# BANDARANAIKE

v.

# JAGATHSENA AND OTHERS

SUPREME COURT.
WANASUNDERA, J., COLIN-THOMÉ, J. AND CADER, J.
S.C. APPEAL No. 58/82.
M.C. HATTON No. 18725.
MARCH 5 TO 9, OCTOBER 22, 25, 26, 29, 30, 1984.

*Criminal Law – Unlawful assembly – Insult, meaning of – Mischief – Penal Code, sections 140, 484 read with 146, 410 read with 146 and 410 read with 32 – Assessment of contradicted evidence.*

*Appeal – Right of appeal of aggrieved person not a party to the original case – Article 128 of the Constitution – Code of Criminal Procedure Act, No. 15 of 1979, section 260 – Judicature Act, No. 2 of 1978, section 41(1) – Review of questions of fact and law – Articles 127, 128, 134(2) and 134(3) of the Constitution.*

The 1st to the 6th respondents were charged in the Magistrate's Court of Hatton on four counts with committing the offences of membership of an unlawful assembly whose common object was to commit the offence of insult against Mrs. Sirimavo Bandaranaike and insult and mischief punishable under sections 140, 484 and 410 read with 146 and 410 read with section 32 of the Penal Code.

On the night of 13th May 1979 when Mrs. Sirimavo Bandaranaike and her party were in the Glencairn Bungalow at Dikoya the 1st to 6th respondents along with some others had gone there and for about two hours indulged in singing obscene songs insulting Mrs. Bandaranaike. On the directions of Mrs. Bandaranaike, one Kamala Ranatunga who was with her had taken down a substantial part of the words uttered on notepaper provided by her.

The Magistrate convicted the 1st to 6th respondents of the charges under section 140 and 484 read with section 146 of the Penal Code and fined the 1st, 2nd and 5th respondents Rs. 250 each and warned and discharged the others ordering each of them to pay Rs. 200 as State costs.

The 1st to 6th respondents appealed to the Court of Appeal from the findings and order against them of the Magistrate. Mrs. Sirimavo Bandaranaike as a party aggrieved was allowed to intervene in the proceedings before the Court of Appeal and was heard by her lawyers. The Court of Appeal however acquitted all the respondents and Mrs. Bandaranaike filed petition in the Supreme Court seeking a review of the judgment of the Court of Appeal. By way of preliminary objection her locus standi was challenged.

The respondents further challenged the evidence relating to their identification and the credibility of the evidence of the prosecution witnesses.

**Held –**

(1) Under section 260 of the Code of Criminal Procedure Act No. 15 of 1979 every aggrieved party has the right to be represented in "any criminal court" by an attorney-at-Law and implicit in this right is the right to address court and make submissions. This right is not confined to a Court of First Instance; the expression "any criminal court" is wide enough to cover all Courts including Appellate Courts having the necessary jurisdiction. Section 41(1) of the Judicature Act No. 2 of 1978 lends support to this interpretation. An attorney-at-law is entitled not only to assist and advise his clients but also to appear, plead or act on behalf of them in every court or other institution established by law for the administration of justice.

The Court of Appeal had rightly held that Mrs. Bandaranaike was an aggrieved party and that this status did not cease with the conviction of the respondents in the Magistrate's Court. It was a status which continues until the final disposal of the appeal. She was therefore entitled to be represented in the Court of Appeal and her attorney-at-law was entitled to be heard in that Court.

(2) Under Article 128(2) the Supreme Court has a wide discretion to grant special leave to appeal to itself from a judgment of the Court of Appeal where in the opinion of the court the case or matter is fit for review by the Supreme Court. Under Article 128(2) of the Constitution it is not necessary to have been a party in the original Court to be granted a hearing in the Supreme Court. Support for this view comes also from Article 134(2) and (3) of the Constitution.

(3) Under Article 127 of the Constitution the Supreme Court is the final court with civil and criminal appellate jurisdiction for the correction of all errors in fact or in law committed by the Court of Appeal or any Court of First Instance and may affirm, reverse or vary any order, judgment, decree or sentence of the Court of Appeal. This wide power must be used with circumspection. A court of appeal must attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence and consequently should not disturb a judgment of fact unless it is unsound. Unless (1) the verdict of the judge is unreasonably against the weight of evidence, (2) there is a misdirection on the law or on the evidence, (3) the court of trial has drawn the wrong inferences from matters in evidence, the appeal court must not interfere with a judgment of fact.

(4) Whether words are insulting depend on a variety of circumstances such as the context in which they were uttered, the intention, the tone and the attitude of the person uttering them and the situation in which they were. Section 484 requires that the person insulting should intend to provoke a person to commit a breach of the peace or other offence or know it to be likely that such provocation will cause that person to break the public peace or commit any other offence. The offence depends on the provocation given and not upon the provocation felt. It is not necessary that the person insulted should in fact be provoked. The mere forbearance of the person insulted is insufficient to protect the offender.

(5) To constitute an unlawful assembly there must be an assembly of five or more persons having a common object which is one of the six specified in section 138 of the Penal Code. The mere presence of a person in an assembly does not make him a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him such a member or unless being aware of facts which render any assembly an unlawful assembly he intentionally joins that assembly or continues in it.

