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BINDUNUWEWA & EMBILIPITIYA; QUESTIONS OF SUBSTANTIAL JUSTICE

LAW & SOCIETY TRUST

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Editor's Note ... ...

Questions of substantial justice arising out of the Bindunuwewa and Embilipitiya massacres and the continuing need to transform systems of accountability in Sri Lanka comprise the common thread of analysis in this Issue of the Review.

It publishes, in the first instance, the recent Supreme Court judgement on the massacre of twenty seven detainees (and the injuring of fourteen others) at the Bindunuwewa Rehabilitation Centre on 25th October 2000, which resulted in the acquittal of the villagers as well as the accused police officer on guard duty at that time.

The legal saga of the Bindunuwewa massacres commenced with the serving of indictments against thirty one local residents and ten police officers in March 2002 on a varying range of counts from belonging to an unlawful assembly with the common object of causing hurt to the detainees to murder and/or attempted murder in prosecution of the common object of the unlawful assembly.

Out of these, eighteen villagers (of whom nine were local residents) and nine police officers remained accused at the conclusion of the trial. The Trial-at-Bar convicted three villagers and two police officers.

Appealing to the Supreme Court thereafter, the convictions of the three villagers, (1st to 3rd accused-appellants) and the 4th accused-appellant police officer who was on guard duty at that time were set aside by a Divisional Bench. At an earlier stage of the appeal, the 5th accused-appellant police officer had been acquitted, on the application of the prosecution, of all the charges preferred, due to the insufficiency of evidence against him.

Unquestionably, the case points to differing judicial perspectives in regard to the application of facts as to what transpired at Bindunuwewa on the day in question as applied to the law of unlawful assembly in particular.

The two competing versions are further complicated by perspectives emerging from the report of the Presidential Commission of Inquiry appointed in March 2001 to inquire into the Bindunuwewa massacres which found grave dereliction of duty on the part of the seniormost police officers in charge at that time. These officers were not indicted in the consequent court proceedings with indictments being served only against their junior officers (the 4th and 5th accused).

In so far as the responsibility of the indicted accused police officer on guard duty at that time was concerned, the High Court had ruled him criminally responsible on the basis that he had the ability and the means by way of troops to control the situation, which he did not employ.

Judicial thinking in this regard appeared to be implicitly (though not explicitly) in consonance with Article 28 of the Rome Statute establishing the International Criminal Court in 1998 which impute responsibility where a commander either knew or should have known that such crimes were being committed by forces effectively under his or her command and failed to take all necessary and reasonable measures to prevent the commission of the crimes or to have them investigated.

In this instance however, while the senior officers had not been indicted, the factual position in respect of their more junior police officers present at the scene of the incident varied. Considering this evidence in setting aside the conviction, a Divisional Bench of the Supreme Court preferred the strict view that the insufficiency of evidence in respect of the illegal omissions or positive (illegal) acts on the part of the accused police officer precluded criminal liability.

The first paper by ***Alan Keenan*** contains a detailed and keenly argued critique of the prosecution strategy employed in the case as well as the judicial reasoning thereon both at the High Court and at the Supreme Court. His comprehensive analysis also covers the examination of the Report of the Presidential Commission of Inquiry and asks several devastatingly unanswered questions in regard to various stages in the legal process.

Following the Supreme Court acquittals, he calls for at the very minimum, disciplinary hearings to be held against the police officers responsible. He argues that in default thereof, the lack of the imposing of any sanctions of whatever kind would have serious impact on the historical responsibility of the Sri Lankan State in regard to what occurred at Bindunuwewa.

The second writer, ***Basil Fernando***, posits the discussion within a broader framework of accountability for rights violations arising out of the conflict in the South as well as the North. Central to his analysis is the Embilipitiya massacre in the late 80s where forty eight Sinhalese school children were killed as well as the Binudunuwewa massacres.

He looks at issues common to both incidents through the eye glass of a father of a child who was 'disappeared' at Embilipitiya and who, upon being interviewed decades later, expresses the opinion that "the overall failures of accountability that made the Embilipitiya massacre possible definitely contributed to the massacre at Bindunuwewa". Poignantly, this interviewee is convinced that this country has not changed much, and the circumstances that cruelly snatched his son still prevails, even more than fifteen years later.

Fernando contends in this context that, while it may be claimed that at least 'some justice' was achieved for the victims of the Embilipitiya massacres through the court, (as contrasted to the Bindunuwewa victims), this was only a pitiful measure of the substantial justice due as of right to them.

Essentially, he discounts the racial paradigms that to his mind, governs most of the discussions on accountability, arguing that to do so would cruelly alienate victims in the South who have suffered equally during the past decades of conflict, as well as render the discussions of limited value.

Instead, he pleads for a fundamental analysis of human rights abuses, which, while recognising the part that race plays as an aggravator of abuse, strives to find common answers to pervasive questions of accountability that are outstanding to all racial classes of victims in all parts of the country.

In the default thereof, he observes as follows;

> *Unless there is a system of justice that functions at least at basic levels of credibility, no political process can be transformed to deal with the basic issues of human rights abuses – regardless of whether the affected group is Sinhala, Tamil, Muslim or other. It means that a discourse purely based on the politics of ethnicity without reference to the functioning of the justice system and institutions cannot bring about a breakthrough in the tautological reasoning involved in such political discourses.*

His warning aptly underlines the theme of this Review

Kishali Pinto-Jayawardena

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

S.C. Appeal 20/2003 (TAB) HC Colombo No. 763/2003

1. Munasinghe Arachichige Sammy
2. Dissanayake Mudiyanselage Sepala Dissanayake
3. Rajapaksa Mudiyanselage Premananda
4. Senaka Jayampathy Karunasena
5. Tyron Roger Ratnayake

Accused-Appellants

Vs

Hon. Attorney-General

Respondent

Before : T.B. Weerasuriya, J., C.N. Jayasinghe, J., N.K. Udalagama, J., N.E. Dissanayake, J., Raja Fernando, J.

