SAMY AND OTHERS
v
ATTORNEY-GENERAL (BINDUNUWEWA MURDER CASE)

SUPREME COURT
WEERASURIYA, J.
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
FERNANDO, J.
SC 20/2003 DB
HC COLOMBO 763/2003 (TAB)
NOVEMBER 12, 23, 29, 30, 2004
JANUARY 5, 2005
FEBRUARY 2, 2005

Penal Code sections 30, 31, 42, 138, 139, 146, 297, Murder - Unlawful assembly – Lucas Principle – Ellenborough dictum – discussed – illegal omission – Failure to take action – Police Ordinance section 56 – Police inaction – Exercising discretion bona fide and to the best of one's ability – Can the officer be faulted?

The case was tried against 41 accused before a Trial at Bar (TAB) upon an indictment containing 83 counts. 18 accused were called upon for their defence and at the conclusion of the trial 13 were acquitted; 5 were convicted and sentences imposed. The charges were sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa.

In appeal,

It was contended that, the evidence only established the presence of the accused-appellants at the scene, and the TAB had wrongly applied the 'Lucas principle and the Ellenborough principle'.

Held:

(1) It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion.

(2) The finding of the TAB that the 1st accused-appellant was present at the commencement of the attack is erroneous for there was no evidence to that effect. It is not prudent to rely on the evidence of Wickremasinghe – he has given false evidence to sustain a verdict of guilt pronounced on the 2nd defendant-appellant. The visit to the camp by the 3rd defendant-appellant was motivated by curiosity on the information that the detainees were attacking the villagers.

(3) The 'Lucas principle' is that falsehood uttered in Court or outside Court by a defendant could be taken as corroboration of the evidence against a defendant. It is not justifiable to hold that the 3rd accused-appellant knew that if he told the truth, he would be sealing his fate. There was no allegation that he had given false evidence and insufficient evidence although the name he gave was false.

(4) The prosecution had failed to establish a strong *prima facie* case against the 3rd accused-appellant which warrants the application of the 'Ellenborough dictum.'

(5) There is no an illegal omission – or intentional failure to comply with the duty imposed by law by police officers. Having regard to the department orders, if the Officer-in-Charge has exercised his discretion *bona fide* and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.

APPEAL from the judgment of the Trial at Bar.

Cases referred to:

1. *Kulatunga* v *Mudalihamy* 42 NLR 331
2. *Andrayes* v *Queen* 67 NLR 425
3. *Rex* v *Lucas* 1981 2 All ER 1008
4. *Karunanayake* v *Karunasiri Perera* 82 2 SLR 27
5. *Rex* v *Cocharane* 1814 Gurneys Report 499.
6. *Inspector Arendstz* v *Wilfred Peiris* 10 C.L.W. 121

7. *R* v *Seeder Silva* 41 NLR 337
8. *King* v *Wickramasinghe* 42 NLR 313
9. *King* v *Peiris Appuhamy* 43 NLR 410
10. *King* v *Endoris* 46 NLR 490
11. *King* v *Abeywickrama* 44 NLR 254

Dr. Ranjith Fernando for 1st, 2nd and 3rd accused-appellants.

D. S. Wijesinghe PC with *Priyantha Jayawardena, Chandrika Silva* and *K. Molligoda* for the 4th accused appellant.

C. R. de Silva PC Solictor General with *Sarath Jayamanne* SSC and *P. Nawana* SSC for the respondent.

Cur.adv.vult.

May 27, 2005

WEERASURIYA, J.

This case was tried against 41 accused before a Trial-at-Bar upon an indictment containing 83 counts. For convenience 83 counts in the indictment could be classified into five groups in terms of the alleged offences based on two different principles of criminal liability, as follows:-

(1) Count 1 of the indictment alleged that on or about 25th October 2000 Bindunawewa, Bandarawela, the accused along with others unknown to the prosecution were members of an unlawful assembly, the common object of which was to cause hurt to the detainees of the Bindunuwewa Youth Rehabilitation and Training Centre and thereby committed an offence punishable under section 140 of the Penal Code.

(2) Counts 2-22 of the indictment alleged the commission of the offence of murder of 27 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in the prosecution of the said object and thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(3) Counts 29-42 of the said indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful

assembly or was such that the members of the said unlawful assembly knew to be committed in the prosecution of the said object, and thereby committed an offence punishable under section 300 read with section 146 of the Penal code.

(4) Counts 43-69 of the indictment alleged the commission of the murder of 27 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 296 read with section 32 of the Penal Code.

(5) Counts 70-83 of the indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 300 read with section 32 of the Penal code.

The prosecution led the evidence of 58 witnesses comprising officials of Bindunuwewa Rehabilitation Camp, senior Police officers in charge of the area, Army officers who came to assist the police to disperse the crowd, certain Police officers who were on duty at the time of the attack, most of the detainees who survived the attack, several villagers, Medical officers who conducted the post-mortem and medico-legal examinations in respect of the deceased and injured detainees, and Police officers who conducted investigations.