In a case where there are several accused the case against each accused must be considered separately. Omnibus evidence of a general character must be closely scrutinised in order to eliminate all chances of false or mistaken implication of innocent persons. It is possible that only some members of the assembly sang and that some of those in the assembly did not entertain the common object.

(6) When versions of two witnesses do not agree the trial judge has to consider whether, the discrepancy is due to dishonesty or to defective memory or whether the witness' powers of observation were limited. The demeanour of the witness in the witness box must be taken into account.

(7) The Magistrate had correctly evaluated the evidence of Mrs Bandaranaike and Kamala Ranatunga and the conflict in the evidence on the number of pens used in recording the words of the songs does not make the record of the song a fabrication. There is no doubt that the incident as deposed to by Mrs. Bandaranaike did take place and her evidence is truthful and that whoever sang the songs intentionally insulted her and gave provocation to her. But the prosecution has not been able to establish beyond reasonable doubt the identity of the persons who sang the songs or who entertained the common object of intentionally insulting Mrs. Bandaranaike.

(8) 1st respondent having died when this appeal was pending the appeal against his acquittal by the Court of Appeal abates.

**Cases referred to :**

(1) *King v. Gunaratne et al 14 Ceylon Law Recorder 174*

(2) *Martin Fernando v. The Inspector of Police Minuwangoda (1945) 46 NLR 210.*

(3) *Haniffa v. Packeer (1949) 51 NLR 330.*

(4) *Fraser v. Sinnaiya (1910) 14 NLR 3*

(5) *Jayasuriya v. Ratnayake (1949) 40 CLW 47.*

APPEAL from the Court of Appeal.

*H. L. de Silva, P.C.* with *Faiz Musthapha, S. Dassanayake, H. H. Ashroff* and *K. Balapatabendi* for petitioner.

*S. J. Kadirgamar, Q.C.* with *S. L. Gunasekera, Raja Dep* and *Daya Pelpola* for 1st and 2nd repondents.

*K. Kanag-Iswaran* with *Rajah Dep* for 3rd and 4th repondents.

*Mark Fernando* with *Daya Pelpola* for 5th respondent.

*A. H. C. de Silva, Q.C.* with *M. S. M. Naseem* for 6th respondent.

*S. W. B. Wadugodapitiya, Addl. S.G.* with *D. P. Kumarasinghe, S.S.C.* for 7th and 8th respondents.

*Cur. adv. vult.*

December 12, 1984.

**COLIN–THOMÉ, J.**

The 1st to the 6th respondents were charged in the Magistrate's Court of Hatton in case No. 18725 on the following charges :–

1. That on or about the 13th day of May, 1979, at Dikoya, within the jurisdiction of this Court, you along with others were members of an unlawful assembly with the common object of intentionally insulting and thereby giving provocation to Sirima R. D. Bandaranaike, intending or knowing it to be likely that such provocation would cause her to break the public peace or to commit any other offence, and thereby committed an offence punishable under section 140 of the Penal Code ;

2. That at the same time and place and in the course of the same transaction one or more members of the said unlawful assembly did intentionally insult Sirima R. D. Bandaranaike by uttering (inter alia) the following words "..... I very much like to get into a river along with Sirima and swim with her and also to suck both her lips ....." and thereby gave provocation to her intending or knowing it to be likely that such provocation would cause her to break the public peace or to commit any other offence, and thereby committed an offence in prosecution of the said common object of the said unlawful assembly, or such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object, an offence punishable under section 484 read with section 146 of the Penal Code :

3. That you did also in prosecution of the common object of the said unlawful assembly commit mischief by causing damage to the amount of Rs. 1,989 to the jeep bearing distinctive No. 31 Sri 1294 belonging to Sirima R. D. Bandaranaike an offence punishable under section 410 of the Penal Code read with section 146 ;

4. That in respect of the said act of mischief, you are also guilty of an offence punishable under section 410 of the Penal Code read with section 32.

The case for the prosecution was that on the 13th of May 1979, at about 9 p.m. a party of about 10 to 12 persons, which included the 1st to the 6th respondents, came to Glencairn Bungalow in Dikoya occupied by the petitioner and her party, shouting out "Where is Mrs. Bandaranaike the prostitute ?" and thereafter indulged in singing obscene songs referring to Mrs. Bandaranaike. Some of the words uttered were spoken to by A. R. Don Gunaratne Jayasinghe, Mrs. Bandaranaike's bodyguard, and a substantial part of the words uttered were taken down by Kamala Ranatunga at the request of the petitioner on notepaper provided by her. The petitioner stated that she read what was taken down that very night and the document P2 shown to her in Court contained what was written down. The 1st to the 6th respondents did not give evidence but called the Examiner of Questioned Documents and a licensed Surveyor who had made a plan of Glencairn Bungalow. The Examiner of Questioned Documents testified that the document P2 had been written with three ballpoint pens while Kamala Ranatunga insisted that she had used only one ballpoint pen. The Surveyor was called to show that Jayasinghe could not have seen what was happening inside the bungalow through a window while standing at a point outside the bungalow.