Counsel : Ranjith Fernando for 1st, 2nd and 3rd Accused-Appellants

D.S. Wijesinghe P.C. with Priyantha Jayawardena, Chandrika Silva and K. Molligoda for the 4th Accused-Appellant.

C.R. de Silva P.C. Solicitor-General with Sarath Jayamanna SSC and P.Nawana SSC for the Respondent

ARGUED ON : 12.11.2004, 23.11.2004, 29.11.2004 and 30.11.2004

WRITTEN SUBMISSIONS TENDERED ON : 05.01.2005 and 02.02.2005

DECIDED ON : 27.05.2005

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 at Bindunuwewa, 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 likely 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 offence of 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 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.
Counts 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 - 1 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 - I 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 Centre 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 25.10.200 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 the 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 complicity of the two groups as classified above will be considered separately under two different head in this judgement. In fact, the Trial-at- Bar proceeded to examine the evidence in respect of the accused based on that same classification.

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

Submissions 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 "Lucus 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 trial 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 as varying between a minimum of five hundred 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 Lt. 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 the 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* (42 N.L.R. 331) 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 prove 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 read as follows:

> *"If an offence is committed by any member of an unlawful 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 objective 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* 67 N.L.R. 425)

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 11 page 1296 – 11th edition.)

> *"All persons who convene or who take part in the proceedings 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 taking any part in the proceedings are not guilty of the offence, even though those persons possess the power of stopping the assembly and fail to exercise it.*
>
> *Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he has 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, all 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 scrutinised 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 *RATANAL and DHIRAJLAL's Law of Crimes* dealing with the same issue. Vol. 1, 24th Ed. pages 598 and 599)

> *"It is settled law that mere presence of a person at the place where 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 or 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 the view of 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 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. If one becomes a member of the unlawful assembly and becomes or continues to remain 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 that the life in a village is 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 has happened.

Where a large crowd collected, all of whom are not shown to be sharing the common object 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 objective of the unlawful 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 was proved to have been present near a riotous mob at any time or to have left at any stage during its activities is in law guilty of every act committed by them from the beginning to the end or 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.

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 scenes 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 Officce 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 a 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 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, p 2134)

The question may be suitably posed as to why the 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 come 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, the Trial-at-Bar was of the view that the 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 that 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 emphasised 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 the 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 five hundred persons to three 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 Vidyapeetiya 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. Abeyratne 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 generated an unusual interest among the villagers in respect of the incident at the camp, it is justified to expect a group of innocent villagers who may or may 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 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 Wickremasnghe Banda, a technical officer of the Vidyapeetaya (Training College). He testified that he saw the 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 Premananda)

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 hear that the detainees were attacking the village. The 3rd accused-appellant had alighted from the vehicle near the Agricultural Training Centre 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 aluminium 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 the 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 (1981) 2 ALL ER 1008)* and followed in the local case of *Karunanayake v. Karunasiri Perera (1982 2SLR 27)* The principle laid down in the 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 a fear of the truth.
(4) The statement must be clearly shown to be a 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 Wijeratne who examined the 3rd accused-appellant on 30th November rejected the proposition that the injury found on his writs area could be caused by an aluminium sheet. In fact, Dr Wijeratne 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 aluminium sheet. It would appear that Dr Anderson had been satisfied of 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 identity 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 Bindunuwewa camp on 25.10.2000.

The rule laid down 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 Sugath 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. Cocharane*, it was obligatory on the 3rd accused-appellant to offer an explanation as to the manner he received an injury on his wrist area.

In his dock statement, the 3rd accused-appellant stated that having heard about the commotion in the camp he went near a tube well in the vicinity of the camp to see what was happening and that he did not harm or kill anyone.

It is necessary to examine the dictum of Lord Ellenborough in *Rex v. Cocharane* (1814 Gurneys Report 499) 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 had 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 consistency 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 (10 C.L.W. 121)*

(2) *R. v. Seeder Silva (41 N.L.R. 337)*

(3) *King v. Wickramasinghe (42 N.L.R. 313)*

(4) *King v. Peiris Appuhamy (43 N.L.R. 410)*

(5) *King v. Endoris (46 N.L.R. 490)*

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 aluminium sheet;
(7) that there was no medical evidence to contradict the position that the injury was not consistent with having been caused by an aluminium sheet;
(8) that the aluminium sheets were found inside the camp;

Having mentioned 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.

Conclusion

For the aforementioned reasons the convictions entered against the 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) act 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 the Code, except where a contrary intention appears from the context which refer to acts done extend also to illegal omissions"

Section 31(1) "The word 'act' denoted 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 Lufave and Austin W. Scott* (Second Edition), (1986) at p 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 made 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 tha 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 join 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* (41 N.L.R. 337 at page 344 *King v. Abeywickrema* 44 N.L.R. 254)

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 the 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 a situation 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 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 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.

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

The general allegation that the Police did nothing to save detainees came mainly from the two detainees namely Ganeshamoorthy Ashokan and Kandasamy Chandrasekeran. 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 disperse 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 that time but he saw Police Officers at the initial stage when hey 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 sated 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 kilometres. 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 the police did in fact arrest 367 persons on the following day, the villagers stormed the police station, 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 perameters 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 Tambirajah 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 cam running towards the Police truck near the turn off to the camp was attacked, there were no police officers at that point.

