JAGATHSENA AND OTHERS
v.
G. D. D. PERERA, INSPECTOR, CRIMINAL INVESTIGATION DEPARTMENT AND MRS. SIRIMAVO BANDARANAIKE (AGGRIEVED PARTY)

COURT OF APPEAL
RANASINGHE, J. (P/C.A.) AND
TAMBIAH, J.
C.A. 365-370/80
M.C. HATTON 18725
23, 24, 29 JUNE AND
01, 02, 12, 19, 20 AND 21 JULY 1982.

Criminal Law – Right of Appellate Court to review findings of fact of original court – Expert evidence – Evidence Ordinance, section 45 – Can prosecution canvass findings of Magistrate in favour of the defence in Appeal Court without prior notice? – Right of Court of Appeal to look into witness's statement to the police to test version of witness – Unlawful assembly – Common object – Criminal Procedure – Sections 110, 260, and 261 of the Code of Criminal Procedure Act No. 15 of 1979 – Right of aggrieved party to appear and be heard by attorney-at-law – Judicature Act No. 2 of 1978, section 41.

Held:

(1) Although the findings of a Magistrate on questions of fact are entitled to great weight, yet it is the duty of the Appellate Court to test, both intrinsically and extrinsically, the evidence led at the trial. If after a close and careful examination of such evidence, the Appellate Court entertains a strong doubt as to the guilt of the accused, the Appellate Court must give the accused the benefit of such doubt.

(2) Under section 43 of the Evidence Ordinance, opinions of persons specially skilled in, *inter alia*, science or art or in questions as to identity or genuineness of handwriting are relevant facts. It is the duty of the Court itself to form an opinion upon questions in respect of which the expert gives evidence. In doing so, the court should, however, take into consideration such expert opinion. The function of the expert is to assist, with his expert knowledge and experience, the court in arriving at a finding upon the particular matter.

(3) It is not open to the prosecution to seek to canvass before the Appellate Court findings of the Magistrate which are in favour of the defence. The prosecution has such right, at any rate without prior notice to the appellant.

(4) It is permissible for the court to look into a witness's statement to the Police marked in the case for the purpose of seeing whether the particular witness had told the Police a story materially different from the story set out in his evidence at the trial, for instance by omitting to mention a material fact deposed to at the trial. (section 110 of Code of Criminal Procedure Act).

(5) The mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he said or did something or omitted to do something which would make him a member of such unlawful assembly. The prosecution must place evidence pointing to each accused having done or said something from which the inference could be drawn that each entertained the object which is said to be the common object of such assembly. Omnibus evidence must be carefully scrutinized to eliminate all chances of false or mistaken implication as the possibility of persons in an assembly resenting or condemning the activities of misguided persons cannot be ruled out and caution has to be exercised in deciding which of the persons present can be safely described as members of the unlawful assembly. Although as a matter of law an overt act is not a necessary factor bearing upon membership of an unlawful assembly, yet, it is safer to look for some evidence of participation by each person alleged to be a member before holding that such person is a member of the unlawful assembly, lest innocent persons be punished for no fault of their's. The common object of an assembly is an inference from facts to be deduced from the facts and circumstances of each case. The common object can be collected from the nature of the assembly, the arms used by them, the behaviour of the assembly at or before the scene of occurrence, and subsequent conduct. The common object must be readily deducible from the direct as well as circumstantial evidence, including the conduct of the parties. It is not sufficient for such evidence to be consistent with such an inference, but must be the only conclusion possible. Merely because the specific offence with which the unlawful assembly is charged is not proved, it does not mean that the common object of the unlawful assembly should be held to be non-existent. In order, to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot and to infer that all these were originally part of its common object. The conclusion must normally be based on more evidence than the mere acts themselves.

(6) The Magistrate omitted to examine several matters in the evidence led for the prosecution. A close examination of the evidence raises strong doubts about the correctness of the convictions of the accused.

(7) (a) The right granted to an "aggrieved party" by section 260 of the Code of Criminal Procedure Act No. 15 of 1979 to be represented in court extends to

representation even before the Court of Appeal when such Court hears an appeal from a Magistrate's Court.

(b) The right of representation is clearly the right to make either on one's own behalf or on behalf of another, statements or submissions to another, either orally or in writing in regard to any matter or thing with a view to influencing the action or conduct of that other. It does not connote merely a silent and an inarticulate presence. An attorney-at-law is one who is a member of a profession, the chief characteristic of which is to plead on behalf of one who has to place matters before another. He is trained and skilled in the art of doing so; and he is held out as one entitled to assist and advise clients and to appear, plead or act before a court of law. The presence of such a person before a court of law would be meaningless if he is merely to be seen and not heard.

(c) Sections 41(1) and (2) of the Judicature Act, No. 2 of 1978 cannot be construed to mean that the right to address Court is given only to an attorney-at-law who appears for a party who has or claims to have the right to be heard. The provisions of this section support the proposition that the right of representation carries with it the right to address court and this right to address court is in no way dependent upon the right in the person, whom the attorney-at-law so represents, to be heard. That to represent another in court carries with it the right to make submissions on behalf of another also finds support in the provisions of subsections (1) and (2) of section 261 of the Code of Criminal Procedure Act. There is no difference as far as the right to address court is concerned between the right granted to be heard and the right granted to be represented under the provisions of the Code of Criminal Procedure Act, No. 15 of 1979. They both connote a right to address court.

Per **Ranasinghe J.** "The right given by the provisions of section 260 of the Code of Criminal Procedure Act of 1979 to an 'aggrieved party' is one given for the first time in the history of criminal procedure of this country. The intention of the legislature seems clearly to be to give the 'aggrieved party' also an opportunity of placing before court any relevant matters which such party desires to bring to the notice of Court."

Cases referred to:

1. *The King v. Fernando* 32 NLR 250, 252.
2. *Martin Fernando v. The Inspector of Police, Minuwangoda* 46 NLR 210.
3. *King v. Gunaratne et al.* 41 C.L. Rec. 144.
4. *Sangarakkita Thero et al. v. Buddharakkita Thero* 39 CLW 89.

5. *Perera v. Alaganathan* 66 NLR 438.

6. *Regina v. Pinhamy* 57 NLR 169.

7. *Charles Perera v. Motha* 65 NLR 294.

8. *Gratiaen Perera v. The Queen* 61 NLR 522.

9. *Fernando v. The Queen* 76 NLR 265.

10. *Mutubanda v. The Queen* 73 NLR 8.

11. *Land Reform Commission v. Grand Central Ltd.* SC 36 – 37/81 – C.A., L.A. Appeal 20 of 81; S.C. Minutes of 16.9..81.

APPEAL from judgment of the Magistrate's Court of Hatton.

S. J. Kadiragamar, Q.C. with *Raja Dep* for 1st and 2nd accused-appellants.

S. L. Gunasekera with *R. J. de Silva* for 3rd and 4th accused-appellants.

Mark Fernando with *Raja Dep* for 5th accused-appellant.

A. H. C. de Silva, QC with *Dunstan de Alwis* and *M. S. M. Nazeem* for 6th accused-appellant.

S. W. B. Wadugodapitiya, Additional Solicitor-General with *C. R. de Silva, S.C.* (on 23 and 24 June 1982) and thereafter with *Joe Perera S.C.* for complainant-respondent.

V. S. A. Pullenayagam with *Faisz Musthapha, Miss Deepali Wijesekera* and *Miss Mangalam Kanapathipillai* for "aggrieved party" (Mrs. Sirimavo Bandaranaike)

Cur. adv. vult.

(Note by Editor, The Supreme Court upheld this judgment by its judgment reported in [1984] 2 Sri LR 397).

31st August, 1982.

RANASINGHE, J. (PRESIDENT):

The six accused-appellants stood charged before the Magistrate's Court of Hatton on four counts which, briefly were: that, on 13.5.1979, at Dickoya they, along with others, were members of an unlawful assembly the common object of which was to intentionally insult Mrs. Sirimavo R. D. Bandaranaike and thereby committed an offence under Section 140 of the Penal Code; that one or more of the members of the said unlawful assembly did, intentionally insult the said Mrs. Sirimavo R. D. Bandaranaike by using the words, set out in count 2, which said offence was committed in prosecution of the said common object of the said unlawful assembly or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object and that they being members of the said unlawful assembly at the time of the committing of such offence are guilty of an offence under Section 484 of the Penal Code read with Section 146 of the Penal Code; that they did also in prosecution of the said common object of the said unlawful assembly commit mischief by causing damage to the amount of Rs.1987/- to the jeep, bearing distinctive number 31 ශ 1294, belonging to the said Mrs. Sirimavo R. D. Bandaranaike, and that they are thereby guilty of an offence under Section 410 of the Penal Code read with Section 140 of the Penal Code; that in respect of the said act of mischief they are also guilty of an offence under Section 410 of the Penal Code read with Section 32 of the Penal Code.