The learned Magistrate at the conclusion of the trial made order convicting the 1st to the 6th respondents on the first two charges. The first, second and fifth respondents were fined Rs. 250 each in respect of each charge ; the 3rd respondent was warned and discharged ; the 4th and 6th respondents were also warned and discharged and ordered to pay Rs. 200 each as State costs. All the respondents were acquitted on the 3rd and 4th charges. The six respondents appealed against their convictions to the Court of Appeal and the Court of Appeal by its judgment delivered on the 31st August 1982, acquitted the respondents upon the ground that if the learned

Magistrate had viewed the evidence adduced by the prosecution "in their proper perspective," he would not have convicted the respondents.

The petitioner in her petition to us has canvassed the findings of the Court of Appeal. The main grounds of the petition are :-

(*a*) that the evidence of Jayasinghe, Kamala Ranatunga and the petitioner when viewed "in their proper perspective" would have compelled a prudent man in the particular circumstances of this case to find the respondents guilty of the charges ;

(*b*) that it is inconceivable that these revolting obscene words were falsely put into the mouths of these respondents by Kamala Ranatunga and the petitioner when "milder" words would readily have occurred to them if they had been inclined to fabricate evidence ;

(*c*) that the testimony of the petitioner, a former Prime Minister of the Island whose credibility the learned Magistrate did not doubt, established that the impugned document P2 was in existence on the very night of the alleged incident ;

(*d*) that it was immaterial whether one ballpoint pen or three ballpoint pens were used by Kamala Ranatunga. What was all important is whether what was written down was what was uttered and that is amply corroborated by the unimpeachable testimony of the petitioner which the learned Magistrate readily accepted ;

(*e*) that the utterances of the respondents on entering Glencairn Bungalow, viz : "Where is Mrs. Bandaranaike the prostitute ?" and their subsequent behaviour would have compelled any prudent man to infer that the unlawful assembly was in existence prior to their "invasion" of the bungalow and the common object of such assembly was to insult the petitioner ;

(*f*) that the credibility of the witnesses is essentially a question of fact and therefore eminently a question for the trial Judge. It is only in rare cases that such a finding should be interfered with and this it is submitted is not such a case ;

(*g*) that the judgment of the Court of Appeal is erroneous and tends to divert the due and orderly administration of justice in this country into a new course which might be drawn into an evil precedent in the future ;

(*h*) that the judgment of the Court of Appeal is, in the particular circumstances of this case, manifestly unreasonable and if unreversed, would occasion a grave miscarriage of justice.

The petitioner submitted that this case constituted a matter fit for review by the Supreme Court and prayed for such other and further relief as shall seem fit and meet to this Court.

At this stage it is pertinent to observe that the plaint was first filed in this case on the 25th of May 1979, against 11 accused, charging them under two counts as follows :-

(1) that on or about the 13th May 1979, at Dikoya they insulted Sirima R. D. Bandaranaike using words such as "... I like very much to get into a river with Sirima and swim with her and to kiss both her lips while swimming and to suck both her breasts ...." and thereby gave provocation to her, intending or knowing it to be likely that such provocation would cause her to break the peace or to commit any other offence and thereby committed an offence punishable under section 484 of the Penal Code read with section 32.

(2) that at the same time and place aforesaid and in the course of the same transaction the accused did with intent to cause or knowing that they were likely to cause wrongful loss or damage to Sirima R. D. Bandaranaike caused damage to jeep bearing No. 31 Sri 1294 which was in the custody of the said Sirima R D. Bandaranaike by tearing the cover and by removing and destroying the reflecting side mirror fixed on the right hand front mudguard so as to reduce the value of the said jeep in a sum amounting to Rs. 1,987, and committed mischief, an offence punishable under Section 410 of the Penal Code read with section 32.

On the 5th of November 1977 the Police filed an amended plaint. The charges against five of the accused were dropped and they were discharged. The two counts in the plaint dated 25th May 1979 were altered to four counts against the six respondents as stated at the outset of this judgment.

Learned Counsel for the respondents took the preliminary objection that the petitioner had no locus standi. It was submitted that she was neither an appellant nor a respondent in the Court of Appeal. The

Court of Appeal erred in allowing her application to be heard as she was not a party in the proceedings. This concession by the Court of Appeal did not convert her into a party and did not confer on her a right to appeal to the Supreme Court. Under Article 128 of the Constitution the right of appeal was restricted only to a party in any proceedings.

In the Court of Appeal learned Counsel for the petitioner made an application to represent the petitioner, who he submitted was an "aggrieved party" in the case. He also asked to be allowed to address Court on her behalf. He relied on the provisions of section 260 of the Code of Criminal Procedure Act, No. 15 of 1979 which reads :

> "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."

The corresponding Section in the repealed Criminal Procedure Code (Cap. 20) was section 287 which stated :

> "Every person accused before any criminal Court may of right be defended by a pleader."

It is clear that the legislature intended that the right of representation shall be extended to an "aggrieved party". The right to address Court and to make submissions is implicit in the right of representation. This right is not confined to a Court of first instance, a trial Court and a court holding an inquiry. The expression "before any criminal Court" in section 260 is wide enough to cover all Courts including Appellate Courts having the necessary jurisdiction.

Section 41 (1) of the Judicature Act, No. 2 of 1978, lends support to this interpretation. It states :

> "Every attorney-at-law shall be entitled to assist and advice *clients* and to appear, plead or act *in every Court* or other institution established by law for the administration of justice and every person who is a party to *or has or claims to have the right to be heard* in any proceeding in any such court or other such institution shall be entitled to be represented by an attorney-at-law."