At the close of the prosecution case on 21/06/2003, 23 accused listed on the indictment were discharged on the application made by the State on the basis that there was no evidence against them. The remaining 18 accused were called upon for their defence and at the conclusion of the trial 5th, 7th, 12th, 15th,19th, 25th, 33rd , 34th, 35th, 36th, 38th, 39th and 40th, were acquitted of all the charges. 4th, 13th, 21st, 32nd and 41st accused were convicted on 1st, 2nd - 16th, 29th, 30th, 31st, 33rd, 35th- 37th, 38th, 39th, 41st and 42nd counts, and following sentences were imposed on them:-

Counts 2-16 death sentence
Count 1-6 months R.I.
Count 29-1 year R.I.
Count 30-7 years R.I.

Count 31-3 years R.I
Count 33-2 years R.I
Count 35-2 year R.I
Count 36-1 year R.I
Count 37-1 year R.I
Count 38-3 years R.I
Count 39-2 years R.I
Count 41-1 year R.I
Count 42-1 year R.I

They were also fined Rs. 1000/- each on counts 30, 31, 33, 38, and 39 of the indictment.

General comments

It is to be noted that the foregoing charges were a sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa on 25.10.2000.

The first three accused-appellants who were residents of Bindunuwewa village, had been convicted on account of their membership of the unlawful assembly with the common object of causing hurt to the detainees of the Rehabilitation Camp and thereby attracting vicarious liability in terms of section 146 of the Penal Code in respect of the charges in the indictment.

The 4th and 5th accused-appellants being Police Officers who were on guard duty around the camp on 25.10.2000 were found guilty on the basis of the illegal omissions and positive (illegal) acts for having aided and abetted the commission of offences set out in the indictment and thereby rendered themselves to be members of the unlawful assembly resulting in criminal liability in terms of section 146 of Penal Code. Accordingly items of evidence with regard to the villagers (1st, 2nd and 3rd accused-appellants) would differ from the evidence presented by the prosecution against the police officers (4th and 5th accused-appellants). Thus the complicity of the two groups as classified above will be considered separately under two different heads in this judgment. In fact Trial-at-Bar had proceeded to examine the evidence in respect of the accused based on the same classification.

At the hearing of this appeal on the application of the learned Solicitor General, 5th accused-appellant was acquitted of all charges preferred against him.

Submission on behalf of 1st-3rd accused-appellants

Learned counsel for the above appellants submitted that the Trial-at-Bar had failed to consider the following circumstances and thereby misdirected itself in imputing vicarious liability on the 1st – 3rd accused-appellant:

(a) that the evidence led against the 1st-3rd accused-appellants only established their presence at the scene on 25/10/2000.

(b) that the evidence disclosed that there was a 'news' that Tigers were attacking the village and due to that reason there was a large gathering of villagers ranging from a minimum of 500 to 3-4 thousand at various points at various times.

(c) that the Trial-at-Bar had wrongly applied the "Lucas principle" and the "Ellenborough principle" in respect of these accused-appellants.

The situation at the Rehabilitation Camp on 24th night as a background to the Incident

On 24th night when Headquarters Inspector Jayantha Seneviratne came to the camp on the information he received that there was a commotion in the camp and that the detainees had tried to grab weapons from the officers, the villagers had assembled near the camp. They (the villagers) had received the information that Lt. Abeyratne had been attacked and injured and that the Police post inside the camp had been abandoned which were factually correct. The crowd witnessed the remnants of the Police post being removed and the detainees abusing the Police and throwing stones. The villagers had planned to stage a peaceful Satyagraha opposite the camp on the following morning, for removal of the camp. Accordingly posters were seen all over the town calling for the removal of the camp on the following morning.

The police sought the assistance of the army and Lt. Balasuriya who came with a platoon of 24 men around 8.50 p.m. dispersed the crowd and left around 1.30 a.m.

Commencement of the unlawful assembly

Evidence led at the trials reveals that the villagers had assembled on 25th morning, in large numbers. As the crowds continued to swell there were reports of traffic congestion and blocking of roads. The number of

villagers gathered on 25th morning had been estimated varying between a minimum of 500 to three to four thousand people.

The detainees were seen inside the camp by Capt. Abeyratne walking along with clubs in their hands. The detainee Asokhan had conceded that they (detainees) carried clubs, rods, iron poles, knives and axes.

The incident of stone throwing which took place on 25th morning from both sides were not considered as a threat to the detainees as conceded by Ltd. Abeyratne.

It was evident that the immediate cause for the attack by a section of the crowd was the provocative act of the detainees, in charging into the crowd with clubs, rods and stones in their hands. The crowd having retreated for a moment which reflected a moment of having got frightened, nevertheless broke into camp with all their fury from the Vidyapeeta site. It is from this point one could assert with justification the commencement of the unlawful assembly with the common object of causing hurt to the detainees.

Law relating to membership of unlawful assembly and vicarious liability

Section 138 of the Penal Code defines an unlawful assembly. For the purpose of this case it is sufficient to state that an unlawful assembly of five or more persons is designated an unlawful assembly, if the common object of the persons comprising that assembly is to commit any offence.

Section 139 of the Penal Code provides that " whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly".

The effect of this section was considered in the early case of *Kulatunga* v *Mudalihamy* [1] where it was held that the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concerned, it had to be proved that he was a member of the assembly which he intentionally joined and that he knew the common object of the assembly.

The vicarious liability imputable on the basis of being a member of

an unlawful assembly as provided for in section 146 of the Penal Code reads as follows:-

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

In terms of that section, for vicarious liability to be imputed on the members of an unlawful assembly the prosecution must prove either:-

(a) that the offence was committed in prosecution of the common object of the unlawful assembly, or

(b) that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

(Vide *Andrayes* v *Queen* (2))

It is well settled law that 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 or where the case falls under section 139 of the Penal Code.