Purported positive (illegal)acts of the Police

The prosecution claimed that certain items of evidence led at the trial had taken he 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 the evidence.

Shooting by the Police

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

1) Ganeshmurthy Ashokan
2) Perumal Easwaran
3) Sinnathamy Sudaharan
4) Kandasamy Chandrasekeran

The medical evidence has revealed that only one detainee had sustained and succumbed to gun shot injures and injures found on him were slated 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 he Police shot in the air and shot at the fence to save them and at the point he lay on the ground. (Vol III p 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. (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 Chandrasekeran 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 probably 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.

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 mater 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 p 207)
Lt. Abeyratne Vol II page 275
Jeganathan Uttamanathan (Vol III page 955
P.C. Premadasa (Vo. III pages 834 – 837)
Gunapala – Grama Arakshaka – Vol III pages 912 & 913

(3) police officers intervened and saved the detainees when they were being attacked.

(Vide evidence of Uttamanathan (Vol 111 p 952 & 957
Sinnathamby Rajendran (Vol. III page 1179)

(4) Police took steps to dispatch 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 ½ acres of land which is approx 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.

Conclusion

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 the 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 the 4th accused-appellant and acquit him of all the charges preferred against him.

JUDGE OF THE SUPREME COURT

C. N. JAYASINGHE J

N. K. UDALAGAMA J

N.E. DISSAYAKE J.

RAJA FERNANDO J.

Making Sense of Bindunuwewa – From Massacre to Acquittals

Alan Keenan[♦]

Introduction

On Oct 25th 2000, a mob of unknown size stormed the Government's rehabilitation camp at Bindunuwewa, five km north of Bandarawela town. After a fury of unrestrained violence lasting anywhere from thirty minutes to an hour, twenty seven Tamil detainees were left dead, and another fourteen injured, some of them very seriously. Three to four days of violence between Tamils and Sinhalese in the surrounding hill country followed the attack at Bindunuwewa.

In the wake of this violence and the national/international outcry regarding the murders at the camp, the government announced a series of investigations. A Commission of Inquiry,[1] comprising then sitting Appeals Court Justice P. H. K. Kulatilaka, was appointed by President Kumaratunga on 8 March 2001 and held public hearings between May and October of that year. The Commission's report was completed in November 2001 and officially handed over to the President some time in early 2002, but it has still not officially been released to the public.[2]

Meanwhile, as the Commission was gathering its evidence, investigations by the Criminal Investigations Division (CID) of the police and criminal proceedings by the Attorney General's Department got underway, culminating in the indictment on 25 March 2002 of forty one suspects, among whom were ten members of the police. The trial of the forty one suspects began in July 2002 in the form of a trial-at-bar before a panel of three judges at the Colombo High Court. Testimony ended in January 2003, and all hearings had concluded by early May 2003. The verdict announced on July 1st 2003, convicted and sentenced to death five of the accused, of whom two were police officers.

When the Colombo High Court announced the long-awaited verdicts on July 1st 2003, reactions were swift, and divided. Some human rights lawyers and activists were quick to announce their satisfaction that justice had been done. While some expressed disappointment that only a few civilians and lower ranking police had been found guilty, the convictions were nonetheless felt by many to be a rare victory against impunity for officially sanctioned violations of human rights.

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[1] The Commission of Inquiry was appointed by the President under the powers granted by the Commissions of Inquiry Act (No. 17 of 1948). The commission is mandated to report back to the appointing authority on a given factual situation. It is empowered to look into records maintained by any government body and to require any person to give evidence before it. Evidence gathered by, or testimony given to, a Commission of Inquiry, however, has no legal validity in a later criminal trial. In the case of the "Presidential Commission of Inquiry Into Incidents that Took Place at Bindunuwewa Rehabilitation Camp, Bandarawela, on October 25, 2000," its mandate was to look into "I. the circumstances that led to the incidents that took place at Bindunuwewa Rehabilitation Camp on 25.10.2000 in the course of which 27 inmates died and 14 persons were injured," "II. the administration of the Rehabilitation Camp at Bindunuwewa and the conduct of public officers in so far as it is relevant to the said incident," "III. the person or persons if any, directly or indirectly responsible, by act or omission for: (1) bringing about the said incidents; (2) causing injuries to persons, or the death of the inmates," and "IV. the methods necessary to prevent the recurrence of such incidents and the remedial measures that could be taken in this regard."

[2] This writer was able to have access to the Commission's unpublished report in the course of preparing this chapter. The full text of the Report, as well as the Sinhala text (and English translation) of the High Court judgment, are now available at **www.brynmawr.edu/peacestudies/faculty/Keenan/srilanka/Documents.html**

Others were outraged. Scenes of the two convicted policemen, one of them wailing in shock and despair and both protesting their innocence, were shown on TV and were featured on the front of all the next day's newspapers. Both officers – Inspector Senaka Jayampathi Karunasena and Sub-Inspector Tyronne Ratnayake – proclaimed loudly that their senior officers had been at the scene of the crime when the massacre had taken place and had unfairly made them their scapegoats. The English and Sinhala language media gave much highly sympathetic coverage to the plight of the two officers and their suffering families, and frequent mention was made of the fact that the two senior officers – Headquarters Inspector Jayantha Seneviratne and Assistant Superintendent of Police A. W. Dayaratne – escaped any punishment while their junior officers had been made to take the fall.

The fact that Sinhala officers were being sentenced to death while "Tiger terrorists" were being allowed free reign under the terms of the ceasefire agreement with the government was also a frequent source of complaint. From this perspective, the verdicts were seen as an affirmation of 'business as usual', rather than being any kind of blow against impunity.