Every person who is either a party to or has or claims to have the right to be heard in any proceedings in any Court is invariably a client of an attorney-at-law. It follows, therefore, that an attorney-at-law shall be entitled not only to assist and advice his clients but also to appear, plead or act on behalf of them in every court or other institution established by law for the administration of justice.

Applying these provisions to the circumstances of this case the Court of Appeal has rightly held that Mrs. Bandaranaike was an "aggrieved party" and that this status did not cease with the conviction of the respondents in the Magistrate's Court. It was a status which continues until the final disposal of the appeal. She was therefore, entitled to be represented in the Court of Appeal and her attorney-at-law was entitled to be heard in that Court.

It now becomes necessary to examine the relevant provisions of Article 128 of the Constitution in relation to the petitioner's application for a review of the judgment of the Court of Appeal :-

> "128. (1) An appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court *ex mero metu* or at the instance of *any aggrieved party* to such matter or proceedings ;
>
> (2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is *fit for review* by the Supreme Court :
>
> Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance."

Under Article 128 (2) the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter *is fit for review* by the Supreme Court. Under Article 128 (2) you do not have to be a party in the original case.

This view is strengthened on an examination of Article 134 (2) and (3) of the Constitution :

> "134 (2). Any *party* to any proceedings in the Supreme Court in the exercise of its jurisdiction shall have the right to be heard in such proceedings either in person or by representation by an attorney-at-law.
>
> (3) The Supreme Court may *in its discretion* grant *to any other person or his legal representative* such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter."

In the instant case as there are questions of law and fact to be decided which are of public and general importance I hold that this case is fit for review by the Supreme Court and the preliminary objections are overruled.

Learned Counsel for the petitioner submitted that it is only in rare cases that a finding on fact by a Magistrate should be interfered with. He submitted that this was not such a case.

Under Article 127 of the Constitution –

> "The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction in Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance. . . . . and it may affirm, reverse or vary any order, judgment, decree or sentence of the Court of Appeal. . . . . "

This wide power must be used with circumspection. It is not necessary to review the many decisions of this court which have held that a court of appeal should "attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence," and, consequently, should not disturb a judgment of fact unless it is unsound. The principle embodied is a simple one, and has been stated succinctly in two cases.

In the *King v. Gunaratne et al* (1) Macdonell, C.J. stated :

> "This is an appeal mainly on the facts from a Court which saw and heard the witnesses to a Court which has not seen or heard them, and in dealing with this judgment I have to apply *the three tests, as they seem to be, which a Court of Appeal must apply* to an appeal coming to it on questions of fact :
>
> (1) Was the verdict of the Judge unreasonably against the weight of evidence,
>
> (2) Was there a misdirection either on the law or on the evidence,
>
> (3) Has the Court of trial drawn the wrong inferences from matters in evidence."

In *Martin Fernando v. The Inspector of Police, Minuwangoda,* (2) Wijeyewardene, J. held that :

> "An Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight." Where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."

It is common ground that the three most important witnesses in the case are the petitioner, Kamala Ranatunga and Jayasinghe. Mrs. Bandaranaike stated that she came to Hatton on the 12th May 1979 in connection with Urban Council elections. She put up at the Glencairn Bungalow for the night. On the 13th after the election campaign she returned to the bungalow at about 6 or 6.30 p.m. She was accompanied by Kamala Ranatunga, Jayasinghe, Chandrasena, Tilak Liyanage, Taldena and a driver Simon. She had dinner at about 8

or 8.30 p.m. and thereafter retired to her room accompanied by Kamala Ranatunga. This room adjoined the hall. The hall consisted of a lounge and sitting room separated by an arch. Jayasinghe occupied the room next to her. At about 9.15 p.m. she heard the tooting of a car horn and some persons talking in a loud tone come inside the bungalow. A person was talking loud as if he was addressing a meeting. She heard a group of persons singing at intervals. The singing came from the direction of the hall.

Mrs. Bandaranaike stated that she was unable to state the words of the song in Court as they were so filthy. She had asked Kamala Ranatunga to note down the words on note paper which she took from her bag. Kamala Ranatunga took them down in her presence. Later as Kamala's handwriting was not easy to read she got Kamala to read over the words to her. She identified P 2 and P 2 A as the papers taken out of her bag on which Kamala wrote the words of the song. The song caused her severe pain of mind and annoyance. She did not see the persons who were singing the song. They continued to sing even after 11 p.m. She had to get down the Manager of the hotel and she asked him to tell those persons to allow them to be in peace as it was after 11 p.m.

Police Officers arrived at the bungalow after midnight. She did not make a statement to them. They took Jayasinghe and Tilak to the Police Station.

Under cross-examination she was shown P 2 and repeated that it was written by Kamala on her instructions. On the following morning (14th) she telephoned the Inspector-General of Police about the incident and told him that as she had to proceed to Ratnapura that day for a meeting she had no time to make a statement. The I.G.P. told her to get the others to make statements and to speak to him when she returned to Colombo. She was not called upon by the Hatton or Norwood Police to make a statement and she did not mention the existence of P2 to them. She intended to produce it in Colombo.