Dr. Gour in Penal Law of India discusses the law in respect of unlawful assembly as follows: (Vol.II page 1296-11th Edition)

> "All persons who convene or who take part in the proceeding of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or from curiosity alone without talking any part in the proceedings are not guilty of that offence, even though those persons possess the power of stopping the assembly and fail to exercise it.
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> "Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 I. P.C .....If members of the family of the appellants and other residents of the village assembled, such persons could

not be condemned *ipso facto* as being members of that unlawful assembly. It would be necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears..... axes etc., this kind of omnibus evidence has to be very closely scrutinized in order to eliminate all chances of false or mistaken implication."

Dr. Gour at page 1299 states that ".....The first thing to remember in cases of this nature is that where a large number of persons has assembled and some of them resort to violence or otherwise misbehaved it need not necessarily mean that every one of the persons present actually shares the opinions, intentions or objects of those who misbehave or resort to violence.

"In fact the possibility of some of the persons actually resenting or condemning the activities of the misguided persons cannot be ruled out. Caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly".

It would be helpful to reproduce the following passages from RATANLAL and DHIRAJLAL's Law of Crimes dealing with the same issue. (Vol.1) (24th Edition pages 598 and 599).

"It is settled law that mere presence of a person at the place where the members of unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion. Whether a person was or was not a member of unlawful assembly is a question of fact".

"Whenever in uneventful rural society something unusual occurs, more so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. If one becomes a member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly it is necessary to keep in mind the life in a village ordinarily uneventful except for small squabbles where the village community is faction ridden and when a serious crime is committed people rush just to quench their thirst to know what is happening.

"Where a large crowd collected, all of whom are not shown to be sharing the common objects of the unlawful assembly, a stray assault by any one accused or any particular witness could not be said to be an assault in prosecution of the common object of the unlawful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the lawful assembly.

"A mere innocent presence in an assembly of persons does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused

shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left at any stage during its activities is in law guilty of every act committed by it from the beginning to the end or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage but at all the crucial stages and that he shared the common object of the assembly at all these stages. It is not uncommon that an unruly crowd on the rampage may contain some miscreants who may go beyond the common object and commit ad hoc crimes graver than the mob had as its objective."

(1) ASSESSMENT OF CULPABILITY OF 1ST – 3RD ACCUSED-APPELLANTS

(A) 1st accused-appellant (*Munasinghe Arachchige Sammy*)

The evidence which is seemingly incriminatory against the 1st accused-appellant emanates from two witnesses namely Ariyasena and Piyasena. These two witnesses had arrived at the scene at two different times and speak to facts and circumstances after the attack on the camp had virtually ended which was evident by the fact that when they arrived at the scene billets were on fire. As between Ariyasena and Piyasena, the first to arrive at the scene was Ariyasena.

E.A.C. Ariyasena, a postman attached to Makulella Post Office on his way to work around 7.00 a.m. on 25.10.2000 had seen a large gathering of people around the camp. After his work he came back to the camp around 8.20 or 8.30 and found two billets on fire and crowd of 3000 – 4000 people gathered at various points, namely, Vidyapeeta grounds, near the gate and around the camp. In his view the crowd inside the camp, was in the region of 700-800, who were armed with clubs. Driven by a desire to ascertain the plight of the detainees, some of whom were known to him, he entered the camp through the cemetery side and saw a young boy falling on to the fire and rescued that boy. Soon thereafter another boy came and informed him that the injured boy was his brother.

Ariyasena looked for some water and went towards the kitchen and having failed to find some water he took the boys along the edge of the ground, when someone struck him a blow on his back. On turning round he saw a crowd of about 20-30 armed with clubs, among whom was the 1st accused-appellant.

The Trial-at-Bar had erroneously stated that after receiving a blow on his back when Ariyasena turned round he saw only the 1st accused-appellant armed with a club which could lead to a wrong inference being drawn that it was the 1st accused-appellant who struck Ariyasena when he was taking the two boys to a safer place (page 66 of the judgment)

There was another item of evidence which could give a different complexion in respect of the attitude of some people who were gathered inside the camp, towards the detainees, if viewed in proper perspective. Ariyasena disclosed that he called for help from a person whom he described as "Hitchchi" to take the injured boys to Vidyapeeta grounds and he (Hitchchi) obliged even though with some reluctance, (vide Vol. V pages 2152 and 2164). It must be noted that the people inside the camp were found armed with clubs (vide Vol. V.P2134).

The question may be justifiably posed as to why 1st accused-appellant did not assist Ariyasena to take the injured boys out of the camp, if he was only an innocent villager. It has to be recalled that Ariyasena did not seek assistance from the 1st accused-appellant and someone in the crowd had shouted whether Ariyasena was a tiger. This would show that there were some elements inside the camp who had strong feelings against the detainees. Therefore the difficult question is how to distinguish between people who formed the unlawful assembly to cause hurt to the detainees, and the innocent villagers who had came there to witness the incident who could be falling into the category of "Hitchchi", due to the circumstances peculiar to this case, which would be enumerated later in the judgment.