The learned Magistrate has, after trial, found all six accused-appellants guilty on counts 1 (Section 140) and 2 (Section 484 read with S. 146), and not guilty on counts 3 and 4 (Section 410 read with Sections 146 and 32). The 1st, 2nd and 5th accused-appellants have been convicted on the said counts, and each has been fined Rs. 250/- on each of the two counts. The 3rd accused-appellant, who is the 18 year old son of the 1st accused-appellant and was a student at that time has been warned and discharged. The 4th accused-appellant, who is the wife of the 1st accused-appellant and the mother of the 3rd accused-appellant, and the 6th accused-appellant have also been warned and discharged and each directed to pay Rs. 250/- as State costs.

The case for the prosecution briefly is that on 12.5.79, the virtual complainant, Mrs. Bandaranaike who has also been represented before this Court as the "aggrieved party", arrived in Hatton to participate in several propaganda meetings of her party in that area: that she spent the night of the 12th of May at the Upper Glencairn Bungalow, which has been described as a tourist bungalow, four miles from Hatton, along with those who had accompanied her from Colombo, *inter alia,* Kamala Ranatunga, D. G. Jayasinghe, R. K. Chandrasena, Tilak Liyanage, V. A. Simon Singho, – and all of who also gave evidence at the trial: that on the 13th of May too Mrs. Bandaranaike did, after participating in party propaganda meetings, come back to the said Bungalow to spend the night: that, at about 8 – 8.30 p.m. Mrs. Bandaranaike had her dinner and retired to her room which she shared with Kamala Ranatunga: that the other members of her entourage occupied other rooms in the Bungalow: that about 9 p.m. the front door of the Bungalow was closed: that about 10 – 15 minutes thereafter about 3 – 4 vehicles, with their horns blaring forth, came on to the premises: that those who came in those vehicles knocked on the front door stating that the A.S.P. and the H.Q.I. have come: that, when the door was opened, about 10 persons entered the Bungalow: that the first to enter was the 1st accused: that, as he was so coming in, the 1st accused inquired, in words which were both obscene and insulting, whether Mrs. Bandaranaike was there: that the 1st accused asked the manager of the Bungalow for whisky, who then called for his assistant Munaweera: that, when Munaweera said there was no whisky, the 2nd accused held Munaweera by his throat: that thereafter several of those who came, and amongst whom were also several ladies, went into the sitting-room whilst several others went along the corridor to the kitchen: that thereafter those who came were served liquor and they consumed such liquor inside the sitting-room: that, at the time they were so partaking of liquor, those who had come in were all in one group: that they began to sing whilst consuming liquor: that they sang songs which were obscene and were also defamatory of both Mrs. Bandaranaike and her son Anura Bandaranaike: that in the group that was so singing were all the six accused and about three others: that whilst they were so singing Kamala Ranatunga did, on the instructions of Mrs. Bandaranaike, copy down from inside the

room in which the two of them were, on two sheets of paper, which Kamala Ranatunga took, at the request of Mrs. Bandaranaike, from Mrs. Bandaranaike's bag, the words so sung by accused: that P2 and P2A are those two sheets of paper: that, after she so recorded those words in P2 and P2 A, Kamala read them out from P2 and P2 A to Mrs. Bandaranaike, who herself thereafter read P2 and P2A that night itself, in their room: that the singing went on till about 11 p.m.: that in the meantime witness Simon Singho, Mrs. Bandaranaike's driver, proceeded on foot to Hatton Police and made a complaint which was produced at the trial marked P1: that, at about 11 p.m., consequent upon an appeal made to Munaweera by Jayasinghe, Munaweera asked those who were singing to leave: that about 10 – 15 minutes thereafter they all left the Bungalow in small groups: that even after they had been asked to leave the 1st accused used a defamatory word: that after they had all left the Bungalow and had got on to the compound, they had shouted for Mrs. Bandaranaike's vehicles to be removed to enable them to go: that the 1st, 2nd, and 5th accused had tried to push Mrs. Bandaranaike's jeep this way and that way: that thereupon the 3rd accused appealed to his father the 1st accused to leave saying, "තාත්තේ අපි මේවා කරන්න ඕනෑ නැහැ. මේ ඇති කෑගැහුව අපි යමු": that there was then an incident between the father (1st accused) and the son (3rd accused) in which the 1st accused had whipped out a revolver threatening to shoot the 3rd accused: that the 4th accused (the wife of the 1st accused) and the other ladies had thereupon pushed these accused into the cars, and they had then all gone away: that, after the accused went away, two Police officers of the Hatton Police Station arrived at the Bungalow: that the witnesses Jayasinghe and Chandrasena were taken by these Police Officers to the Hatton Police Station where their statements were recorded: that when they returned to the Bungalow they found that S.I. Sanders of the Norwood Police station too had come to the Bungalow: that they then made statements to him too, as it was stated that the Bungalow is situated within the Norwood Police area: that they also made statements to the C.I.D. on 18th May, after their return to Colombo on the night of the 14th of May: that Mrs. Bandaranaike made a statement to the Police for the first time only on 15th May on her return Colombo, which said statement was followed by a second statement on the 18th of May: that Kamala Ranatunga

made her first statement to the Police also in Colombo on the 18th during the course of which the documents P2 and P2A were handed over to the Police.

In accepting the evidence led for the prosecution and arriving at a finding of guilt against all the accused on counts 1 and 2 and at the same time acquitting them all on counts 3 and 4, the learned Magistrate has, *inter alia,* held: that the words relied on as being insulting were contemporaneously recorded by Kamala Ranatunga, on the direction of Mrs. Bandaranaike, in the two sheets of paper which were produced at the trial marked P2 and P2A: that, even though both Mrs. Bandaranaike and Kamala Ranatunga did not, in their evidence in Court, state orally the words which are alleged to have been uttered by the accused on the night in question and which are set out in the charge, yet, as they are correctly recorded in P2 and P2A, it is not necessary for Mrs. Bandaranaike to state orally the said words from the witness-box: that, in view of the evidence of the Examiner of Questioned Documents, three ball-point pens had been used to write the contents which appear in P2 and P2A: that, when Kamala Ranatunga stated, at the trial, that she used only one black ball-point to write the entirety of the contents of P2 and P2A, she was making a mistake in view of the passage of time: that Kamala Ranatunga's evidence has been fully corroborated by the evidence of Mrs. Bandaranaike: that the evidence of both Kamala Ranatunga and of Mrs. Bandaranaike is corroborated by the evidence of the witness Jayasinghe who has, in his evidence, stated the obscene words used by the accused: that, as both Kamala Ranatunga and Mrs. Bandaranaike are ladies, and as Mrs. Bandaranaike is both an ex-Prime Minister of this country and was, at the time of the alleged incident, a Member of Parliament, their evidence is accepted as being truthful: that the delay – of about 2 days – in Mrs. Bandaranaike making a statement to the Police, as she wanted to consult her lawyers before making a statement to the Police, is not a matter for surprise as she had been the Prime Minister of this country for several years and is also the leader of a leading political party: that Jayasinghe is a witness who could have clearly seen this incident and also have heard the words used: that, although there were minor contradictions in the evidence of the witnesses Simon Singho,

Jayasinghe, Mrs. Bandaranaike, Chandrasena and Kamala Ranatunga, they are, however, not in respect of important matters: that these witnesses have no reason to implicate those accused falsely: that they have given evidence in such a manner as to satisfy him (the learned Magistrate): that, as the defence has pointed out several infirmities in the evidence of the witness Tilak Liyanage, his evidence is of no value: that these six accused, with others, came and the 1st accused inquired whether Mrs. Bandaranaike was there, referring to her in obscene language: that thereafter they sang obscene songs for a period of over an hour, having also consumed a bottle of liquor in the meantime: that the evidence does not establish, beyond reasonable doubt, that the accused were members of an unlawful assembly the common object of which was to commit mischief.

Learned Counsel appearing for the accused-appellants, and also learned Counsel appearing for the respondents and learned Counsel for the party-aggrieved (whose claim to represent and to address this Court on behalf of Mrs. Bandaranaike was upheld by this court for the reasons which are set out later in this judgment) between them canvassed almost all the findings of the learned Magistrate.

The duty of an Appellate Court in a criminal case was clearly set out by Akbar, J. in the case of *The King v. Fernando,*[1] that the duty of the Appellate Court in a criminal case is not similar to that of an Appellate Court in a civil case: that, in a criminal case, if the judge of the Appellate Court has any doubt that the conviction is a right one, the accused should be discharged: that, in a civil case the Appellate Court must be satisfied, before setting aside the order of the lower Court, that the order is wrong: that, an Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically. These principles were followed by Wijeyewardene, J. in the case of *Martin Fernando v. The Inspector of Police, Minuwangoda,*[2] where the duty was expounded as follows: that, though the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight, an Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically: that, where a close

examination of the evidence raises a strong doubt as to the guilt of the accused, the accused should be given the benefit of the doubt. Macdonnel, C.J., in the case of *King v. Gunaratne et al.*[3], formulated three tests to be applied by a Court of Appeal to an appeal coming to it on questions of fact as: was the verdict of the Judge unreasonable and against the weight of evidence? Was there a misdirection either on the law or on the evidence? Has the Court of trial drawn the wrong inferences from matters in evidence? In the case of *Sangarakkita Thero et al. v. Buddharakkita Thero,*[4], too Wijeyewardene, C.J., interfered with the findings of fact of a Magistrate and set aside the convictions entered against the accused in the Magistrate's Court. This question was also considered by (G. P. A.) Silva, J. in the case of *Perera v. Alaganathan,*[5] and after a consideration of the earlier authorities Silva, J. at page 452 stated:

> "The substance of all these decisions is that the Court of Appeal will not lightly interfere with a finding of fact by a Magistrate but where there is good ground to do so in the circumstances of the case or where the judgment of the lower court is unsound not merely has this court the right but is under a duty to reverse such finding."