On the 15th she spoke again to the I.G.P. about the alleged incident and thereafter a police officer from the Cinnamon Gardens Police Station recorded her statement that day. She told the police that insulting words were uttered during the incident. At that time P2 was not with her, it was with Kamala Ranatunga.

A group of persons were singing for about 1 1/2 hours. All that was sung was not written down. She was questioned again by the police on the 18th and in that statement she referred to P2. When she was questioned by the police on the 15th she was not questioned in detail about the words used in the song. They were not words that could be stated to the police, particularly to a male police officer. On the 1st occasion she made only a short statement. On the 18th she gave a detailed statement to the police.

Kamala Ranatunga stated that Mrs. Bandaranaike asked her to take down the words of the songs as much as possible. She wrote the words on paper and with the pens which were in Mrs. Bandaranaike's bag. The songs, which were sung very fast, were recorded by her on two sheets of paper P2 and P2A. These papers were in her custody until she handed them over to the police on the 18th. The singing went on for about two hours. She took down the words while standing. She said she used a black colour ballpoint pen. She was unable to give the number of papers taken by her from the bag where files were kept. She was concentrating on not missing any of the words sung. She stood close to the door and took them down. There were occasions when she went to speak to the security officers in the next room. Later she showed P2 to Mrs. Bandaranaike. Mrs. Bandaranaike found it difficult to read her handwriting and so she read it over to her. At that time the black ballpoint pen was on the table.

Kamala Ranatunga's attention was drawn to line 4 on the reverse of P2. She stated that it appeared to her that the page was written with only one pen. It was not clear to her that there was a difference in the colour between line 4 and the other lines. On the 15th she returned to her home in Veyangoda. She was asked to come to Rosmead Place on the 18th. On that day she made a statement to the police and handed over P2 and P2A to them.

Jayasinghe stated that at about 9.15 p.m. four or five vehicles approached the hotel with their horns tooting. At that time he was near the telephone counter. About 10 persons in a group entered the bungalow after knocking at the door. The first respondent came in first. There were about three women in this group. After they came in Jayasinghe withdrew towards his room. They asked whether there was a stud bull present. Jayasinghe stated, "They asked 'where is Sirima the prostitute ?' I am not sure as to who had asked so. One

among them asked this." Jayasinghe added, "The group of persons who had come asked for a bottle of whisky." Then he corrected himself and said the 1st respondent asked for whisky and the manager said there was no whisky and then the 2nd respondent caught him by his shirt. Then some of the persons went into the sitting room while others went to the kitchen through the corridor.

Jayasinghe stated he saw an employee taking tumblers and ice to the group. "I think they took liquor thereafter. I saw them taking liquor." While consuming liquor they started to sing in an insulting manner ; he could recollect some of the words, they were :

> "I like very much to get into a river with Sirima and swim and to suck both her lips while swimming, and also to squeeze both her breasts. I like very much to get together with Sirima and get into a river and swim and to get on to her stomach : There comes the foolish son ; Mother take the girl inside the house ; Please take the girl inside. Sirima my life, please listen, your period is over now. This is our period ; The elephants have come in 1977."

A male was singing the song in lead while others joined in the refrain. Mostly it was the men who sang.

In answer to Court Jayasinghe said :

> "I *saw them* singing in the sitting room and swinging golf clubs I can compare the voice of the leading singer to that of the 5th accused."

He stated that the 1st, 2nd and 5th respondents were among those who sang. He had heard the 1st respondent speak briefly the previous evening but he was not familiar with the voices of the 2nd, 3rd, 4th, 5th and 6th respondents before the 13th.

He identified the 1st, 2nd, 3rd, 4th and 5th respondents in the corridor. In addition to the six respondents there were others who were singing. The group sang till about 11.10 p.m. After the Manager spoke to them they prepared to leave. He heard one of those persons shout that if the vehicles were not removed within five minutes they would push them down the hill. He was not sure who said this. He saw the 1st, 2nd and 5th respondents pushing the petitioner's jeep. When

the jeep was being shaken hard the 3rd respondent made an appeal to his father, the 1st respondent, "Father, there is no necessity to do this, enough of this singing, let us go". Then the 1st respondent pushed the 3rd respondent who fell and the 1st respondent pulled out a pistol and threatened to shoot his son. Then the 4th respondent and some other women pulled these respondents away, pushed them into the cars and left.

Later Jayasinghe accompanied police officers to the Hatton Police Station where he made a statement. Sub-Inspector Sanders of the Norwood Police Station arrived after that and he made a statement to him as well. On the 18th he made a 3rd statement to the C.I.D.

Under cross-examination it became evident that when Jayasinghe stood by the door of his room during the incident nobody inside the lounge or the sitting room was visible from this position. Having conceded this vital fact he then stated for the first time that he went outside the bungalow and peeped through a window near the lounge for two or three minutes. He did not however say what he saw or whether he identified any of the respondents singing insulting songs at the time he peeped through the window. He admitted that if he had not gone out and peeped through the window nothing happening in the sitting room or lounge would have been visible to him from near the door of his room.