With the judgment of a five panel bench of the Supreme Court on May 27th 2005 that acquitted all of those convicted, the legal slate has now been wiped cleaned. Much about the case remains clouded in uncertainty, however, and certainly from the perspective of the victims and their families justice remains undone.

In order better to understand the Supreme Court's judgment, it is important to consider the totality of available sources of information about what happened in Bindunuwewa on October 24th and 25th of 2000. This is especially true since the trial record on which the Supreme Court Justices based their acquittals does not contain all the relevant information. The analysis that follows will rely heavily on the as-yet unpublished report of the Presidential Commission of Inquiry.

Together with other material -- published and unpublished legal documents, newspaper articles, and personal interviews with many people with first hand knowledge of the camp and the legal process – the Commission report makes it possible to piece together the major elements of the case and offers a larger perspective on the events at Bindunuwewa than what the Supreme Court panel had available to it.[3]

It is important to state, of course, that none of the available documents or statements can simply be taken at face value. This is true even of the testimony before the Commission of Inquiry, where witnesses had had a lot of time to arrange their stories, as well as being obvious targets for intimidation.

The Attack

After being away for four days, the Officer-in-Charge (OIC) of the Rehabilitation Centre, Captain Y. K. Abeyratne, returned to a tense camp on the evening of 24th October. Many of the forty-one inmates – all of them Tamil men and boys, ranging in age from twelve to their mid-thirties – began to complain of various small grievances. This culminated in a collective protest against being held

[3] This essay is based on months of research, including attendance at most of the hearings of the Commission of Inquiry, attendance of some of the trial-at-bar, analysis of the media coverage of the case in all three languages, close analysis of many of the essential documents in the case, and more than fifty interviews with those involved, including a number of the victims, some the accused and their families, prosecution and defense lawyers, lawyers for the Human Rights Commission and those representing the interests of the victims and survivors, former and current staff from the Bindunuwewa and Telipilai Rehabilitation Centres, journalists, residents and politicians in the Bandarawela area, activists who followed the case, and various individuals who had personal experience of the Bindunuwewa Centre prior to the attack. My sincere thanks are offered to all who gave of their time to help me make sense of this complicated case. Any inaccuracies in this report are, of course, entirely my own responsibility.

beyond what they thought would be their dates of release from detention, which eventually became a demand for their immediate release. The shouting soon turned physical – a shot was fired by one of the police stationed to guard the camp, one inmate attacked and slightly wounded the second in command of the camp, Lieutenant P. Abeyratne (no relation).

A tense and volatile situation ensued, with Captain Abeyratne apparently prevented by the inmates from leaving the camp while the second in command, Lieutenant Abeyratne, left the camp and announced to neighboring villagers that "the Tigers" had attacked him and would be attacking the village. Lieutenant Abeyratne then traveled to the Bandarawela Police Station and alerted them to the events in the camp. Headquarters Inspector (HQI) Seneviratne, along with Inspector Karunasena and about a dozen other police quickly headed to the camp. A disarmed HQI Seneviratne was allowed into the camp, where he negotiated with the inmates and reached a temporary calm, agreeing to remove the police post that was within the camp premises. Captain Abeyratne assured HQI Seneviratne that everything would remain under control as long as the police protected the camp from the crowd of Sinhala villagers who had gathered around the camp since the altercation began and some of whom had begun throwing stones. The situation eventually calmed down later in the evening, as the crowds around the camp were dispersed by a small army contingent sent from the nearby Diyatalawa army camp. The army returned to barracks sometime after midnight, leaving a small band of police standing guard overnight.

By 6:45 the next morning, well-armed police reinforcements began to arrive and were stationed at various points around the camp.[4] At about the same time, crowds once again began to gather. A bus was stopped and its passengers were asked to join the protest against the camp. Others arrived on foot and in cars and lorries – perhaps spurred in part by posters that had sprung up overnight featuring racist slogans calling for the violent removal of the camp and the murder of its inmates. Eventually a sizable crowd had gathered – estimates range from five hundred to three thousand – many of whom were armed with sticks and knives and poles (but none with any firearms). The inmates themselves were armed with makeshift weapons, and after escalating tension and provocations from both sides, the camp was stormed sometime around 8:30 am by a portion of the crowd.

The inmates were attacked and killed in multiple and gruesome ways – hacked and clubbed to death, their bodies dismembered and burned, some even burned alive. The police not only failed to prevent the attack, but some appear even to have partaken in the massacre, shooting at least two of the inmates – and killing one of them – as they fled their pursuers. A number of those detainees who reached the apparent safety of a police truck were subsequently attacked, and one of them killed, while the police looked on. None of the attackers were arrested. No police and very few of the attackers were injured. Twenty seven of the detainees were killed. Fourteen were injured, some very seriously. By the time the riot squad arrived from the Bandarawela police station and the army arrived from the nearby Diyatalawa camp around 9:30, the violence was all over. The wounded were taken to a variety of different hospitals.

Almost as soon as the attack was over, a number of competing narratives and explanations began to vie for supremacy in the public sphere, feeding off the lack of clear information available from trustworthy sources. Among the most popular initial stories were two diametrically opposed accounts. The first held that the attack was actually the intended result of an LTTE conspiracy, instigated by a recent arrival at the camp, the soon-to-be infamous "Anthony James".

Phone calls he made from the camp to contacts in Batticaloa on the evening of the 24th and morning of the 25th were interpreted by some as evidence of his dangerous LTTE connections and involvement

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[4] The camp sits at the top of a hill surrounded by a scattering of other buildings and numerous small hamlets, or clusters of dwellings.

in the attack.[5] While Anthony James did apparently help lead the initial protests on the evening of the 24th, there is no available evidence that he was an LTTE plant – and no evidence more generally that the LTTE had any hand in organizing the detainees' agitation, or that it was intended as a deliberate provocation. Similarly, there is no evidence that there were any more than forty one detainees in the camp at the time of the attack or that there were any additional victims not acknowledged by government authorities.