The principles laid down by the authorities, referred to above, make it clear: that, although the findings of a Magistrate on questions of fact are entitled to great weight, yet, it is the duty of the Appellate Court to test, both intrinsically and extrinsically the evidence led at the trial: that, if after a close and careful examination of such evidence, the Appellate Court entertains a strong doubt as to the guilt of the accused, the Appellate Court must give the accused the benefit of such doubt.

The sum and substance of the submissions made by the several Counsel appearing for the accused-appellants is that several facts and circumstances, arising from the evidence of the prosecution witnesses themselves, in favour of the defence have not been considered by the learned Magistrate, and that, if the learned Magistrate had properly directed himself on the evidence before him the learned Magistrate would, at the lowest, have had a reasonable

doubt arising in his mind in regard to the guilt of the accused-appellants.

Learned counsel appearing for the several accused-appellants all opened their submissions on the footing that the position of the prosecution was that the unlawful assembly relied on by the prosecution came into existence only after the accused-appellants entered the Bungalow. Both Mr. Pullenayagam and the learned Additional Solicitor-General, in their submissions, however, contended that the unlawful assembly alleged by the prosecution had been formed by the time all the accused-appellants, and the other members, alighted from their vehicles and that such unlawful assembly was already in existence at the time they all (the accused-appellants and the other members) entered the said Bungalow.

The learned Magistrate has in his judgment observed that, although ordinarily in a case where the charge framed against an accused is in respect of an offence of intentional insult, under Section 484 of the Penal Code, the virtual complainant should, in his evidence, set out the very words, which are alleged to have been used by the accused and which are relied on as being insulting, yet, as he, the learned Magistrate, has accepted that the words so alleged to have been used have been correctly recorded in the documents P2 and P2A, he is of opinion that it was unnecessary for Mrs. Bandaranaike to have stated orally the said words in the course of her evidence at the trial.

The accused-appellants challenge the genuineness of the documents P2 and P2A. It is their position – as formulated by Mr. Mark Fernando, learned Counsel for the 5th accused-appellant – that, even if a contemporaneous record was in fact made by Kamala Ranatunga, then what was so recorded were only the lines one to three and lines five to nine appearing on the reverse of P2 (and also marked page 2 in red), and that line 4, and all the rest appearing both on that page itself and on page 1 of P2 and P2A, which is also numbered 3 in red, have all been written up subsequently.

Kamala Ranatunga was cross-examined in regard to the documents P2 and P2A; and her clear and categorical position was

that P2 and P2A were written by her inside the room in the presence and in the full view of Mrs. Bandaranaike while the said obscene songs were being sung, and that she used one black ball-point to write the entirety of the contents of both documents. Her attention was drawn expressly to the colour of the words appearing in line 4 of P2 and the colour of the words appearing in the other lines of that page, both above and below the 4th line, and yet she maintained quite definitely that she used one, and only one ball-point pen to write all that appears both on P2 and P2A.

Mrs. Bandaranaike stated in evidence: that she asked Kamala Ranatunga to take down the words of the obscene songs that were being sung: that Kamala Ranatunga did so on sheets of paper which were in her (Mrs. Bandaranaike) bag: that once that was done she took the sheets of paper from Kamala Ranatunga to read them: that as she could not read their contents, she gave them to Kamala Ranatunga who read them out for her: that thereafter she herself read them that night itself. According to the record, when Mrs. Bandaranaike was being examined-in-chief at the trial, learned Senior State Counsel conducting the prosecution had moved to mark the two sheets of paper, on which the obscene words were stated to have been written down, as P2 and P2A. Immediately thereafter there appears an answer given by Mrs. Bandaranaike that these two sheets of paper, which had been in her bag, were given to Kamala Ranatunga. Thereafter, in cross-examination, P2 had been shown to Mrs. Bandaranaike, and she had stated: "That was written by Ranatunga on my instructions." There is no entry in the record before this particular answer appears that the witness, Mrs. Bandaranaike, had herself perused the document before she gave this answer. Nor is there any other answer of her appearing in the record which shows or tends to show that she had, in the witness-box, perused the documents P2 and or P2A and categorically stated that all that which now appears in P2 and P2A is what was in fact taken down by Kamala Ranatunga inside their room that night and thereafter not only read out to her by Kamala Ranatunga but also read by her. Even so, the learned Deputy Solicitor-General submitted that Mrs. Bandaranaike had in Court accepted P2 and P2A as such, and that she herself identifies not only the two sheets but also the entirety of

the contents of both P2 and P2A; and this analysis and the assessment of the evidence led at the trial pertaining to these two documents – P2 and P2A is therefore, being done on that basis.

After the cross-examination of Mrs. Bandaranaike the two documents P2 and P2A were forwarded to the Examiner of Questioned Documents, by the learned Magistrate upon an application made in that behalf by the defence, "to report whether the 4th line of writing on page 2 of P2 has been written using the same pen that has been used to write the rest of the writing; on this document". The report forwarded by the said Examiner of Questioned Documents to the court was thereafter produced, marked 1D3, by the said Examiner of Questioned Documents himself when he testified at the trial as a defence witness.

The Examiner of Questioned Documents in his Report 1D3 has expressed the opinion: that all the writing on P2 and P2A are ball-point pen writings: that all the writings on P2 and P2A fall into three groups – (1) those on page 1 of P2 and those commencing from line nine on page 2 and going right down to the last, the colour of the ink of all of which is violet-blue, (2) those on page 2 of P2 from line 1 to line 3 and again from line 5 to line 8, the colour of the ink of all of which is blue-black (3) the 4th line on page 2 of P2 the colour of the ink of which is bright blue: that each of the three groups of writing has been written with a different ball-point pen.

The learned Magistrate has accepted the evidence of the Examiner; for, in considering the impact of the evidence of the Examiner of Questioned Documents on that of Kamala Ranatunga in regard to P2 and P2A, the learned Magistrate has stated that: an important question which arises is whether Kamala Ranatunga's evidence that she used only one ball-point pen is rendered false because of Ranatunga's (the Examiner of Questioned Documents) evidence that three ball-points pens have been used to write the contents of P2 and P2A: he (the learned Magistrate) feels (හැඟීමයි) that three pens have been used by her (Kamala Ranatunga) to write these documents: he feels that the statement that only one pen was used to write these documents has been due to forgetfulness or to a

mistake. The evidence of this expert is not only inconsistent with but also contradicts Kamala Ranatunga's persistent and categorical position, as already set out above, that only one ball-point pen was used and that too one black in colour. A conflict of evidence such as this on an important point would ordinarily have, in a criminal case, resulted in at least considerable doubt being entertained in regard to the veracity of such a witness. The learned Magistrate has, however, glossed over this infirmity in Kamala Ranatunga by attributing it to a ground which was not even preferred by the witness herself. There was, not even for a moment, any uncertainty in her own mind in regard to the number of pens used by her, or its colour. There was not in her evidence the faintest hint by her of her making a mistake on this matter. In that state of her evidence the learned Magistrate was not called upon to consider whether or not she was in any way making a mistake, whether or not she has had a lapse of memory. She does not herself call in aid any such possibility. She herself is quite firm and uncompromising. That being so, I do not think it was open to the learned Magistrate himself to go looking for an excuse or explanation, not suggested or even faintly hinted at by the witness herself, in order to render her evidence acceptable in spite of such expert evidence.

It was contended before this Court by the learned Additional Solicitor-General – it is noteworthy that Mr. Pullenayagam himself did not, in his submissions, so urge – that the evidence of the Examiner of Questioned Documents should not have been accepted by the learned Magistrate for the reason that this witness cannot and must not be regarded as an expert on the particular topic upon which his opinion was sought and in respect of which he later testified in the Magistrate's Court.

The Examiner of Questioned Documents commenced his evidence by setting out his qualifications. He has held the said office from, March 1977: He has had experience in the examination of questioned documents for a period of 15 years: He holds a general degree in Science: He has received specialised training abroad: He has also had experience, *inter alia,* in the different kinds of ink and other instruments used for the purpose of writing: He has had training

in regard to hard-point pens: He has had specialised training in regard to the various kinds of ink: He has been examining almost daily documents handwritten with ball-point pens. This witness has set out his examination of P2 and P2A, and the grounds upon which he has arrived at his opinion that three ball-point pens have been used. Quite apart from his opinion based upon an examination conducted with instruments, even a visual examination of P2 and P2A by the naked eye does reveal that the ink with which line 4 on page 2 of P2 is different from the ink used to write the three lines preceding it and the five lines immediately following it, and that the ink of the rest of the writing on page 2 of P2, together with the writing on page 1 of P2 and on P2A, seem to be different from the two different colours of the ink used to write the first nine lines on page 2 of P2A.