It was established by the defence that Jayasinghe did not mention in his first statement to the Hatton Police in the early hours of the 14th that he had peeped through a window near the lounge. He stated falsely under cross-examination that he had mentioned this fact in his statement to the C.I.D. on the 18th. This was disproved by Inspector C. K. Gajanayake who recorded his statement on the 18th. Jayasinghe stated that he got close to the window, one or two feet away from it, and peeped through it into the hall. He pointed out the window from which he peeped in the plan 1 D 2 produced by the defence. Having first said that he peeped through the window only once, later he stated that he had done so twice or thrice and that he spent more than 10 or 15 minutes peeping through the window.

The only other witnesses who claimed to have identified the respondents are Chandrasena and Tilak Liyanage. They were security officers. Chandrasena stated that 12 or 13 persons arrived that night. During the singing, on the instructions of Jayasinghe, he took up a

position at a place like a balcony. This was at the rear of the building between Jayasinghe's room and the kitchen. Chandrasena stated that at a certain stage the first respondent came into the corridor and attempted to kick the door of the room occupied by Mrs. Bandaranaike but the 6th respondent rushed up and pulled him away. He also stated that he saw the 2nd and 5th respondents with golf clubs walking about in the hall shouting "Who is in come out"

Apart from the impossibility of observing anybody in the lounge or sitting room from the balcony it was also established that Chandrasena was not familiar with the voices of any one of the respondents. He had seen the 1st, 3rd and 4th respondents briefly on the previous day and he saw the 2nd, 5th and 6th respondents for the first time on the day of the incident. Chandrasena stated that he mentioned to the Police that the 2nd and 5th respondents were walking up and down with golf clubs. He was forced to admit that he did not know the 2nd and 5th respondents at the time of the incident and that he did not mention to the police that some persons were walking about with golf clubs. He did not know the names of the respondents. Later he learnt their names from outsiders.

Tilak Liyanage's evidence was rejected by the learned Magistrate. He was not at the bungalow for most of the time as he went to make a telephone call to the police from a nearby hospital. He stated that at the time the respondents arrived he was in an upstair room in the bungalow. He could not explain how he could have seen the respondents from the room upstairs. Liyanage claimed that prior to the incident he had known the 1st, 3rd and 4th respondents. However, it was proved by the defence that in his statement to the Hatton Police he had stated "Jagathsena was there. I did not know the others"

Simon Singho, driver of Mrs. Bandaranaike, stated that the singing started at about 9 p.m. He was unable to recollect the words and he did not identify the persons who sang. After about half an hour he went on foot to the Hatton Police Station about 4 or 5 miles away and made a complaint as he feared that Mrs. Bandaranaike would be harassed by the group of persons who arrived at the bungalow.

None of the respondents gave evidence at the trial. The defence called P. H. Gunatunga, B.Sc. Hons., Examiner of Questioned Documents. He had 15 years' experience in examing questioned

documents. He was also trained at the Royal Canadian Mounted Police Crime Detective Laboratory for 1 1/2 years and at Ottawa and Toronto. He also had experience in examining inks and pens including ballpoint pens and other writing implements. He had examined the document P 2 under a microscope under ultra violet and infra red rays. The examination revealed that–

"1. the colour of the ink in the entire handwriting in the body of page 1 of P 2 and the colour of the ink in the handwriting from line 9 to the last line of page 2 of P 2 is violet blue.

2. the colour of the ink in the handwriting from line 1 to line 3 and from line 5 to 8 in page 2 of P 2 is blue black.

3. the colour of the ink in the handwriting in line 4 of page 2 of P 2 is bright blue "

He also examined document P 2A. The entirety of this document was written with a ballpoint pen using an ink which was violet blue in colour. P 2 had been written with three different ballpoint pens.

Under cross-examination Mr. Gunatunga stated that the method adopted by him for his report on P 2 was only a physical analysis. He conceded that sometimes colours of ink change due to effluxion of time and also due to chemical action. The common factor in P 2 and P 2A was that ballpoint pens with blue colour ink were used. He stated that he had done chemical tests on ballpoint pen ink in other cases but he had not done so in this case. Permission of Court is obtained for chemical tests as the documents may get damaged. The learned Magistrate accepted his opinion that P 2 had been written with three different ballpoint pens.

D. L. Y. A. Wijewardhana, a licensed Surveyor, was called by the defence to produce plans of the Glencairn Bungalow marked 1D1 and 1D2. He had prepared these plans on the 10th February 1980. He stated that the window through which Jayasinghe claimed that he had peeped was 6 feet 7 1/2 inches above the ground. The cross-section was 51 1/2 inches. He stated that a person cannot see what is happening inside the lounge if he stood very close to the window. It is so even if he stood two feet from the window. There was a flower bed outside this window which was 9 feet in width. The flower bed was between the window and the path.

The main submissions of any substance by learned Counsel for the respondents about Mrs. Bandaranaike's evidence were that–

(1) She was a belated witness. She did not inform the Police of the details of the insulting words until the 18th.

(2) P 2 and P 2 A were belatedly handed over to the Police.

(3) She did not mention the obscene and insulting words in Court

In the Magistrate's Court Mrs. Bandaranaike stated that she was unable to state the words of the song as they were so filthy. She was shown P 2 and P 2 A both by State Counsel and by Defence Counsel and she stated that they contained the words of the song. She therefore adopted the contents of P 2 and P 2 A.