On the other hand, there are important indicators of some degree of organization behind the attack by the "villagers" – people were needed to write and post the hate-filled posters calling for the camp's violent destruction, and someone made calls to bring people from neighboring villages and the town of Bandarawela to join the crowd.[6] The fact that there had been a significant agitation by Sinhala nationalist parties during the campaign for the October 10, 2000 Parliamentary elections, some of it explicitly calling for the camp's closure, offers further grounds for suspicion.

The Camp and the Detainees

The Bindunuwewa camp was one of three "rehabilitation centers" that operated under the auspices of the Commissioner General of Rehabilitation, though it was actually administered by the National Youth Services Council, which in 2000 came under the auspices of the Ministry of Sports and Youth Affairs. Those in the camps were either "detainees," who had been arrested under the PTA or the Emergency Regulations then in force, or were "surrendees," who had handed themselves over to the police or armed forces under the terms of the ER, generally after some involvement with the LTTE (though this category of inmates also included those who surrendered to the security forces after fleeing the LTTE, as was the case with one of the inmates at Bindunuwewa at the time of the attack).

None of the inmates had been convicted, or even charged, with any offence. Most of the inmates were at Bindunuwewa for about a year, though their lengths of detention varied and depended on different and quite complex bureaucratic procedures, which the inmates themselves often did not understand. (The fact that the most serious complaints lodged with Captain Abeyratne on the evening of 24 October concerned the belief of many inmates that they were being held beyond their dates of release should thus have come as no surprise.)

The Commission points to the more basic problem that the Rehabilitation Centres mixed "detainees" and "surrendees," whose situations are obviously very different. While those who surrender have in one way or another rejected the LTTE, detainees often maintain strong loyalties to the LTTE. The fact that children as young as ten were housed together with men in their mid-thirties is not only less than ideal from the standpoint of rehabilitation, but is also a clear violation of the International Convention of the Rights of the Child, to which Sri Lanka is a state signatory.

From evidence presented at the Commission hearings, as well as post-attack reports from other sources, it seems clear that the inmates maintained cordial relations with the local community. The inmates performed regular community service, or *shramadana* for their neighbors and took part in local religious festivals; two former detainees were living and working peacefully in the Bandarawela town at the time of the attack; local residents even took part in games and festivities within the camp,

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[5] According to reliable sources, at least one of Anthony James' phone calls was to the International Red Cross office in Batticaloa, while another was to Joseph Pararajasingham, then a TULF MP from Batticaloa.

[6] The Human Rights Commission was one of the first to point to the importance of these posters and of following up the leads they could provide as to whom might have helped plan the attack. In their words, "All the information we have been able to gather so far does not suggest that what occurred on the 25th was an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack." This very early report remains the best published analysis of the attack. "The Bindunuwewa Massacre: Interim Report of the Human Rights Commission," 1 November 2000, published in the *Law and Society Trust Review*, Volume 11, Issue 158, December 2000, p. 11.

as well as making offerings (*dana*) to the inmates as part of their own religious observances. Other than reports of some initial hostility to the introduction of LTTE cadre to the camp in 1993, there seems to have been no serious complaints from their Sinhala neighbors prior to the October 2000 election campaign, when the local Sihala Urumaya affiliate began to agitate against the camp.

The Commission's Findings

The Events of October 24th

That there were problems in the camp – both in its administration and in its very conception – prior to the attack seems clear. But that it had functioned for seven years without serious trouble is also undisputed. How did a small incident within the camp spiral out of control and lead to such an outburst of terror and violence? To answer that question, the Commission's report begins with the events of the evening of October 24th, when a portion of the inmates began lodging their complaints with Captain Abeyratne, who had just returned after four days away, during which time Lieutenant Abeyratne had been in charge. Eventually the inmates' complaints turned to vandalism, as Captain Abeyratne was unable to clarify their terms of detention or guarantee their early release. As some of the inmates began to break some of the camp's lights and do damage to the camp buildings, two shots were fired, apparently in the air, by the police guards stationed at the camp.

According to the Commission – accepting here the evidence of the second in command, Lieutenant Abeyratne – the shots were fired only after he had been attacked and wounded on his side and shoulder. Other testimony, from Captain Abeyratne and one of the inmates, places the attack on Lieutenant Abeyratne after the shots had been fired. For the commission, however, the inmates were clearly at fault for protesting so violently, and the police were in their rights to fire in the air. The Commission report also clearly locates a major portion of the responsibility for the inmates' revolt in Anthony (Anton) James. He is named as the ringleader of the agitation. Furthermore, the Commission makes much of the fact that he was a dangerous anomaly in the camp: a "hard core" LTTE cadre, who had served with the LTTE for 13 years and taken part in numerous attacks on the Sri Lankan army and police. That he was in the camp was a serious breach of security to begin with, the Commission report argues.

The Commission goes on to fault the Bandarawela HQI and Captain Abeyratne for agreeing to the inmates' request that evening to remove the police post within the camp. This not only left the inmates in virtual control of the camp, but by doing so it sent a very dangerous signal of weakness to the local villagers. An equally serious mistake, according to the report, was Captain Abeyratne's insistence to the police, and later to the army, that things were under control in the camp. Either Abeyratne was fooling himself or else he was embarrassed at losing control in his own domain and didn't want to ask for help.