Under the Section 45 of the Evidence Ordinance opinions of persons specially skilled in, *inter alia*, science or art, or in questions as to identity or genuineness of handwriting are relevant facts. The authorities – *Regina v. Pinhamy*[6]; *Charles Perera v. Motha*[7]; *Gratiaen Perera v. The Queen*[8]; – have laid down the proper approach that should be followed by a Court, in regard to the evidence of an expert: that it is the duty of the Court itself to form an opinion upon the question in respect of which the expert gives evidence: that, in doing so, the Court should, however, take into consideration such expert opinion: that the function of the expert is to assist, with his expert knowledge and experience, the Court in arriving at a finding upon the particular matter.

A consideration of the evidence given by the Examiner of Questioned Documents makes it clear that not only is the question upon which he has been called upon to express an opinion a matter which properly falls within the functions of an Examiner of Questioned Documents, but also that this witness has the necessary qualifications and the experience to satisfy the Court that he is a person who is specially skilled in the field in which he has been called upon to give expert evidence. The learned Magistrate had, therefore, evidence before him upon which he could find that three ball-point pens had in fact been used for the purpose of writing the

contents of the documents P2 and P2A. I see no reason why this finding should be interfered with in any way.

It was also contended on behalf of the accused-appellants that it was not open to the learned Additional Solicitor-General to seek to canvass the said finding of the learned Magistrate before this Court in this appeal. Although it is not really necessary to consider this contention in view of my opinion that the aforesaid finding of the learned Magistrate does not call for interference by this Court, yet, as the contention was put forward on behalf of the defence, and there is no authoritative decision on this point as yet, I propose to indicate very briefly my own views in regard to it. The defence submitted that it is not open to the prosecution to seek to canvass before this Court the said finding of the learned Magistrate which is in favour of the defence, as the prosecution has not, prior to this appeal being taken up for hearing before this Court, either filed any papers by which such findings are ordinarily canvassed before this Court – for instance by way of Revision – or given to the defence prior notice of it in any way. Sections 316-330 of Part 7 of the Code of Criminal Procedure Act No. 15 of 1979, deal with appeals from the Magistrate's Court to this Court. There is no section in the said Part 7, which is comparable to the provisions of Section 772(1) of the Civil Procedure Code. Nor has our attention being drawn to any other section of the said Act No. 15 of 1979. A respondent to a civil appeal, who desires to do what the respondent to this appeal seeks to do in this appeal in regard to the aforesaid finding of the learned Magistrate, would have had to first comply with the provisions of the said Section 772(1) Civil Procedure Code. If such a respondent fails to take the steps so specified, he will not be allowed to canvass any such finding of the trial judge which is unfavourable to him. It is the said section and the said section alone which enables such a course of action. The absence of such a provision in the Code of Criminal Procedure Act No. 15 of 1979 is indeed significant. In the absence of such an express provision in regard to a criminal matter, in which the necessity of such a requirement need hardly be stressed, it seems reasonable to take the view that, in a criminal appeal, a respondent has no such right, at any rate without prior notice to the appellant. In this view of the matter it seems to me that there is considerable

substance in the objection put forward on behalf of the accused-appellants.

The defence also submits that whatever suspicions arise in regard to the authenticity of P2 and P2A as a result of the learned Magistrate's acceptance of the defence position that three ball-points have been used to write what now appears on P2 and P2A, are further heightened by the delay, in respect of which no satisfactory explanation has been given, in handing them over to the Police. P2 and P2A have been handed over to the Police only on 18.5.79 – about five days after the alleged incident.

Mr. Mark Fernando, appearing for the 5th accused-appellant, has, as set out earlier contended on behalf of the defence that, having regard to the circumstance that, of all the contents appearing on both P2 and P2A, only lines one to three and five to nine on page 2 of P2 have been written with a ball-point pen containing ink of a black blue, and having regard to Kamala Ranatunga's insistence that she used only one ball-point pen and the colour of it was black, and also seeing that page one of P2 is a letterhead of the National State Assembly, if Kamala Ranatunga did write down anything at all that night on P2, it is more likely she would have commenced writing on page 2 of P2 rather than on page 1 and that, having so commenced, she did write down only the lines 1 to 3 and 5 to 9 on that particular page of P2, and that the rest of the contents, which now appear on the balance of page 2 of P2 and on page 1 of P2 and also on P2A, together with line 4 of page 2 of P2, have been written up subsequently. This is a submission which is based upon certain facts and circumstances, which were established at the trial, and upon possible inferences to be drawn from such facts and circumstances. To these should be added the further circumstance that the Police seem to have not had sufficient particulars – for Mrs. Bandaranaike herself stated that, on the occasion the Police recorded her second statement, Police stated that her statement (which seems to be a reference to her first statement recorded on the 15th) is lacking in sufficient particulars, and in 3D1 (which will be referred to later) the witness Jayasinghe himself had not set out the alleged offending words themselves – prior to 18.5.82. This is a matter, which seems to

be in favour of the defence and which was, therefore, required to be considered before a finding in regard to the authenticity of P2 and P2A was arrived at.

The learned Magistrate has held that Kamala Ranatunga's evidence is corroborated by the evidence of Mrs. Bandaranaike. The defence, however, challenges Mrs. Bandaranaike's evidence as being unworthy of credit; and learned counsel for the accused-appellants have drawn the attention of this court to several infirmities which are said to exist in Mrs. Bandaranaike's evidence which, if it is submitted, they had been considered in their proper, perspective by the learned Magistrate, he would, at the lowest, have hesitated to act on her evidence. It is, as I have already stated, the position of the prosecution that Mrs. Bandaranaike too has, in her evidence, testified to the identity and the genuineness of both P2 and P2A. That being so, any doubts arising in regard to the genuineness of P2 and P2A – as documents in which the offending words were in truth and in fact taken down by Kamala Ranatunga on the night in question from inside, the room she shared with Mrs. Bandaranaike in the aforesaid Bungalow – would also affect Mrs. Bandaranaike's evidence that P2 and P2A contain the offending words which were used by the accused on the night in question. Apart from this infirmity, the defence also relies on several other features in Mrs. Bandaranaike's evidence which the defence submits affect her credibility. It is in evidence that, shortly after the accused had left the Bungalow, the Hatton Police had, consequent upon the complaint P1, made by the witness Simon Singho, arrived at the Bungalow; and both Mrs. Bandaranaike and Kamala Ranatunga admit that the Police Officers, who came at that time, spoke to Mrs. Bandaranaike and asked Mrs. Bandaranaike as to what had happened. It is in evidence that thereafter early next morning, about 8 – 8.15 a.m., S.I. Sanders, the then officer-in-charge of the Norwood Police within which Police area the said Bungalow is situate, had himself proceeded to the Bungalow for investigation and had asked Mrs. Bandaranaike whether she would make a statement to him. Mrs. Bandaranaike had not made a statement to S.I. Sanders about the incident that is alleged to have taken place the previous night but had instead, according to S.I. Sanders, told S.I. Sanders that she would come to Colombo and

make a statement in the company of her lawyer. Mrs. Bandaranaike,. however, denies that she told the Norwood Police so; and she categorically stated under cross-examination, that it would be incorrect (වැරදියි) for anyone to state that she said so. There was thus a conflict as between Mrs. Bandaranaike and S.I. Sanders on this point. Although the learned Magistrate has not expressly said so, he has nevertheless not accepted Mrs. Bandaranaike's evidence on this point; for, he has accepted S.I. Sanders evidence that Mrs. Bandaranaike did tell S.I. Sanders what S.I. Sanders says she told him; and the learned Magistrate has proceeded to state that it is not surprising that, when a person of the standing of Mrs. Bandaranaike makes a statement to the Police in regard to an incident of this nature, she would consider the matter further and obtain the advice of her lawyers before making such a statement. On that basis the learned Magistrate observes that it is not a matter for surprise that there was a delay of few days in Mrs. Bandaranaike making a statement to the Police. Here again the learned Magistrate has proceeded to adopt as an excuse for what he himself considers a seemingly belated statement to the Police, an explanation which the witness herself had not only not adduced but has also quite definitely stated would be wrong for anyone to say she preferred. It seems to me that it was not open to the learned Magistrate to satisfy himself – in regard to a matter, which in any criminal trial would, in the absence of a satisfactory explanation, be ordinarily viewed with caution – upon a ground which is not only not urged as an excuse by the witness herself but is, on the other hand, flatly, repudiated by the witness herself. In this case what really called for an explanation and became a matter to be viewed with caution in the absence of such an explanation, was not so much the passage of time – which had been only about 36 hours or so – between the alleged incident itself and the making of the statement to the Police, but the fact that not only was a statement not made at the first available opportunity to the Police, but also that a statement was not made, even though the Police had asked the witness, within a very short time of the alleged incident, what had happened, and again a few hours later – within about nine to ten hours – the officer-in-charge of the Police station of the area himself had expressly requested the witness, at the scene of the alleged incident itself, to make a statement. A consideration of

Mrs. Bandaranaike's evidence shows that she has referred to a telephone conversation she says she had with the Inspector General of Police from Hatton on the morning of the 14th in the course of which, she says, she told the Inspector General of Police that, as she had to attend a meeting at Ratnapura, she had no time to make a statement, and that the Inspector General of Police had asked her to get the others to make statements and to contact him on her arrival in Colombo. The Inspector General of Police, however, was not a witness at the trial. Even assuming that such a conversation did take place, the explanation so given by Mrs. Bandaranaike for her not making a statement to the Police before she left Hatton on the 14th of May does not seem to bear close scrutiny. On the evidence accepted by the learned Magistrate, it is clear, as set out earlier, that she had, within a space of about 10 hours of the alleged incident, two opportunities of making statements to the Police, once to the Hatton Police and again to the officer-in-charge of the Norwood Police. At one stage of her cross-examination Mrs. Bandaranaike has stated that she did not make a statement either to the Hatton Police or to the Norwood Police because the Police took Jayasinghe and Tilak to the Police Station. Neither of these explanations has been considered by the learned Magistrate as excuses for Mrs. Bandaranaike's failure to make a prompt statement to the Police.