With regard to the submission of belatedness she was aware on the 13th night that the Hatton and Norwood Police were informed of the incident. She herself informed the I.G.P. about the incident on the 14th morning and on the 15th as well. She made a brief statement to the Police on the 15th and made a detailed statement to the C.I.D. on the 18th when she for the first time referred to P 2 and P 2 A and the contents of these documents

She explained that she was reluctant to mention the words to a police officer. They were not words that could be stated to a male police officer by a woman. She had promptly informed the police and the I.G.P. in a general way about the incident. Considering the nature of the songs sung the learned Magistrate accepted her explanation as reasonable and truthful. We have no hesitation in accepting the learned Magistrate's evaluation of the testimony of this witness.

The main submissions against Kamala Ranatunga's evidence were that :

(1) According to the Examiner of Questioned Documents three ballpoint pens of different shades of blue ink were used to write the words in P 2. But according to Kamala Ranatunga she used only a black coloured (ink) ballpoint pen.

(2) The interpolations on the reverse of P 2 in different shades of blue ink indicate that these documents were not made contemporaneously but long after the event.

(3) The tendering of P 2 and P 2 A to the police only on the 18th supports the theory of subsequent fabrication.

The discrepancy between the evidence of the Examiner of Questioned Documents and Kamala Ranatunga's evidence regarding the number of ballpoint pens used in writing P 2 has to be critically examined in the light of all the circumstances connected with the writing on P 2 and P 2 A. Kamala stated, "Madam said that there were paper and pens in her bag and asked me to write down as much of the songs as possible." She wrote most of the words in a standing position. Sometimes she went to the next room to speak to the security officers. The singing went on for almost two hours. She was concentrating on the words sung.

When versions of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether the witness' powers of observation were limited. In weighing the evidence the trial judge must take into consideration the demeanour of the witness in the witness box. Was she trying to the best of her ability to speak the truth ? The learned Magistrate had to bear in mind that Kamala was giving evidence eight and a half months after the incident. Could she be expected to remember every detail of the incident ? She was unable to remember how many papers were taken from the bag. She made these entries at night. Can she be expected to remember precisely several months later what shade of blue ink she used ? According to her recollection she used a black coloured (ink) ballpoint pen which was clearly an error. The learned Magistrate considered all these circumstances and held that Kamala made a mistake about the number of pens she used as all her attention was focussed on recording the words of the song and not on the implements used for recording it. This mistake was trivial and did not detract from the fact that Kamala Ranatunga had recorded the words on P 2 and P 2 A contemporaneously with the singing.

Mrs. Bandaranaike and Kamala Ranatunga have explained the delay in handing P 2 and P 2 A to the Police. The Police were aware of the incident on the 13th night. Mrs. Bandaranaike informed the Inspector-General about the incident on the 14th morning and again on the 15th. Being a woman she was too ashamed to give details of the obscene words to a male police officer. The learned Magistrate has accepted this explanation and rejected the suggestion of a subsequent fabrication of these documents. It was never suggested to Mrs. Bandaranaike and Kamala Ranatunga under cross-examination that they had a motive for implicating the respondents. There was not even a suggestion that they knew the respondents earlier. In their

evidence they did not state that any of the respondents sang the obscene songs. They did not set eyes on them at any stage during the incident. The Magistrate has considered all the circumstances in which Kamala Ranatunga wrote the words in P 2 and P 2 A and has accepted her evidence. We see no reason for rejecting the learned Magistrate's assessment of the evidence of Kamala Ranatunga.

Learned Counsel for the respondents submitted that the words used in the song did not amount to an "insult" as contemplated in section 484 of the Penal Code which states :

> "484. Whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The verb "insult" according to the Oxford Dictionary means "to assail with scornful abuse or offensive disrespect ; to offer indignity to : to affront, outrage." Whether words are insulting depend on a variety of circumstances, such as the context in which they were uttered, the intention, the tone and the attitude of the person uttering them, and the situation in which they were uttered. Whether words or acts are insulting is to be determined on the facts of each case. Similarly, whether the insult was intentional is also a question of fact to be inferred from the tone, the manner in which the words are spoken and other circumstances.

Section 484 requires that the person insulting should intend to provoke a person to commit a breach of the peace or other offence or know it to be likely that such provocation will cause that person to break the public peace or commit any other offence.

The mere forbearance of the person insulted and provoked from committing a breach of the peace is insufficient to protect the offender. The offfence depends on the provocation given and not upon the provocation felt. In *Haniffa v. Packeer* (3) per Basnayake, J. it

was held that an offence under section 484 is committed where the insult is provocative of a breach of the peace even where the person insulted is not actually provoked or where he shows restraint :

> It is not necessary "that the person insulted should in fact be provoked or yield to his resentment, because if it were so it would not be an offence to insult a person who by virtue of his position in life exercises restraint or is too weak to retaliate. The law is not designed to enable those who do not respect law and order to oppress those who do. The section punishes insults which are provocative of the breach of the peace, and their character is judged by the standard of the ordinary reasonable man, holding them criminal if they are ordinarily sufficient to arouse passions and provoke retaliation."

See Gours' *Penal Law of India*, 8th Edn. pp. 3662 – 3667 : *Fraser v. Sinnaiya* (4) and *Jayasuriya v. Ratnayake* (5).

