absconding from the Court Proceedings for a considerable period of time. Further, as I observed, the Appellant was present before the learned Magistrate on 6th April 2001, and from 17th July 2001, he was absent in several instances and not represented by an Attorney-at-Law. Section 192(1) procedure is applicable to those suspects/accused who did not have prior knowledge about the next dates and/or steps of the Court

proceedings. I am of the view that due to the abovementioned facts, the Appellant possessed prior knowledge of the next dates and/or steps of the Court proceedings. Further, as he was occasionally present before the Court, the Appellant is not entitled to claim any relief under section 192 of the Code of Criminal Procedure Act.

The second question of law in this matter is, whether all Accused were acquitted on Count No. 2, 3 and 4 and can the Appellant be convicted on Count No.1, namely under Section 140 of the Penal Code. The learned High Court Judge, in her judgment, stated that there was no evidence to prove charges 3 and 4 with regard to the Appellant. The learned High Court Judge also stated that the second charge was defective. On those grounds, the learned High Court Judge has acquitted the Appellant on charges 2, 3 and 4. The only charge which was affirmed was the first charge, which was a charge of unlawful assembly. Section 138 of the Penal Code defines unlawful assembly while the substantive offence of being a member of an unlawful assembly is constituted by Section 139, the punishment for this offence is prescribed by Section 140.

As it was submitted in the present case, the learned High Court Judge has set aside the conviction of the 3rd and 4th counts of the Appellant, mainly based on the statement of evidence of the two main eyewitnesses namely Marimuttu Murugayya (P.W.1) and Muththusamy Sundaram (P.W.2) that, the Appellant arrived at the scene of the crime but have failed to clearly describe the individual acts they committed. But, witness Marimuththu Murugayya (P.W.1) in his evidence clearly stated that a mob had attacked the house and he was able to identify only three accused out of the others, and among them the Appellant (Gunathilake) was there, stated as follows;

> *"සුමින් සහ ගුණතිලක මහත්තයා බැහැලා ආවා.... තව කට්ටියක් කලු පාට පට්ටලින් මුහුණ බැඳලා සිටියා. 4,5 දෙනෙක් මගේ ගෙදරට ගොඩ වුනා. ඊට පස්සේ මම දොර වහගත්තා. මම දොර ඇරියේ නැහැ, ඔවුන් දොරට තට්ටු කරලා පොලු වලින් ගැහුවා. ඊට පස්සේ පිටිපස්සෙන් ආවා. ජනේලය ඔක්කොම කැඩුවා. කට්ටිය ඉස්සරහ ඉඳලා කෑ ගැහුවා. දොර කැඩුවා කියලා.... මගේ නිවසට*

පහර දුන්න පුද්ගලයින් අද අධිකරණයේ ඉන්නවා. පළවෙනියට ඉන්නේ චන්දරේ, දෙවෙනියට ඉන්නේ සුමිත්, ඒ දෙන්නා ඇතුළට ආවා. තුන් වෙනියට ඉන්නේ ගුණතිලක."

An approximate translation would read as follows;

"Mr. Sumit and Mr. Gunathilaka came down…. Others had their faces tied with black bands. 4,5 people boarded my house. Then I closed the door. I didn't open the door. They knocked on the door and beat with sticks. Then came from behind. All the windows were broken. The group shouted from the front. That the door was broken... The people who attacked my house are in court today. Chandare is the first one, Sumith is the second one, they both came inside. The third is Gunathilake."

Unlawful assembly is a legal term to describe a group of people, five or more, with the common object of deliberate disturbance of the peace. All the members of an unlawful assembly are liable to acts of any member in furtherance of a common object. In terms of Section 138 and Section 140 of the Penal Code, the prosecution has to prove the presence of a common object. The concept of common object may apply to two or more persons, and by definition, an unlawful assembly should have been formed for one or more of the six purposes enumerated in section 138. One can define a "common object" as the shared intention entertained by each of the members of an unlawful assembly, and the existence of this intention is sufficient for the purpose of section 146. Further, in the context of a common object, it is sufficient that each accused person joined the unlawful assembly with knowledge of its character and objects, even though no further act was done by some of them. Furthermore, the offence envisaged by section 146 is one committed in the prosecution of the common object of the assembly, or such as the members of that assembly knew to be likely to be committed in the prosecution of the common object of the assembly.

With the above understandings, I am of the view that Section 140 of the Penal Code only requires the presence of a common object. Hence, for the above reasons, I answer the first and second questions of law negatively.

Decision

After careful consideration of the submissions made, facts and circumstances of the instant case as discussed above, there is no basis to interfere with the decision of the learned Provincial High Court Judge of the Uva Province holden at Badulla. I hereby dismiss this Appeal, by answering the first and second questions of law negatively. I affirm the judgment of the Provincial High Court of the Uva Province holden at Badulla dated 15th July 2010.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J
I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.
I agree.

JUDGE OF THE SUPREME COURT