Mrs. Bandaranaike's first statement to the Police has been made only on 15.5.79, after she had returned to Colombo on the night of 14.5.79, at her Colombo residence and after, she says she had rung up the Inspector General of Police, to an officer of the Cinnamon Gardens Police station. Thereafter she had made a further statement to the Police on 18.5.79 as, she says, the Police informed her that her statement did not contain sufficient particulars (විස්තර ඔදිය).

The documents P2 and P2A, according to the evidence, have been handed over to the Police only on 18.5.79 by Kamala Ranatunga during the course of the statement made by her also to the Cinnamon Gardens Police station at Mrs. Bandaranaike's residence. This statement is also Kamala Ranatunga's very first statement to the Police. Kamala Ranatunga has not herself given an explanation as to why she did not make a statement to the

Police prior to the 18th. She had from the time of the alleged incident right up to the morning of the 15th, when, she says, she left Mrs. Bandaranaike's residence early at about 6 a.m. even before Mrs. Bandaranaike woke up, been with Mrs. Bandaranaike; and she too had the same opportunities that Mrs. Bandaranaike had, of making a statement to either the Hatton Police or the Norwood Police at the aforesaid Bungalow itself before they left the Bungalow for Ratnapura on 14.5.82, and of handing over the documents P2 and P2A to the Police very shortly after the alleged incident. Yet, she has not done so; and no satisfactory explanation has come forth from Kamala Ranatunga either.

P2 and P2A, according to the prosecution, were written by Kamala Ranatunga at the request of Mrs. Bandaranaike who had realised the necessity and the importance of a document which comes into existence contemporaneously with the incident. Time and again Mrs. Bandaranaike expressed, in her evidence at the trial, her awareness of the importance of such a document and also the importance of making a prompt statement to the Police; and there is no doubt but that a person of her standing would also have realised the value and importance of handing over such a document to the Police as early as possible, and at the very first opportunity they have of doing so. Even so, neither the Hatton Police, nor the Norwood Police had been so informed. The first intimation to the Police of their existence is only on the 18th by Mrs. Bandaranaike; and that too only in her second statement to the Police after her return to Colombo. Mrs. Bandaranaike did at the trial explain why she had not, in her first statement, made on 15.5.79, made any reference to P2 and P2A. She states that that was because P2 and P2A were not with her, and that if she had referred to them without having them with her the Police officers may not have accepted what she said (සම්භරවිට පොලිස් නිලධාරීන් නොපිලිගන්න පුළුවන්). It must also be noted that at an earlier stage of her cross-examination Mrs. Bandaranaike had put forward as an excuse for not having referred to P2 and P2A in her first statement made on the 15th the explanation that she answered only the questions put to her by the Police. Yet when it was ultimately referred to on the 18th, it was Mrs. Bandaranaike who said so on her own. The submission made on behalf of the defence that the

explanations given by Mrs. Bandaranaike for not informing the officers of the Hatton Police and of the Norwood Police on the 13th – 14th of May, and thereafter failing to refer even in her statement on the 15th of May to P2 and P2A – a document brought into existence because she herself wanted such a document for future action, to be used against those whom she thought have gravely wronged her, and a document the value and the importance of which for such a purpose, she, on her own showing, full-well appreciated – were, coming as they do from a person of her standing, far from convincing, is one which cannot be lightly brushed aside. These are matters which called for careful consideration by the learned Magistrate.

A circumstance that seems to have weighed heavily with the learned Magistrate is that the two witnesses who speak to P1 and P2 – Kamala Ranatunga and Mrs. Bandaranaike – are both ladies, and that Mrs. Bandaranaike is what she is – one who has been the Prime Minister of this country and was also, at the relevant time, a Member of Parliament. The learned Magistrate had evidently taken the view that both witnesses being ladies, it is unthinkable that they would have deliberately thought of such foul and obscene words on their own and then written them down even without such words having been actually uttered by the accused themselves that night, particularly where one of the ladies had also held the highest possible positions in the public life of this country. These circumstances have been taken into consideration by the learned Magistrate in determining their credibility, that persons such as they are not likely to perjure themselves in a court of law. In regard to Mrs. Bandaranaike as a witness, although the circumstances referred to by the learned Magistrate may be considered relevant in determining the question of credibility, it is, however, necessary to guard against the danger of prejudice being caused to the accused, even imperceptibly, by any over-emphasis of such circumstances. Mrs. Bandaranaike is herself an interested party in this matter, and the evidence given by her at the trial must be tested in the same way as that of any other witness. The adoption of any other standard could result in a violation of the constitutional guarantee that all persons are equal before the law and are entitled to the equal

protection of the law. Relevant as the above considerations may be, the accused are also entitled to a consideration of certain circumstances which are peculiar to them: that several of them hold positions of responsibility: that the 3rd and 4th accused are the son and wife respectively of the 1st accused: whether it is likely that, even if the 1st accused himself had such an object as is urged by the prosecution, the 3rd and the 4th accused would also have shared in such an object with the 1st accused.

The learned Magistrate, in taking the view that the accused had in fact conducted themselves in the manner urged by the prosecution, seems to have been influenced by the fact that the group of singers had also partaken of liquor; for he states:

> "ඒ අතරතුරේදී මත්පැන් බෝතලයක් ගෙන්වා එයත් පානය කර ඇත. අපි සියලුදෙනාම දන්නා කරුණක්ය, මත්පැන් පාවිච්චි කළාම බොහෝ අයගේ හැසිරීම සාමාන්‍ය හැසිරීමට වඩා නරක අතට හැරෙන බව, නැතහොත් දුෂ්ඨ අතට හැරෙන බව."

"In the meantime (they) got down a bottle of liquor and consumed that too. It is a fact which we all know that, when liquor is consumed, the conduct of many persons becomes worse, if not wicked." Although there is evidence that the Bungalow-boy did take a bottle of liquor into the sitting-room, there is, however, no evidence as to the persons who consumed such liquor, whether all or only some of them. Although such instances may not be altogether unknown and unheard of, yet the sight of both parents consuming liquor with their teen-age sons and engaging in the singing of ribald songs with them, whether in public or private places, is still not a common spectacle in our country. It seems to me that these are also considerations which called for express and careful examination by the learned Magistrate along with the specific consideration expressly referred to by the learned Magistrate as being peculiar to the two aforementioned prosecution witnesses. An examination of the judgment of the learned Magistrate does not indicate that they have received such consideration.

On a consideration of the infirmities that have been shown to exist in the evidence of Mrs. Bandaranaike given at the trial in this case, it seems to me that, had the learned Magistrate addressed himself to them and considered them in their proper perspective it is more than likely that the learned Magistrate would have found himself unable to say that Mrs. Bandaranaike's evidence corroborates the evidence of Kamala Ranatunga.

The only witness, who did, at the trial, state orally the very words, which are alleged to have been used by the accused and which are said to be obscene and insulting, is the witness Jayasinghe. The learned Magistrate has accepted Jayasinghe's evidence as supporting the evidence of Kamala Ranatunga and of Mrs. Bandaranaike that the words set down in P2 and P2A are the words used by the accused. The defence has drawn the attention of this Court to certain features in Jayasinghe's evidence too, which, it is submitted, show that Jayasinghe's evidence given at the trial is not acceptable. Jayasinghe is, as set out earlier, one of the two persons – the other being Tilak Liyanage whose evidence has not been accepted by the learned Magistrate – whom Mrs. Bandaranaike had told the officers of the Hatton Police, were persons who had seen the incident, and who had then been taken to the Police station and their statements recorded that night itself. The statement so recorded at the Hatton Police station at 12.30 a.m. on 14.5.79 has been produced by the defence as 3D1. 3D1 was marked by the defence to prove that Jayasinghe had not told the Police that, whilst this incident was taking place, he had gone outside and had peeped into the sitting-room of the Bungalow where the accused were said to be singing, because Jayasinghe's position in Court was that, at one stage, he did so go out and peep into the said sitting-room. This item of evidence given by Jayasinghe assumed importance in view of Jayasinghe's ultimate admission, made under cross-examination, that, had he not so gone out of the Bungalow and looked into the lounge (sitting-room) through the window, he would not have seen anything that was happening inside the lounge, but that he could only have heard what was happening therein. The defence led evidence of a licensed surveyor, named D. Y. Wijewardena, who produced marked 1D1, a sketch of the said Bungalow and as 1D2 a sketch of the said