What, then, were the effects of the incidents within the camp, and of the police and army responses to them on the local community? The story the Commission tells, based on testimony from inmates, villagers, police, and others, is as follows. Word that Lieutenant Abeyratne had been attacked and injured – he had conveniently left his blood stained shirt at a neighboring house – quickly spread throughout the area, together with Lieutenant Abeyratne's warning that "the Tigers" were going to attack the village. This rumour, together with false reports that some Tigers had escaped from the camp, was actively endorsed and spread even by the police posted outside the camp that night. Such stories were particularly powerful given the popular fears and hatred of the LTTE, emotions which had recently been strengthened by the Sinhala nationalist tenor of much of the election campaign in the preceding weeks, as well as recent funerals in the area of three soldiers and one army Major. The withdrawal of the police post within the camp and the warnings from the police themselves of possible attacks fed distrust of their ability to protect the camp's neighbors.

In addition, the Commission finds clear evidence that a significant degree of organizing took place in the twelve to fourteen hours between the initial protest in the camp and its violent destruction. Lieutenant Balasuriya, who led the army detachment that dispersed the crowds on the 24th night, testified before the Commission that villagers told him they were planning to demonstrate against the camp the next morning. At eight in the morning of the 25th, the District Secretariat had received a telegram announcing such a demonstration, signed in the name of the Sapugasulpatha villagers. The Commission report also confirms that vehicles were used to transport protesters to the camp – at least 10-15 vehicles (vans, buses, and three wheelers) were seen that morning at the entrance to the Vidyapeetaya Technical College that bordered the camp. The Commission report suggests these vehicles might have been the work of "extremist elements to exploit the situation to achieve their own objectives."

The Events of October 25th

The Commission report also offers some further useful points of clarification about the events of the morning of the 25th. Testimony by local residents seems to have established that some fifteen to twenty inmates were visible early that morning outside their barracks carrying poles and screwdrivers. The crowd was heard shouting threats of murder. Given the murderous slogans written on the posters that went up in and around Bindunuwewa that morning – such as "Feed Tiger flesh to our dogs" – it is clear that some in the crowd had come to kill, not just demonstrate. The crowd outside initiated the violence by throwing stones at the camp. The inmates reacted to the provocations by exploding a gas cylinder within the camp. While this initially succeeded in frightening the crowd, its ultimate effect seems to have been to further inflame things, as the crowd soon thereafter stormed the camp as the police looked on. Witnesses state that large crowds were standing outside the camp's main gate prior to the attack with armed police standing amidst them, doing nothing to disperse them, or keep them at bay.

That there was an utter failure on the part of the police stationed around the camp is beyond dispute. The Commission report strongly criticizes the two most senior police officers in the area – ASP Dayaratne and HQI Seneviratne – for a series of failures. This begins with their failure to stay at the camp overnight, which would have sent a strong signal to the villagers; indeed, they did not even wait to get a report back from the army contingent sent to disperse the crowd on the night of the 24th. Their failures were further compounded when they chose not to send the riot squad from the Bandarawela police station, even after being warned the next morning by the highest-ranking officer stationed overnight at the camp, Inspector Karunasena, that large crowds were gathering and buses had been stopped near the camp. The ASP and the HQI failed to send any additional police from the Bandarawela station. Even at the last moment, the inmates could have been evacuated from the camp.

Once the attack began, no attempts were made to stop the invading crowd other than a brief round of shots fired in the air. Not a single arrest was attempted or made by a single police officer (out of more than 60 stationed at various points around the camp). Given that not all of the hundreds, perhaps even thousands, gathered at the camp were armed, the Commission argues that the police could, as a last resort, have shot at the relatively small number in the crowd who did have weapons – what the report calls "the criminal elements." Instead the only shots fired seem to have been at the inmates – and their death of the one inmate who died from gunshots seems hard to read as accidental, as he had seven bullet wounds on his body.

The Commission is particularly critical of Inspector Karunasena – whom it holds was the highest ranking officer at the start of the attack – for ordering the police to shoot: "the order to shoot by Inspector Karunasena and the act of shooting by three policeman consequent to that order were more than what was warranted in the circumstances," the Commission states. Precisely what happened with the shooting remains ambiguous. Karunasena admitted to the Commission that he had ordered his

men to fire in the direction of a number of inmates as they were running towards his officers in an attempt to escape their pursuers. But what he intended by this order is not clear. Did Karunasena in fact order his officers to fire on the inmates? Did he order them to fire at those who were chasing the inmates, as he implied in his Commission testimony, but the inmates were hit instead? Or did he order his officers to fire in the air, as he claimed during the trial, but some of them choose to fire at the inmates instead? The fact that Karunasena did not immediately take action or publicly denounce his officers for hitting the three inmates and killing one of them is suspicious, to say the least.

However, whether Inspector Karunasena really was in charge at the time of the attack remains highly questionable. No one disputes that Karunasena was placed in charge of the police detachment left at the camp overnight, or that he was in charge of initially detailing the additional squads of police that arrived from various other local police stations at about 6:45 on the morning of the 25th. After that, things get more murky. According to Karunasena, both ASP Dayaratne and HQI Seneviratne were there at the camp from 7:30 am onwards. Another police officer, Sub-Inspector N.S. Walpola (who along with Karunasena, was later indicted and put on trial), identifies the ASP as being near the barracks before the attack.

Of course, the interests of both Karunasena and Walpola would be served if it was accepted that their superior officers had been on the scene. But other, less interested parties also identify the ASP and HQI as being there at least by the time the attack was in full swing. Captain Abeyratne stated in his testimony before the commission that he had seen ASP Dayaratne there at the very early stages of the attack, before the crowd had had a chance yet to set fire to the camp (many of the inmates were either burned to death or had their bodies burned afterwards). And according to an even more reliable witness, the Bandarawela Divisional Secretary, W.N.R. Wijeyapala, the ASP and HQI were both well inside the camp when Wijeyapala arrived, soon after 8:30 am, as the attack was actively underway.