The Trial-at-Bar had observed that if Sammy (1st accused-appellant) had no intention to cause hurt to the detainees without going into the camp with a club in hand at the commencement of the attack, he could have moved out of the camp. Accordingly

Trial-at-Bar was of the view that 1st accused-appellant's presence inside the camp at the commencement of the attack armed with a club, was sufficient to draw the inference that he was a member of the unlawful assembly with the object of causing hurt to the detainees.

The finding of the Trial-at-Bar that the 1st accused-appellant was present at the commencement of the attack is erroneous for the reason that there was no evidence to the effect. The evidence of Piyasena does not support the proposition that the 1st accused-appellant was near the camp with a club in hand at the commencement of the attack. It is to be emphasized that Piyasena had arrived at the camp between 9.00 and 9.30 a.m. and he had seen the 1st accused-appellant near Sugathan mama's boutique which was 150 meters away from the camp. It is manifest that when Piyasena came to Sugathan Mama's boutique the attack was almost over and the billets were on fire. This is evidenced by the fact that Captain Dematapitiya who arrived at the camp after 9.45 a.m. dispersed the crowd assembled near Sugathan Mama's boutique. It must be noted that within 20 minutes after the arrival of Piyasena, the army had come and dispersed the crowd. Therefore there was no evidence to suggest that the 1st accused-appellant was found near the camp by Piyasena, at the commencement of the attack on the camp, having assembled near Sugathan Mama's boutique.

It is to be noted that the Trial-at-Bar too had observed at page 27 of the Judgment that when Piyasena arrived at the scene the camp was on fire and detainees were 'finished' implying that they were not alive by that time.

On an overall examination of the evidence, the presence of a large gathering of people ranging from a minimum of 500 persons to three to four thousand persons in and around the camp could be due to several reasons. It was revealed that among the gathering, were a Buddhist Priest of the temple, women, students of Vidyapeeta and ordinary villagers (vide evidence of Piyasena). The reasons for the unusual gathering of people could be summarized as follows:-

(1) the incident on 24th night involving detainees which culminated in the removal of the Police Post;

(2) the news that the detainees who were suspected of having connections with the L.T.T.E. taking control of the camp;

(3) the information that the Deputy Commander of the camp Lt. Abeyrathne had been injured due to an attack by a detainee.

(4) the decision of the villagers to stage a peaceful satyagraha in the morning calling upon the authorities to remove the camp from Bindunuwewa and the publication of posters in the town to that effect.

(5) The fear and anxiety of villagers about their safety and the curiosity to know as to what is happening in the camp.

In view of the circumstances peculiar to this case as enumerated above which has generated an unusual interest among the villagers in respect of the incident at the camp, it is justifiable to expect a group of innocent villagers who may or not form the majority to gather without any intent of causing hurt to the detainees. In the circumstances it would be safer to look for some evidence of participation by each person alleged to be a member before holding such person as a member of the unlawful assembly, lest innocent persons be punished for no fault of theirs although as a matter of law an overt act is not a necessary factor bearing upon membership of an unlawful assembly.

In the light of the material adverted to in the preceding paragraphs I am of the view that it is unsafe to arrive at a finding that the 1st accused-appellant was a member of the unlawful assembly with the object of causing hurt to the detainees named in the indictment.

(B) 2nd accused-appellant (*Sepala Dassanayake*)

The evidence to impute liability on the 2nd accused-appellant emanates from Wickramasinghe Banda, a technical officer of Vidyapeeta (Training College). He testified that he saw 2nd accused-appellant coming out of the main entrance of the camp with a club in hand.

He admitted in his evidence that his statement to the C.I.D. was based mainly on the facts disclosed to him by the Vice Chancellor

and other villagers. He referred in particular to the fact that it was from the Vice Chancellor that he came to know that the 2nd accused-appellant was armed with a club. He admitted that he gave false evidence in Court for fear of reprisal by the villagers. Nevertheless at a subsequent stage of his evidence he stated that he actually witnessed the incident and that his evidence was not false or hearsay.

Having regard to the material on which he gave false evidence in respect of the 2nd accused-appellant, it is not prudent to rely on his evidence to sustain a verdict of guilt pronounced on the 2nd accused-appellant.

(C) 3rd accused-appellant (*Rajapakse Mudiyanselage Premanand*a)

The evidence against the 3rd accused-appellant emanates from the following witnesses:-

(1) Don Sugath Jayantha
(2) Rick Anderson
(3) Dr. E.A.G. Wijeratne

The 3rd accused-appellant had gone with Sugath Jayantha and Padmananda to the Camp as they had heard that the detainees were attacking the village. The 3rd accused-appellant had alighted from the vehicle near the Agricultural Training center and had gone into the camp where there was a commotion. After about 15 minutes he had come running with a bleeding wrist injury stating that he had cut his hand by an aluminum sheet. He had taken treatment for the injury from Dr. Anderson and given his name as Siripala.

The Trial-at-Bar had held that since 3rd accused-appellant had stayed inside the Camp for about 10-15 minutes, he should explain as to how he got injured; his subsequent conduct namely, giving a false name to Dr. Anderson raises suspicion and that he tried to cover up as to how the injury occurred.

There is no dispute that the 3rd accused-appellant had gone into the camp and stayed there for 10-15 minutes and that he had received a cut injury whilst he was inside the camp.