Applying these principles to the present case there is no doubt that whoever sang the songs intentionally insulted and gave provocation to Mrs. Bandaranaike, knowing it to be likely that such provocation will cause her to break the public peace, or to commit any other offence, an offence punishable under section 484 of the Penal Code.

The crucial question in this case is whether the respondents have been identified beyond reasonable doubt as members of an unlawful assembly with the common object of intentionally insulting and thereby giving provocation to Mrs. Bandaranaike as stated in the first two charges. It must be remembered that the six respondents were only some of the 10 to 12 persons who came to the Glencairn Bungalow on the 13th night.

The only witnesses who claimed to have identified the respondents as being members of an unlawful assembly were Jayasinghe, Chandrasena and Tilak Liyanage. Jayasinghe stated that a male was singing the song in lead while others joined in the refrain. Mostly it was the men who sang. He said he saw them singing in the sitting room. Under cross-examination it was established that he stood by the door of his room during the singing and he conceded that from this position he could not see what was happening in the lounge and sitting room where the singing was taking place. He then stated for the first time that at a certain stage he went outside the bungalow and peeped

through a window into the lounge. He did not mention this important fact in examination in chief, nor had he mentioned it in his statement to the Hatton Police on the 13th night or in his detailed statement to the C.I.D. on the 18th. In any event he did not state that he saw anyone ...ng when he peeped through the window. The learned Magistrate did not consider these unsatisfactory features in Jayasinghe's evidence when evaluating his evidence. These defects taken together with the Surveyor's evidence that the window was 6 feet 7 1/2 inches from the ground and that no one close to it could have seen anyone inside the lounge prove that Jayasinghe's evidence of peeping through a window was pure invention.

If Jayasinghe could not see what was happening inside the lounge and sitting room from near his door then it was also impossible for Chandrasena to have seen any occurrence in the lounge and sitting room fron the balcony which was further away. It is probable that the learned Magistrate did not analyse Chandrasena's evidence because of this glaring defect. Tilak Liyanage claimed that he heard the respondents sing. He admitted that he was in an upstairs room at the time. The Magistrate correctly rejected his evidence.

To constitute an unlawful assembly there must be an assembly of five or more persons having a common object. The common object must be one of the six specified in section 138 of the Penal Code. It is settled law that mere presence of a person in an assembly does not make him 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 being aware of facts which render any assembly an unlawful assembly he intentionally joins that assembly, or continues in it.

What has to be proved against a person who is charged with the offence of being a member of an unlawful assembly is that he was one of the persons constituting the unlawful assembly and entertained the common unlawful object of the assembly. In a case where there are several accused the case against each accused must be considered separately. Omnibus evidence of a general character must be closely scrutinised in order to eliminate all chances of false or mistaken implication of innocent persons.

In the instant case there is no reliable evidence that Jayasinghe, Chandrasena and Liyanage saw the respondents sing. They were not in a position to see what was happening in the lounge and sitting

room. There was no evidence, therefore, of the behaviour of each member of the assembly during the singing in order to infer that each respondent was actuated by a common unlawful object. It has not been established beyond reasonable doubt that all ten or twelve persons in the lounge and sitting room were singing the insulting songs. It is possible that only some members of the assembly sang. The witnesses did not have that degree of familiarity with the voices of the respondents and others in the assembly to identify them by their singing. The possibility that some of those in the assembly did not entertain the common object cannot be ruled out.

The learned Magistrate had not marshalled the evidence against each respondent separately so as to consider each case individually. He has also omitted to consider items of evidence favourable to some of the respondents on the vital question whether they entertained a common object of intentionally insulting Mrs. Bandaranaike ; notably the cases of the 4th and 3rd respondents – the wife and 18 year old son of the 1st respondent. It would not have been unusual for them to have accompanied the 1st respondent with an innocent intention. There is also evidence that when the 1st respondent was leaving the bungalow he pushed a jeep belonging to Mrs. Bandranaike and that his son, the 3rd respondent, tried to pull him away saying, "Father, we need not do this, enough of this singing, let us go." When the 1st respondent set upon his son and threatened him with a pistol the 4th respondent and the other ladies pulled them apart and bundled everyone into their vehicles and saw them off the premises. It is also in evidence that when the 1st respondent attempted to kick the door of Mrs. Bandaranaike's room the 6th respondent rushed up to him and dragged him away. If these respondents are excluded the charges on the basis of an unlawful assembly fails. For reasons best known to the prosecution a charge of intentionally insulting Mrs. Bandaranaike under section 484 of the Penal Code based on a common intention was not included in the amended plaint.

It has been brought to our notice that the 1st respondent died pending the conclusion of the hearing of this petition. The petition against his acquittal by the Court of Appeal therefore abates.

While we have no doubt that the incident as deposed to by Mrs. Bandaranaike took place and her evidence is truthful we however find that the prosecution had not been able to establish beyond reasonable doubt the identity of the persons who sang the songs or who

entertained the common object of intentionally insulting Mrs Bandaranaike. It is also a requirement of the law that an unlawful assembly should consist of a minimum number of five persons. It has not been established beyond reasonable doubt that five or more persons in the assembly entertained a common unlawful object.

The petition is refused. There will be no costs.

WANASUNDERA, J. – I agree

CADER, J. – I agree.

*Petition refused.*