Bungalow and the compound surrounding it. The learned Magistrate has considered the defence position – based upon the two documents 1D1 and 1D2, and the oral evidence of the surveyor who prepared them – that, even if Jayasinghe had in fact gone out of the Bungalow and looked towards the lounge room he could not have seen those who were inside and what each one was doing. He has also dealt with the non-reference to this matter in 3D1. The learned Magistrate has taken the view that, if Jayasinghe had looked from near the road depicted in the sketch he could have seen what was happening inside the room. The learned Magistrate seems, however, to have not given sufficient consideration to the surveyor's evidence, given under cross-examination, about the ability to see from near the said road; for, his evidence is that if one stands by the side of the road near the window "A" (which is the window of the lounge on the side of the summer-house) one cannot see any one (by one inside the lounge) and that one could, however, see from the road, and that too only the face-portion (මුහුණ කොටස) of one who is about 3-4 feet from the said window within the lounge. The learned Magistrate has observed that Jayasinghe, who maintained that he saw by standing about 1–2 feet away from the window, has not measured the distance with a foot-ruler and that, as it was also dark, he thinks that Jayasinghe could not state the distance definitely. The learned Magistrate does not seem to have considered, in this connection: the fact that there is a flower-bed 9 feet in extent between the said window and the road: and that the distance of 1–2' given by Jayasinghe, though it may not be very accurate, tends to show that the spot he refers to is closer to the window than to the road: and that the Surveyor's evidence points rather to a person inside the lounge being seen, even to the limited extent set out by him, only by one standing on the road and not by one standing even near (අසබඩ) the said road.

The defence has also drawn the attention of this Court to two other omissions in Jayasinghe's statement, as embodied in 3D1: the failure to refer is the specific words which he, Jayasinghe, stated in his evidence at the trial that the accused uttered in the course of their singing inside the sitting-room: the non-reference to the use of any

insulting epithet in regard to Mrs. Bandaranaike in the inquiry made by the members of the group as they were entering the bungalow.

It was contended on behalf of the prosecution that the defence cannot now rely on any such omission in 3D1 as they were not relied on by the defence at the trial and put to the witness. The decisions in the cases of *Fernando v. The Queen*[9] and *Mutubanda v. The Queen*[10] and also the provisions of subsections (3) and (4) of Section 110 of the Code of Criminal Procedure Act 15 of 1979, do, in my opinion, permit this court to look into 3D1, which has also been proved at the trial, for the purpose of seeing whether Jayasinghe had told the Police a story materially different from the story set out in his evidence at the trial, for instance by omitting to mention to the Police any material fact which Jayasinghe has deposed to at the trial. An examination of 3D1 shows that Jayasinghe, in that statement made shortly after the incident when the details of it would have been fresh in his mind and the exact words, which, if he had in fact heard being used, would neither have been forgotten nor forgiven, has not set out the said words. Nor is there in it any reference to the objectionable epithet which in his evidence at the trial he stated was used in relation to Mrs. Bandaranaike when the inquiry was made whether Mrs. Bandaranaike was in occupation. It further shows that the inquiry, as to whether Mrs. Bandaranaike and Anura were in occupation, had been made only after the request for Brandy and Whisky had been made and such liquor forcibly obtained, and that it was not, as was the position at the trial, the first question asked by the offenders as they were coming into the Bungalow after the front door was opened. This discrepancy is of importance in the consideration of the prosecution position – which has been referred to earlier and which will be discussed again later – that the accused had formed themselves into the unlawful assembly set out in count 1, even before they entered the Bungalow that night.

The learned Magistrate has, after discussing Jayasinghe's failure to have mentioned to the Police that he had gone out and looked through a window, and also Jayasinghe's assertion in Court that he could and did see through the window, stated that the submissions in

regard to Jayasinghe's claim to have seen through the window, including his failure to tell the Police about it, and the "other contradictions" (අනිකුත් පරස්පරවලින්) do not render his evidence false. He, however, has not set out what the "other contradictions" so referred to are; and winds up by holding that Jayasinghe is, therefore, a witness who had an opportunity of seeing this incident clearly and also of listening to the words used by the accused. It, however, appears to me that, had the facts and circumstances detailed above been considered by the learned Magistrate in their proper perspective, he could and would not have arrived at the aforesaid finding. He would, at the lowest, have had considerable doubt as to whether Jayasinghe did in fact "see" and "listen to" that which Jayasinghe said, in Court, he heard and saw.

The three witnesses referred to above, Kamala Ranatunga and Mrs. Bandaranaike through the medium of P1 and P2 and Jayasinghe upon his oral evidence given at the trial – are the only witnesses relied on by the prosecution to prove the offending words set out in count 2 of the charge framed against the accused; and at the argument before this Court it was common ground that the entire case against the accused revolves round these three witnesses. Although the view I have expressed above in regard to the evidence of these three witnesses – that, had the learned Magistrate considered the facts and circumstances set out above as being in favour of the defence in their proper perspective, the learned Magistrate would have found himself unable to hold that counts 1 and 2 had also been proved beyond reasonable doubt – is, in my opinion, sufficient to a determination of this appeal, I shall nevertheless consider the further submission made by learned Counsel for the accused that, in any event, the prosecution has failed to prove beyond reasonable doubt the charge of unlawful assembly framed against the accused in count 1.

It was contended on behalf of the defence: that the evidence led by the prosecution, even if accepted, falls far short of establishing beyond reasonable doubt that either all six accused, or some of them who with the other unnamed persons together numbered at least five

had the common object of intentionally insulting Mrs. Bandaranaike: that the prosecution evidence does not clearly and categorically point only to the conclusion that, at the time they arrived or at any time thereafter, their sole object was to insult Mrs. Bandaranaike: that the inference that the primary object of the members of the group which came in, was to have a drink was also possible: that if whilst they were so consuming liquor, one or more – less than five – of the members of the group burst into song and sang obscene songs, such conduct is not sufficient by itself, to transform the group into an unlawful assembly, still less to establish that all the members of that group, including the six accused, were all members of an unlawful assembly with the common object set out in count 1: that the conduct of several of the accused, particularly 3rd, 4th and 6th accused at any rate tended, if not to establish clearly that they were not members of any such unlawful assembly, at least to raise a doubt as to their sharing of any such common object.

It was common ground at the hearing before us – and it is the correct position in law – that, if the prosecution fails to establish the unlawful assembly set out in count 1, then all the accused are entitled to be acquitted not only of count 1 but also of count 2, and that none of them could be found guilty even individually of an offence under Section 484 as no such individual charge has been framed against any one of them.

At the hearing before this Court it was the position of the prosecution that the unlawful assembly set out in count 1 had come into existence by the time the six accused, and the others who were with them, entered the said Bungalow, and was already in existence at the time they went into the lounge (or the sitting-room); and the consideration of the question, whether the charge set out in count 1 has been established or not, will proceed on that basis. The items of evidence relied on by the prosecution to prove the existence of such an unlawful assembly, as stated by both the learned Additional Solicitor-General and Mr. Pullenayagam, are: that the accused, and the others, all arrived at the Bungalow together as one group: the words offered as they arrived – the obscene epithets used in relation to Mrs. Bandaranaike and Anura Bandaranaike in the inquiries made

as to whether they were in occupation: the subsequent conduct of the accused – singing of vulgar songs within the Bungalow, in the lounge.

It is well settled: that the mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he has said or done something or omitted to do something which would make him a member of such an unlawful assembly: that the prosecution must place evidence pointing to each accused having done or said something from which the inference could be drawn that each entertained the object which is said to be the common object of such assembly: that omnibus evidence must be carefully scrutinized in order to eliminate all chances of false or mistaken implication, as the possibility of persons in an assembly resenting or condemning the activities of misguided persons cannot be ruled out, and caution has to be exercised in deciding which of the persons present can be safely described as members of the unlawful assembly: that, although as a matter of law an overt act is not a necessary factor bearing upon membership of an unlawful assembly, yet, it is safer to look for some evidence of participation by each person alleged to be a member before holding that such person is a member of the unlawful assembly, lest innocent persons be punished for no fault of theirs: that the common object of an assembly is an inference from facts, to be deduced from the facts and circumstances of each case: that the common object can be collected from the nature of the assembly, the arms used by them, the behaviour of the assembly at or before the scene of occurrence, and subsequent conduct: the common object must be readily deducible from the direct as well as circumstantial evidence, including the conduct of parties: that it is not sufficient for such evidence to be consistent with such an inference, but must be the only conclusion possible: that merely because the specific offence with which the unlawful assembly is charged is not proved, it doesn't mean that the common object of the unlawful assembly should be held to be non-existent: that, in order to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot and to infer that all these were originally part of its common

object, but that the conclusion must normally be based on more evidence than the mere acts themselves – Ratnalal and Dhirajlal: *The Law of Crimes* – (22 edt.) p. 334.