It is to be noted that the suggestion to go to the camp had come from Padmananda who accompanied Jayantha and the 3rd accused-appellant and the reason for that was given by Padmananda himself that the detainees were attacking the village. On their way to the camp they had refrained from discussing anything pertaining to the incident in the camp suggestive of any positive act either offensive or defensive in nature. It would appear that their visit to the camp was solely motivated by curiosity on the information that the detainees were attacking the village. This attitude is clearly reflected by the fact that the 3rd accused-appellant had gone into the camp unarmed.

Lucas principle

The prosecution sought to apply the principle laid down in *Rex* v *Lucas*(3) and followed in the local case of *Karunanayake* v *Karunasiri Perera*(4). The principle laid down in Lucas case was that statements *made out of Court which are proved or admitted to be false in certain circumstances amount to corroboration.* Lies proved to have been told in Court by a defendant is equally capable of providing corroboration.

It is to be noted that a lie told out of court, or in court to be capable of amounting to corroboration must satisfy the following requirements:-

(1) It must be deliberate

(2) It must relate to a material issue

(3) The motive for the lie must be a realization of guilt and fear of the truth

(4) The statement must be clearly shown to be lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness

There is no doubt that the 3rd accused-appellant had given a false name to Dr. Anderson in seeking treatment for his injury found on the wrist area. There is no explanation either from Sugath Jayantha or from the 3rd accused-appellant for giving a false name to the doctor. What has to be ascertained is whether the motive for the falsehood by the 3rd accused-appellant was the realization of

the guilt and a fear of the truth. In other words the court has to ascertain whether he knew, that if he told the truth, he would be sealing his fate.

Neither Dr. Anderson nor Dr. Wijeyratne who examined 3rd accused-appellant on 30th November rejected the proposition that the injury found on his wrist area could be caused by an aluminium sheet. In fact Dr. Wijeyratne had confirmed that such an injury could be caused by a sharp edged surface. Therefore there is no material to reject the assertion by the 3rd accused-appellant that the injury was caused by an aluminum sheet. It would appear that Dr. Anderson had been satisfied with the statement made by Jayantha that the injury found on the 3rd accused-appellant was caused by an aluminium sheet. There was no evidence to suggest that Dr. Anderson had inquired from the 3rd accused-appellant as to the manner the injury was caused.

There was no allegation that the 3rd accused-appellant had given a false address or insufficient address although the name he gave was false. Dr. Anderson had noted in his register that the patient named Siripala was brought by Sugath Jayantha, the van driver known to him.

In this situation the identity of the 3rd accused-appellant could be readily obtained from the person who brought him for treatment. Accordingly it is difficult to state that by giving his name as Siripala he could effectually prevent his identify being established. In the circumstances it is not justifiable to hold that the 3rd accused-appellant knew that if he told the truth, he would be sealing his fate. Further there was no material to suggest of an attempt being made to suppress the evidence of Jayantha relating to the visit to the Binunuwewa camp on 25.10.2000.

The rule laid in *Rex* v *Lucas (supra)* is that a falsehood uttered in Court or outside court by a defendant could be taken as corroboration of the evidence against a defendant. The evidence which is sought to be corroborated by the alleged false statement is the evidence of Sudath Jayantha that the 3rd accused-appellant had gone into the camp unarmed and after 15 minutes he had come out of the camp with a cut injury on his right wrist area.

Nevertheless the question is on these facts whether an irresistible inference could be drawn that he intentionally joined an unlawful assembly with the common object of causing hurt to the detainees.

Ellenborough *dictum*

It was contended by the prosecution that by applying the *dictum* of Lord Ellenborough, in *R.* v *Cochrane*[5], it was obligatory on the 3rd accused-appellant to offer an explanation as to the manner he received an injury on his wrist area.

It is necessary to examine the dictum of Lord Ellenborough in *Rex* v *Cocharane (supra)* which reads as follows:-

> *"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refuses to do so where a strong prima facie case has been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

This *dictum* has been applied in Sri Lanka both in cases of circumstantial and direct evidence. It must be noted that in the following cases this dictum was applied where a strong *prima facie* case had been made out against the accused.

(1) *Inspector Arendstz* v *Wilfred Peiris* [6]

(2) *R.* v *Seeder Silva* [7]

(3) *King* v *Wickramasinghe* [8]

(4) *King* v *Peiris Appuhamy* [9]

(5) *King* v *Endoris* [10]

On a careful survey of these cases it is manifest that a condition precedent to the application of this dictum is that there must exist a strong *prima facie* case made out against the accused.

In the instant case the purported incriminating circumstances against the 3rd accused-appellant relied upon by the prosecution were as follows:-

(1) that he was inside the camp for about 10-15 minutes and

(2) that he came running with a bleeding injury on his wrist.

As against these purported incriminating circumstances there were other circumstances as well, enumerated below which require careful consideration before one arrives at a decision whether a *strong prima facie* case has been made out:

(1) that the suggestion to visit the camp originated from Padmananda, the other van driver

(2) that the information relating to the situation in the camp was provided by Padmananda

(3) that no discussion took place on their way to the camp of any action contemplated by the 3rd accused-appellant

(4) that he went inside the camp unarmed

(5) that at the time he went into the camp there was a commotion

(6) that he came out running with a bleeding injury stating that it was caused by an aluminum sheet

(7) that there was no medical evidence to contradict the position that the injury was not consistent with having been caused by an aluminum sheet

(8) that aluminum sheets were found inside the camp.