Thus, if Captain Abeyratne's and the Divisional Secretary's testimony are correct, the ASP and HQI were there early enough to be as responsible for the shootings and killings of the inmates as any of the other police officers. And indeed, the Commission accepts that the ASP and HQI were at the scene while the attack was going on:

> *"I have no doubt that ... both the ASP and HQI were present in the Rehabilitation Centre while the crimes were still taking place and assailants were freely moving about carrying weapons inside the Rehabilitation Centre."*[7]

While the Commission report is severely critical of the ASP and HQI for their inaction, which it classifies as "dereliction of duty," it nonetheless presents their failure as one of negligence and indifference, rather than the result of foreknowledge, acceptance, or willful complicity in the attack.

> *"Evidence which I have already discussed in my report do establish that ASP Dayaratne, HQI Jayantha Seneviratne, Inspector Karunasena, Sub-Inspectors Walpola, Ratnayake and Abeynarayana were around whilst the crimes were committed inside the Rehabilitation Centre [sic]."*

Of these officers, the Commissioner goes on to write;

> *"I have come to the conclusion that the conduct of [these] officers on 25.10.2000 should be the subject of a disciplinary inquiry, for the reason that their inaction, and*

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[7] *Ibid*, p. 143. Indeed, according to the testimony of SI Chintaka Abeynarayana, the ASP allowed an inmate to be attacked and beaten at his feet, even as the inmate was pleading for his life. The ASP did nothing to help the inmate other than to eventually order the police to drag the inmate away. The exact fate of the inmate is left unclear in Abeynarayana's testimony. Commission Hearings, 14 September 2001.

attitude at the time of the incident is indefensible. There is ample evidence that they were present at the time of the incident and made no effort either to avert the attack or to disperse the mob and arrest the offenders."

Without offering any explanation, however, the report chooses to disregard the claims of Karunasena and Walpola that their superior officers had been there from the beginning, choosing instead to accept the ASP's and HQI's claims that they were on their way to a disciplinary hearing in Badulla when they got the news of the attack, and only got to the scene after it was too late to prevent the violence.

There is significant circumstantial evidence, however, to suggest that more might well have been going on than the Commission's framing of the events allows one to see.

A host of evidence exists that implicates the hierarchy of the Bandarawela police in a pattern of animosity against the inmates, likely foreknowledge of the attack, and falsification of evidence afterwards – which adds up to something significantly more than negligence. For instance, with respect to the actions of the police, there is strong evidence that HQI Seneviratne was angry at the way the inmates had treated him when he had visited the camp on the evening of the 24th. According to interviews with the HQI and with others who had been at the scene, videotaped just days after the attack, it is clear that the HQI felt humiliated by being forced to enter the camp unarmed and negotiate with people who were, after all, suspected and surrendered LTTE cadres. According to one reliable source who had been at the scene, the HQI had denounced the detainees when he was leaving the camp that evening.

In a voice loud enough to have been heard by the crowd that had gathered around the camp, the HQI is said to have pronounced something to the effect that,

"these people are bad people, they overran the police post, they forced me to come in without a gun and put knives against our throats."

In addition, we know from the Commission report and other eyewitness sources that the anti-camp posters, with their homicidal and bitterly anti-Tamil slogans, had gone up the night of the 24th not only around the camp, but in Bandarawela town, too, and that the police would certainly have seen them. We know from eyewitness testimony before the Commission that the police stationed at the camp on the 24th were themselves spreading rumours that the Tigers would attack the village. And the Commission has also established that the ASP and HQI lied when they claim to have fired tear gas during the attack. (Indeed, they had chosen not even to supply their police at the scene with any tear gas at all).[8] Not only did they lie to the investigating authorities, but CID discovered that they had ordered their men in the days immediately after the attack to discharge tear gas in a nearby quarry, so as to create evidence that they had done their best to disperse the attacking mob. And finally, we also know that the Bandarawela police deliberately kept their duty logs from being seen by investigators from the Human Rights Commission.

The Commission also failed to investigate and report upon the distinct possibility that the attack had been planned, or at least aided, by forces outside the surrounding villages. The Commission report leaves unexamined the identities of the owners of the vehicles that came to the camp on the morning of the massacre. The political affiliations of those involved in the attack remain unexplored, although rendered relevant in this context by evidence placed before the Commission.

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[8] On p. 42 of the High Court's judgment, it states that Karunasena had tear gas available before the attack took place. However, the Commission report is clear that this was not the case (Commission Report, p. 186). Indeed, even the best claim that ASP Dayaratne can make is that he ordered tear gas to come after the attack and that it was used to disperse the crowd still in the centre (p. 149). Yet the Commission was able to disprove even this claim (154-8).

Many of the posters bearing racist and anti-camp slogans were written on the backs of People's Alliance election campaign posters. The possible connections with other political forces also remain unexplored: for instance, the role of the local Sihala Urumaya organizer, who lived directly opposite the turn off to the Bindunuwewa camp from the Badulla-Bandarawela road; or reports about the Sinhala nationalist political leanings of some of the homeguards posted to the rehabilitation centre.

Instead, the Commission report offers blanket assurances that there is no evidence to suggest the attack was planned by outside forces. The Commissioner states toward the end of his report that;

> *"I have also placed on the record that this attack was not master-minded or planned by any external forces and that it was not a pre-planned one."*

Such a blanket statement, without any other evidence in the report that such a possibility had been seriously investigated, is clearly not adequate.