The evidence relating to the conduct of the accused before they entered the Bungalow through the front door is that they had, along with a few others, come to the premises in several vehicles and that, in order to have the door opened, they had stated that the "A.S.P. and the H.Q.I.", had come. Thereafter, as they came into the Bungalow, the 1st accused (according to Chandrasena only for, Jayasinghe at the trial stated he could not say who made the inquiry) had inquired, using obscene epithets, whether Mrs. Bandaranaike and Anura were in the Bungalow. Apart from the use of the two objectionable epithets – whether by the 1st accused or by any other accused makes no difference – there is no evidence of anything else said or done by any of the other accused (or for that matter by any of the other unnamed persons said to have been in the group) which should give any indication of the object with which they had arrived and said as they were entering the Bungalow. These items of evidence are in my opinion, insufficient to establish that any of the members of the group, other than the 1st accused at the most, had the object set down in count 1. They may have come because some of them wanted to take a drink. That this could have been so is supported by the evidence that thereafter there had been a demand for liquor, and that liquor, was in fact obtained, though by force. Liquor had then been served in the lounge. What thereafter happened inside the lounge could not (except when, Jayasinghe, says, he went outside and looked in through the X window) and was not seen by any of the witnesses, who testified at the trial. Their evidence of what took place inside is what they heard emanating from inside. In this connection it has to be noted that, according to Mrs. Bandaranaike's evidence, the objectionable singing had not commenced the moment the group had come in, but only after the lapse of some time; for, she has first heard several persons speaking loudly. She had also heard a person speaking in a loud tone as if at a meeting, which said speech also gave her the impression that it was a reply to what had been stated at their (Mrs. Bandaranaike's meeting earlier that day, and that it was

being so said for her to hear; and, when the noise increased, she had even sent a message through Kamala to see what it was. The singing, which, according, to Mrs. Bandaranaike, had been intermittent (මිටක්මිට), seems to have commenced only sometime after the members of the group had entered the lounge. The objectionable singing, alleged by the prosecution, could have begun after the consumption of liquor. The learned Magistrate himself seems to have thought that the liquor had had something to do with the objectionable conduct; for, he made an observation in regard to the effect of liquor on human conduct. As already set out, there was in this group a husband and wife and their teen-age son. Whether the wife and the son also partook of the liquor with the husband (and father) and also joined in the singing with him, or whether the two of them were helpless spectators who not only did not associate with but also completely, though silently, disapproved of the conduct of the head of the family were certainly matters which called for express and careful consideration by the learned Magistrate – even though neither the son (the 3rd accused), nor the wife (the 4th accused) themselves went into the witness-box at the trial.

The evidence shows that feminine voices were also heard. That by itself would not bring in the 4th accused; for, the self-same evidence disposes the presence of several ladies in the group which came in.

Mr. Pullenayagam submitted that the extremely revolting nature of the language set out in count 2 should not tend to raise doubts as to whether the 3rd and 4th accused would have shared in a common object to use such despicable language, as the fact that such foul language was in fact used by a member of the unlawful assembly would not prevent the sharing of a common object to intentionally insult, though not by the use of such foul language which would not have been approved of some of the other members of the unlawful assembly. Although as a proposition of law it may be so, what has first to be established here is that the 3rd and 4th did share, along with the others, including the 1st accused, an object to intentionally insult Mrs. Bandaranaike. The evidence must be such as to establish, as the prosecution contends, that that was the sole object of these two accused as well when they entered the Bungalow that night. The

prosecution must eliminate the possibility that the two of them came to the bungalow that night merely as innocent dependants of the 1st accused; that they came there merely because the 1st accused wanted to come there – whatever may have been the purpose for which the1st accused himself came there, be it to have a drink or even to cause annoyance to Mrs. Bandaranaike. Unless the prosecution can establish, eliminating all reasonable doubt, that the 3rd and 4th accused were not only aware of the purpose for which the 1st accused coming to the said Bungalow that night, but that they too quite willingly approved of and did themselves have such an object, the charge set out in count 1 must fail, at any rate as against them.

In regard to what happened within the sitting-room the only witness, who even purports to say he saw what happened inside that room, is Jayasinghe; but this witness too does not state what exactly he saw taking place, within that room when he looked into that room, from outside from near the window, for about 2 to 3 minutes. An attempt made by both Jayasinghe and Chandrasena to identify those who were singing inside the sitting-room – viz. the 1st, 2nd and 5th accused failed dismally at least as against the 5th accused when it not only became clear that they had not heard the voice of the 5th accused either before or after the night in question, but also when Jayasinghe's evidence, that he saw what he saw through a window by just standing erect on the ground near such window, was at least rendered suspect after the Surveyor, called by the defence, stated that that window was 6' 7" above ground level.

Furthermore, there are certain specific items of evidence, relating to what the 3rd and 6th accused and also all the ladies, who had been in the group, had, at various times done, which tend to raise doubts as to whether they at any rate shared in the common object alleged even against them by the prosecution. It is in evidence that, sometime after the singing had begun, the 1st accused had come out of the sitting-room and had gone up to the door of the room occupied by Mrs. Bandaranaike and was about to kick it, when the 6th accused rushed up to the 1st accused and took the 1st accused away. It is also in evidence that, after the accused all got on to the

compound on their way out and the 1st accused seemed bent on aggression, the 3rd accused had intervened to take his father away, saying:

"ඌට මේවා කරන්න ඕනෑ නැහැ. මේ ඇති කෑගැහුව අපි යමු" (We need not do these. Enough of this shouting. Let us go), and that the 1st accused had then set upon the 3rd accused, and that the ladies had then, with difficulty, bundled them all into the vehicles and left the premises.

These items of evidence, which do not seem to have engaged the attention of the learned Magistrate, must also be taken into consideration as forming part of the subsequent conduct of the accused. These items of evidence, far from tending to point a finger of guilt at these accused – the 2nd, 4th, 6th and the ladies in the group – could be said to raise doubts as to whether they at any rate shared in the common object alleged by the prosecution as against them too.

If the witness Jayasinghe's is the correct estimate of the number of persons who entered the bungalow that night, then of a group of about 10, about three had been women.

The learned Magistrate has not analysed, as against each accused separately, the evidence placed before him by the prosecution. Furthermore, although all six accused have been found guilty of count 1, it is not clear whether of those mentioned in count 1 only the six accused were members of the said unlawful assembly or whether all or any of the "others" were also so guilty.

In regard to the "others" count 1 does not state that they are *unknown* to the prosecution. Did the "others" comprise any of those persons who were also accused persons in the original plaint but were dropped from the amended plaint in which for the first time the charge of an unlawful assembly was brought in.

All these are matters which required careful consideration by the learned Magistrate; but they, however, do not seem to have received

such consideration. Had they been so considered, I doubt very much that he could and would have held that count 1 has been proved beyond reasonable doubt.

A close examination, as set out above, of the evidence led at the trial raises in my mind a strong doubt that the convictions of the six accused are right. The accused are entitled to the benefit of this doubt.

It now remains for me to set down our reasons for overruling the objections, put forward both by learned Counsel for the defence, and by the learned Additional Solicitor-General appearing for the respondent, to Mr. Pullenayagam, who, as set out earlier, represented the "aggrieved party", Mrs. Bandaranaike, being heard at the hearing of this appeal.

Mr. Pullenayagam relies on the provisions of Section 260 of the Code of Criminal Procedure Act in support of his claim to represent Mrs. Bandaranaike, who, he submits, is the "aggrieved party" in this case, and to address this Court on her behalf. The said Section 260 provides as follows:

> "Subject to the provisions of this Code and any written law every person accused before any criminal court may of right be defended by an attorney-at-law, and every aggrieved party shall have the right to be represented in court by an attorney-at-law."

It must be noted that, as far as the right of an accused person is concerned, the provisions of the said Section 260 are the same as the provisions contained in Section 287 of the now repealed Criminal Procedure Code (Chap. 20). The right given to an aggrieved party by the latter part of the said Section 260 was not in the said earlier Code. Another important point of difference is that even the right of the accused person is made "subject to the provisions of this Code and any written law."

The objection put forward on behalf of the defence and the respondent against the Counsel appearing or the said aggrieved party being heard by this Court is three-fold: that Mrs. Bandaranaike is not now, before this Court, an aggrieved party: that the right of representation granted by the said section to an aggrieved party is confined to the original Court and is not available before an Appellate Court: that, the right of representation is distinct from the right to be heard, and the right given to an aggrieved being only a right to be represented, he cannot, in any event claim that he has a right also to be heard.