Having examined the totality of the aforementioned circumstances I am of the view, that the prosecution had failed to establish a strong *prima facie* case against the 3rd accused-appellant which warrants the application of the *dictum* of Lord Ellenborough.

Conclusions

For the aforementioned reasons the convictions entered against 1st, 2nd and 3rd accused-appellants cannot be sustained.

Accordingly I allow their appeals and set aside the convictions and sentences in respect of 1st, 2nd and 3rd accused-appellants and acquit them of all charges preferred against them.

(II) ASSESSMENT OF CULPABILITY OF 4th ACCUSED-APPELLANT

(4th accused-appellant - Senaka Jayampathy Karunasena)

Submissions on behalf of 4th accused-appellant

Learned President's Counsel for the 4th accused-appellant submitted that the Trial-at-Bar had seriously misdirected itself on the following matters in assessing the culpability of the 4th accused-appellant in respect of the charges levelled against him.

(1) That the charges based on unlawful assembly are misconceived in respect of the 4th accused-appellant since there was no factual or legal basis to have joined him along with the unruly crowd as members of the unlawful assembly.

(2) That the prosecution must establish necessary *mens rea* in respect of illegal omissions and positive (illegal) acts to impute vicarious liability in terms of section 146 of the Penal Code.

(3) That the prosecution must present a consistent case against the accused-appellant whether by way of illegal omissions or positive (illegal)acts or both.

Basis of the prosecution case against 4th accused-appellant

Learned Solicitor-General submitted that the prosecution presented its case against the 4th accused-appellant on the basis of illegal omissions and positive (illegal) acts. The allegation of illegal omissions consisted of the general allegation of intentional failure to comply with the duty imposed by law and certain specific illegal omissions by Police officers. Two specific instances of illegal omissions highlighted were:

(a) failure to arrest miscreants and

(b) failure to take action when certain detainees were attacked inside the truck.

The positive (illegal) acts enumerated by the prosecution were

(a) shooting at the detainees and

(b) removal of dead bodies with a view to destroy evidence

Law relating to illegal omissions

The relevant provisions of the law which govern illegal omissions are found in sections 30, 31 and 42 of the Penal Code.

Section 30 - "In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions."

Section 31 (1) "The word 'act' denotes as well a series of acts as a single act."

Section 31 (2) "The word 'omission' denotes as well a series of omissions as a single omission"

Section 42 "A person is said to be "legally bound to do" whatever it is illegal in him to omit"

In Criminal Law by *Wayne R. Lafave and Austin W. Scott* (Second Edition (1986) at page 202) illegal omissions are defined as follows;

> "More difficult, however are crimes which are not specifically defined in terms of omissions to act but only in terms of cause and result. Murder and manslaughter are defined so as to require the killing of another person; arson so as to require the burning of appropriate property. Nothing in the definition of murder, manslaughter or arson affirmatively suggests that the crime may or may not be committed by omission to act. But these crimes may in appropriate circumstances be thus committed. So, a parent who fails to call a doctor to attend his sick child may be guilty of criminal homicide if the child should die for want of medical care, though the parent does nothing of an affirmative nature to cause the child's death"
>
> At page 210, it is stated that "one's failure to act to save someone toward whom he owes a duty to act is murder if he knows that failure to act will be certain or substantially certain to result in death or serious bodily injury. If he does not know that

death or serious injury is substantially certain to result, but the circumstances are such as to involve a high degree of risk of such death or injury if he does not act (in some jurisdictions he must, in addition, be conscious of this risk), his failure to act will afford a basis for liability for involuntary manslaughter. A failure to act which, under the circumstances, amounts to no more than ordinary negligence would not, by the general rules of criminal homicide make him liable for either murder or manslaughter. Thus it cannot accurately be said that an omission to act (assuming a duty to act) plus death equals murder or equals manslaughter without considering the *mens rea* requirements of those crimes."

The above proposition of the law would make it clear that the mere fact that there was a duty to act in the given circumstances and death has resulted due to the said failure to act will not be sufficient to establish the offence unless the prosecution proves that the omission was intentional.

Section 139 of the Penal Code lays down that "Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins the assembly or continues in it, is said to be a member of an unlawful assembly".

Therefore the vital ingredient of the offence of being a member of an unlawful assembly is the intention to join the assembly with a particular common object. The onus of proving the ingredient lies on the prosecution. In this case the prosecution has sought to rely both on positive (illegal) acts and illegal omissions to establish the necessary *mens rea* on the part of the 4th accused-appellant. It is the duty of the prosecution to present its case consistent with this position. In order to establish an intention to join the unlawful assembly the purported (illegal) positive acts and the illegal omissions must necessarily point in the same direction.

The prosecution must necessarily rely on circumstantial evidence to establish that the 4th accused-appellant intentionally joined the unlawful assembly with the object of causing hurt to the detainees. Therefore the inescapable inference from both the positive acts and the omissions taken together must be that the 4th accused-appellant had only the intention to join the unlawful

assembly with the common object of causing hurt to the detainees. If the proved facts do not exclude other reasonable inferences then a doubt arises whether the inference sought to be drawn is correct. (Vide *Rex* v. *Seedar de Silva* at 344 (*supra*) *King* v *Abeywickrema*[11]

Insufficiency of action: Does it amount to inaction?

The prosecution contended that the Police did some acts to prevent the commission of offences but the action taken viewed in the light of final outcome, namely, death of 27 detainees and injuring 14 was insufficient and therefore the 4th accused-appellant entertained the common object of other members of the unlawful assembly.

There is no dispute that the Police Officers are bound to prevent the commission of offences. Chapter VIII of the Code of Criminal Procedure deals with the powers of the Police Officers to command any unlawful assembly which is likely to cause a disturbance of the public peace to disperse and their right to disperse such assembly and if the said assembly shows a determination not to disperse, the Police are empowered to fire at them with a view to disperse such assembly.

Section 56 of the Police Ordinance lays down the duties of Police Officers as including the duty to preserve the peace and detect and bring offenders to justice and to use their best endeavour and ability to prevent all crimes, offences and public nuisances.

It is necessary to highlight that a decision with regard to the course of action that should be taken in situations of this nature is essentially a matter within the discretion of the officer in charge of the Police party. Departmental Order No. A 19 Rule 29 states "It will be appreciated that no rules or regulations can be drawn up for every conceivable contingency that may arise. The man on the spot that is the Senior Police Officer at the scene must decide what best he should do and use his judgment and discretion as the situation may seem to dictate".

Part III B (2) of the said Departmental Order states as follows:-

"In dealing with disorderly crowds the officer in charge of the Police must consider carefully the number of men at his disposal. Due regard must be paid to the particular circumstances of each case and as to whether the party of Police is strong enough to

avoid any danger of being rushed and overpowered if the crowd is engaged in hand-to-hand combat"

Having regard to the departmental orders referred to above if the officer in charge has exercised his discretion *bonafide* and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.

Purported illegal omissions and positive (illegal) acts of the Police establishing their complicity

The general allegation that the Police did nothing to save the detainees came mainly from the two detainees namely Ganesha-moorthy Ashokan and Kandasamy Chandrasekaran. Ashokan stated that the Police did not do anything when they saw crowds outside the camp carrying clubs. However in re-examination he stated that Police shot at the fence to save them (vide Vol. III page 1038).

Chandrasekaran stated that the Police did not come and save them when they were attacked but later admitted that he did not see any Police at that time but he saw Police Officers at the initial stage when they were asked to stay inside the billets.

The evidence relating to alleged illegal omissions of the Police must be assessed against the other evidence of detainees who stated that the Police took steps to save them. (Vide evidence of Uttaranathan - Vol 3 page 953) (Sinnatamby Rajendran) (Vol. III page 1179) (Ganeshamoorthy Ashokan - Vol. III page 1031 and 1038)

It was submitted by the prosecution that the 4th accused-appellant had admitted in his dock statement that he was stationed near the main entrance to the camp at the time of the attack implying that he could see the detainees being attacked and merely stood by and watched the attack. On a reading of the said dock statement it would appear that there was no such admission. He had stated that he came up to the entrance when the attack commenced and immediately ordered his men to shoot in the air and proceeded towards the camp. He had explained that the reason for not shooting at the attackers directly was the inability to distinguish between the detainees and the villagers in the commotion. It was revealed that he was not possessed of even tear gas equipment at the time, as seen from the evidence of A.S.P.

Dayaratne who stated that he brought tear gas equipment when he came to the camp that morning.

Two purported specific acts of illegal omissions

(1) Failure to arrest miscreants at the time of the incident.

It was submitted that the alleged omission would indicate that the Police did entertain an intention to share the common object of the members of the unlawful assembly.

In dealing with this allegation one has to be mindful of the fact that only 65 officers were available to the 4th accused-appellant at the time of the break-in by the unruly mob. The 4th accused-appellant was not in a position to muster the full strength of the Police unit at the entrance to the camp for the reason that some of his men were deployed around the perimeter of the camp running into approximately 1.5 kilometers. In the circumstances it would be clear that the Police were greatly outnumbered. Considering the public feeling against the detainees and the fact that the Police were getting outnumbered, any attempt to arrest the offenders could have led to a backlash against the Police. It is to be recalled that when Police did in fact arrest 367 persons on the following day, the villagers stormed the Police demanding their release on bail.

It was submitted by the prosecution that the Trial-at-Bar had held that if the 4th accused-appellant really wanted to guard the camp and to protect the detainees he could have positioned all his men around the billets without positioning his men around the perimeter of the camp. This proposition is clearly unreasonable for the reason that the 4th accused-appellant was under orders not to enter the camp premises.

In the light of the aforesaid material it is not justifiable to draw the inference that the failure to arrest the offenders on that day was an indication that the 4th accused-appellant shared the common object of the unlawful assembly. In this regard what matters is the intention of the officers as would be seen from their actions and not on the extent of the damage.

(2) Failure to take action when detainees were attacked inside a truck.

Two detainees namely Nicholas Edwin and Thambirajah Navarajah had given evidence that they were attacked by the crowd in the presence of the Police inside the truck parked at the

entrance to the camp. However, Gamini Rajapakse a villager who gave evidence at the trial claimed that when a detainee who came running towards the Police truck near the turn off to the camp was attacked, there were no Police Officers at the point.

Purported positive (illegal) acts of the Police

The prosecution claimed that certain items of evidence led at the trial had taken the prosecution into a new dimension which shows that in addition to illegal omissions the Police had done overt and positive acts. The purported positive acts were:

(1) shooting by the Police resulting in the death of 4 detainees;

(2) removal of dead bodies with a view to destroying evidence.