I shall first consider the argument that Mrs. Bandaranaike does not come before this Court as an "aggrieved party". That she was, in relation to the charges framed against the accused before the Magistrate's Court, an "aggrieved party" before the learned Magistrate is not challenged by learned Counsel opposing this application. The charges so framed were of intentionally insulting Mrs. Bandaranaike and of committing mischief in respect of property belonging to her. Although the respondent was the complainant before the Magistrate's Court, the virtual complainant was Mrs. Bandaranaike. The complaint to court was in respect of offences alleged to have been committed against Mrs. Bandaranaike. She was therefore, undoubtedly a person aggrieved by the conduct so alleged against the accused. Mrs. Bandaranaike was clearly an "aggrieved party" as contemplated by the provisions of Section 260 the said Code of Criminal Procedure Act (hereinafter referred to as "the Code"). It is the submission of learned Counsel in support of this objection that, as all the accused have been found guilty by the learned Magistrate of the offence of intentional insult under Section 484 of the Penal Code, and as there is no appeal against the acquittal on the charges of mischief, Mrs. Bandaranaike does not come before this Court as a person complaining of a grievance: that her grievance has been gone into by the Magistrate's Court and she has been granted relief: that as she has succeeded before the Magistrate's Court, she is no longer a person with a grievance. This submission is, in my opinion, untenable. The accused, who have been found guilty by the Magistrate's Court, have come before this Court to have the said finding set aside. This court has the power to

grant the accused the relief they pray for; and, if such relief is granted, the resulting position would be that the relief, which Mrs. Bandaranaike obtained at the hands of the learned Magistrate, is taken away from her, and, as far as she is concerned, she is re-visited with grief. The verdict of a Magistrate's Court is not final. It is liable to be set aside in appeal. A person who comes before a Magistrate's Court complaining of an offence committed against him, – whether as a complainant or as a virtual complainant – becomes impressed with the character of an "aggrieved party", and must continue in that capacity throughout the proceedings – not only in the Magistrate's court, but also in the event of an appeal, the proceedings, before the Appellate Court or Courts – until the decision, which, under the law, is final, is made. This submission must, therefore, fail.

It has also been argued that the said right is restricted to the Courts of First Instance – the trial court, and court holding an inquiry. A reading of the said Section 260 shows that the right granted to a person accused is a right exercisable by such person before any criminal court "before which he stands accused, and that the right granted to an aggrieved party is a right excercisable by such party "in Court." The words "Criminal Court" are not defined in the said Code; but there is no doubt but that a Magistrate's Court at any rate would be included within the term "Criminal Court". The question then is whether in the case of an accused such right is not available also before an Appellate Court. The section, it must be noted, provides for the exercise of such right before "any criminal court." It is by itself wide enough to cover all courts – whether original or appellate – which have jurisdiction to hear and make orders in any criminal matter.

Article 138(1) of the Constitution vests the Court of Appeal with jurisdiction to correct, *inter alia*, by way of appeal, all errors in fact or in law committed by any Court of First Instance, and also sole and exclusive cognizance, by way, *inter alia*, of appeal, of all *inter alia*, prosecutions of which Courts of First Instance may have taken cognizance. The provisions of Section 325(1) of the Code dealing with the procedure in regard to appeals from the Magistrate's Court,

and Section 349(1) of the Code in regard to appeals from the High Court make no express reference to any appearance by an attorney-at-law. Section 353 of the Code however, refers to the power of the Court of Appeal to assign to an appellant an attorney-at-law in any criminal case where the Court is of opinion that the appellant is in need of legal aid, but has no sufficient means to obtain such aid. In the Court of Criminal Appeal Ordinance (Chap. 7), Section 11 dealt with the power of the court, in certain circumstance, to assign Counsel to an appellant who is undefended; and Section 12 dealt with right of the appellant to be present at the hearing of the appeal; and Section 13 provided for the Crown to be represented on every appeal to the said Court. There is, however, no express provision even in the said Ordinance (Chap. 7) granting an appellant the right to be represented by a lawyer at the hearing of an appeal before the said Court. Nor was there an express provision in the repealed Courts Ordinance (Chap. 6) in regard to the right of an appellant to the then Supreme Court to appear through a lawyer. Section 344 and Section 345 of the old Code (Chap. 20) set out the procedure to be followed when an appeal from the Magistrate's Court came up for hearing before the then Supreme Court. Although there had been no express provision in the Courts Ordinance, (Chap. 6), the Court of Criminal Appeals Ordinance (Chap. 7) and in the Criminal Procedure Code (Chap. 20) yet, Counsel have, even before the turn of this century – ever since the year 1898 when the Criminal Procedure Code (Chap. 20) came into operation and right down to the year 1978, – been appearing for appellants in appeals from the Magistrate's Court to the then Supreme Court. Whenever a party was to be denied the right to be heard in a court of law, either personally or by pleader before an appellate court, the legislature expressly said so – *vide* Section 366 of the Code. The words "any Criminal Court" in Section 260 of the said Code must, therefore, be construed to include not only the Magistrate's Court but also an appellate Court hearing an appeal from a Magistrate's Court.

The words "in Court" with reference to an aggrieved party in Section 260 of the said Code seems to be even wider than the words "any Criminal Court". It admits of no limitation. I am of opinion that the right granted to an "aggrieved party" to be represented in Court

extends to representation even before the Court of Appeal when such Court hears an appeal from a Magistrate's Court.

I shall now consider the last of the submissions made in support of the aforesaid objection, viz: that the right to be represented does not confer a right on an attorney-at-law, who so represents an aggrieved party, to address Court.

The meaning given, in the *Oxford English Dictionary – Vol. 8 –* (1933, edt.), to the word "represent" is: to place (a fact) clearly before another, to state or point out explicitly or seriously to one with a view to influencing action or conduct – to make objections against something; to protest. Wharton: *Law Lexicon* (14 edt.) p. 869, defines "representation": standing in the place of another for certain purposes, as heirs, executor, or administrators – any indication by words, letters, signs or conduct by one person to another of the existence of a fact. The plain, ordinary meaning of the words "to represent" and "representation" is, therefore, clearly to make, either on one's own behalf or on behalf of another, statements or submissions to another orally or in writing, in regard to any matter or thing with a view to influencing the action or conduct of that other. It does not connote merely a silent and an inarticulate presence. An attorney-at-law is one who is a member of a profession, the chief characteristic of which is to plead on behalf of one who has to place matters before another. He is trained and skilled in the art of doing so; and he is held out as one entitled to assist and advise clients and to appear, plead or act before a court of law. The presence of such a person before a court of law would be meaningless if he is merely to be seen and not heard.

Reliance was placed on the provisions of Section 41(1) of the Judicature Act No. 2 of 1978, in support of the submission that there is a distinction between a right to be heard and a right to be represented only. The contention is that it is only an attorney-at-law representing a party, who has a right to be heard, who could himself claim a right to be heard by Court. An analysis of the provisions of Section 41(1) reveals that the latter part of that section gives the right to be represented by an attorney-at-law before a court of law to two

categories of persons – those who are parties to any proceedings in a court, and those who either have or claim to have the right to be heard in any proceedings in a court. The distinction between these two categories is made even more explicit by the provisions of sub-section (2) of the self-same Section 41. An attorney-at-law representing either of these categories would undoubtedly have the right to address Court. I do not think that the provisions of this section can be construed to mean that the right to address Court is given only to an attorney-at-law, who appears for a party who has or claims to have the right to be heard. The provisions of this section seems to me to support the proposition that the right of representation carries with it the right to address Court and that the right to address Court is in no way dependent upon the right in the person, whom the attorney-at-law so represents, to be heard. That to represent another in court carries with it the right to make submissions on behalf of another also finds support in the provisions of subsections (1) and (2) of Section 261 of the said Code. These subsections refer to the appearance in Court of one on behalf of another as a representation. It cannot be doubted even for a moment that the person, who, in terms of the two aforesaid subsections, represents the other hasn't the right to address the Court, and be heard by the court. It seems to me that there is no difference, as far as the right to address Court is concerned, between the right granted to a person to be heard, and the right granted to a person to be represented, by the provisions of the Code of Criminal Procedure Act No. 15 of 1979. They both connote a right to address court.

The right given by the provisions of Section 260 of the Code of 1979 to an "aggrieved party" is one given for the first time in the history of criminal procedure of this country. The intention of the Legislature seems clearly to be to give the "aggrieved party" also an opportunity of placing before court any relevant matters which such party desires to bring to the notice of Court. If the intention was merely to ensure the presence of an attorney-at-law in Court who could assist out if and when such assistance is sought by court, such an express provision, after the earlier Code of 1898 (Chap. 20) had been in operation for about 80 years, was hardly necessary; for, it has always been open to a court to obtain such assistance *ex mero motu*.

The possibility that such a construction could result in the court having to listen, in every criminal case, to an extra attorney-at-law (and even more in the event of there being more than one such party) is not a weighty consideration which should stand in the way of this new right given to an "aggrieved party" being made meaningful and effective.

The right of an attorney-at-law who appears for another who is entitled to be represented in court, is, however, subject, as is the right of all other attorneys-at-law appearing for other parties, to the overriding right of this Court to refuse the right of audience to any attorney-at-law for good cause, – *vide*: *Land Reform Commission v. Grand Central Ltd.*[11]

The final submission too was, therefore not entitled to succeed. The objection, put forward on behalf of the defence and the respondent, was accordingly overruled; and Mr. Pullenayagam, who represented the "aggrieved party", Mrs. Bandaranaike, was heard by this Court.

For the reasons set out earlier, the appeals of the six accused-appellants are all allowed. The verdict recorded, and the sentences passed by the Magistrate's Court are all reversed; and the 1st to the 6th accused-appellants are all acquitted.

TAMBIAH, J. – *I agree.*

Appeal allowed.