(1) Shooting by the Police

The evidence with regard to Police shooting emanates from the following witnesses:-

(1) Ganeshamurthy Ashokan
(2) Perumal Easwaran
(3) Sinnathamby Sudaharan
(4) Kandasamy Chandrasekaran

The medical evidence has revealed that only one detainee had sustained and succumbed to gun shot injuries and injuries found on him were slanted upwards.

Ganeshamurthy Ashokan stated that he was shot by the Police when he with other detainees ran for protection. But in re-examination he conceded that the Police shot in the air and shot at the fence to save them and at the point he lay on the ground. (Vol. III page 1038)

Perumal Easwaran claimed that he was shot in the right hand and his finger was severed. However evidence of Dr. Kahandage clearly showed that he had cut injuries on both hands and a laceration in the right hand which had been caused by sharp edged weapons and blunt weapons. (Vol. IV pages 1621 - 1623)

Though Sinnethamby Sudaharan claimed that he sustained gun shot injuries while he was running towards the playground. Dr. Chandana, who examined him testified that he had minor

injuries on the face and right shoulder caused by a blunt weapon. (Vol. IV pages 1561-1566)

Despite the assertion by Kandasamy Chandrasekaran that a detainee named Karunakaran was shot in the leg near the tube well, it was revealed at the post mortem examination held by Dr, Wijeratne on the body of Karunakaran that he had stab and cut injuries which could be caused by a sharp weapon and injuries caused by blunt weapons. It is to be noted that he had no gun shot injuries. (Vol. IV pages 1561 - 1566).

On the available evidence it is apparent that the Police fired shots in the air from a lower elevation, from the road outside the camp. Most of the empty cartridges were found on the road near the entrance to the camp.

On a careful analysis of the evidence of 4 witnesses who testified on the act of shooting, it would appear that only one detainee had sustained gun shot injuries. The allegation that the Police shot at the detainees is not borne out by medical evidence. In the circumstances it is highly probable that the detainee who succumbed to gun shot injuries was accidentally shot when the Police were firing in the air.

The Trial-at-Bar had failed to evaluate the evidence with regard to the alleged shooting and had accepted the evidence of the detainees at its face value.

(2) Removal of dead bodies

It was submitted that the Trial-at-Bar had held that the Police had removed the dead bodies, without having recourse to normal procedure with a view to destroy evidence. A.S.P. Dayaratne conceded that he was instructed by the D.I.G. to remove the bodies to preserve the peace in the area as there was a large concentration of Tamil estate workers in the surrounding area.

In view of the above evidence it was a total misdirection by the Trial-at-Bar to hold that dead bodies of the detainees were removed from the scene with a view to destroy evidence.

Positive acts by the Police which would negate the proposition that there was an intentional failure on their part to prevent the commission of offences

The following items of evidence would reveal that Police officers on duty around the camp did their best to prevent or minimize the harm which was being caused by the unruly mob. They would negate the position that there was an intentional failure on the part of the Police and the 4th accused-appellant in particular to prevent the commission of offences and share the common object of causing hurt to the detainees. Even if the matter is left in a state of doubt, it is to be highlighted that the prosecution had failed to establish the necessary *mens rea*.

(1) Police shot in the air with a view to disperse the crowd immediately when the crowd broke into the camp [(Vide evidence of Capt. Dayaratne [Vol. II page 147] and evidence of Ashokan. [Vol. III page 1038)].

14 empty cartridges were found at the bend near the turn off to the camp and 6 empty cartridges were found near the turpentine tree inside the camp. The leaf of the turpentine tree had been damaged at a height of 10.7 meters indicating that firing was in the air.

(2) The Police drove away groups of people preventing them from entering the camp at various points [Vide evidence of Capt. Abeyratne (Vol. II page 207) Lt. Abeyratne (Vol. II page 275) Jeganathan Uttamanathan (Vol. III page 955) P. C. Premadasa (Vol. III pages 834-837) Gunapala - Grama Arakshaka. (Vol. III pages 912 & 913)].

(3) Police officers intervened and saved detainees when they were being attacked [Vide evidence of Uttamanathan (Vol. III pages 952 & 954) Sinnathamby Rajendran. (Vol. III page 1179)].

(4) Police took steps to despatch injured detainees to the hospital [Vide evidence of Ashokan. (Vol. III page 1031)]

(5) The 4th accused-appellant deployed Police Officers who reported for duty under him having regard to the most vulnerable areas. It is to be noted that the available Police Officers had to be deployed around 8 1/2 acres of land which is approximately 1.5 kilometers.

(6) When the situation got out of hand the 33rd accused who was under the 4th appellant, called for help twice that morning.

(7) 4th accused-appellant gave clear instructions to the officers who were under him (a) not to allow anyone to enter the camp and (b) not to shoot unnecessarily except upon superior orders.

Conclusions

After a careful examination of all the material enumerated in the foregoing paragraphs, I am of the view that there is no merit in the contention that 4th accused-appellant along with the villagers, was a member of the unlawful assembly with the common object of causing hurt to the detainees.

In the circumstances, I allow the appeal and set aside the conviction and sentences entered against 4th accused-appellant and acquit him of all the charges preferred against him.

JAYASINGHE, J. – I agree.

UDALAGAMA, J. – I agree.

DISSANAYAKE, J. – I agree.

FERNANDO, J. – I agree.

Appeals allowed.