While the Commission report certainly adds much to our knowledge about the massacre and the conditions that led to it, and should be made available to a wide public, the overall framework it employs to interpret the attack obscures many of the deeper political dynamics at work in the camp and the rehabilitation system and largely depoliticizes the attack itself.

Unfortunately, what knowledge the report does have to offer had until recently been unavailable to all but a very small handful of people, as the Commission's report has yet to be released to the public by the President.

The Trial-at-Bar: 25 March 2002 – 1 July 2003

The Indictment

Unfortunately, many of the most important findings of the Commission does not seem to have been taken into account in the indictments, framed by the Attorney General's Department, that constituted the framework for the High Court's Trial-at-Bar.[9]

The story of the massacre proposed by the prosecution in its indictments and in the trial follows the general outlines of what is found in the Commission report: it tells the story of a massive crowd spurred into action by fear and rumours of marauding Tigers, and of police who failed miserably in their job of protecting the camp and its inmates, becoming a part of the mob they were supposed to control. Yet, crucially, there were no indictments of the ASP or the HQI, despite all the evidence uncovered by the Commission. Nor was anyone prosecuted for any planning, or foreknowledge, of the attack. It was, instead, a story of rage and hatred and fear getting out of control and police getting caught up in violent forces they should have kept in check.[10]

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[9] The Commission's Report and recommendations were forwarded to the Attorney General as per standard procedure.

[10] The High Court's judgment unfortunately reaffirms this interpretation of the events: "there was displeasure within the villages about maintaining the Bindunuwewa Rehabilitation camp. The evidence presented has proven that this displeasure was due to the fact that the inmates of the camp were known to be members of an organization called the L.T.T.E, better known as Tigers. The evidence shows that the villagers had a significant fear of the inmates who were kept at the camp for rehabilitation. Also disclosed was the fact that the villagers were angry at the inmates for cracking unnecessary jokes at young women who pass by the camp. Evidence has also disclosed that the day before the incident, on the night of 24.10.2000, a false rumour had been spreading that the Tigers in the camp had entered the village and taken weapons belong to police Officers, and that a crowd of people had attacked the camp due to this reason." (18)

In the indictments handed down in March 2002, thirty one local residents and ten police officers were each accused of eighty three counts. The eighty three counts were composed of five categories: 1) one count of belonging to an unlawful assembly with the common object of causing hurt to the detainees (section 140 of the Penal Code); 2) twenty-seven counts of murder in prosecution of the common object of the unlawful assembly (section 296 read with section 146 of the Penal Code); 3) fourteen counts of attempted murder of the surviving inmates in prosecution of the unlawful assembly's common object (section 300 read with section 146 of the Penal Code); 4) twenty-seven counts of murder "on the basis of the Common Intention shared among the doers of the acts of offence" (section 296 read with section 32 of the Penal Code); and 5) fourteen counts of attempted murder on the basis of Common Intention (section 300 read with section 32 of the Penal Code).

The basic legal argument was two-fold. First, that those accused who were identified as members of the crowd and as being armed with weapons constituted part of a larger "unlawful assembly," which was animated by a common object of "causing hurt" to the inmates. Having a "common object" is understood legally not to require explicit agreement between all or any of the members of the assembly, but as a goal that can be ascertained through knowledge of the shared actions and manner of the individuals involved. While the actual involvement in the assembly by each accused must be proven individually, each member of the unlawful assembly takes on a vicarious responsibility for the actions of all the other members. Thus the prosecution was arguing for convictions of the accused "villagers" first for being members of the unlawful assembly (count one), and then for the specific acts of murder and attempted murder that the crowd as a whole committed (counts 2-42). They did not have to show that any given accused had committed any specific acts of murder or attempted murder.[11]

For the police officers among the accused, another strand of argument and evidence had to be added. The case was made that the police posted to protect the camp became members of the unlawful assembly in their failure to act as their legal duty required them to. In standing by as members of the crowd entered the camp and massacred its inmates and in making no attempt to control or arrest any of the attackers, the police came to share in the common object of the unlawful gathering. To make this connection, the prosecution had first to argue that there was ample legal precedent for considering an "illegal omission" to arise from the failure to perform one's duty, a principle they held was especially well established in cases of homicide.

Of the villagers charged, all had been identified by eye-witnesses as being at the scene of the crime with weapons in hand. Unfortunately in criminal cases of this sort, where it is neighbor who has to testify against neighbor (and, in one instance, relative against relative), eyewitness testimony can constitute a less than reliable foundation. And indeed, at the conclusion of the leading of evidence by the prosecution, it applied to the court to have charges dropped against 23 of the 41 accused, citing lack of evidence. The withdrawal of charges was due to the fact that four witnesses went back on the statements they had made earlier to the CID and refused to implicate their accused neighbors in the camp. (These four witnesses were promptly charged with, and ultimately convicted of, perjury.)[12] One of the ten accused police officers was also discharged at this stage as well.

With respect to the police officers charged, there were problems of a different nature. Of the more than sixty police officers stationed at the camp at the time of its attack, only those of medium rank – Sub-Inspector and Inspector – were charged: they were either those whom witnesses identified as

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[11]High Court Judgment, p. 76. In respect of charges 43-83, which were based on the separate principle of common intention, the Prosecution eventually conceded in their concluding written submission that the evidentiary requirements for proving "common intention" had not been met, given that section 32 of the Penal Code requires that specific doers of positive acts be identified individually by witnesses. (Prosecution Written Submission, p. 51.) Thus these charges were effectively dropped at the conclusion of the case, an action the High Court acknowledges in its judgment at pp.79-80.

[12] According to a number of reliable sources, among the twenty-three accused discharged were some of the ring-leaders of the attack. The four would-be witnesses claimed that they had been threatened and warned not to testify against their neighbors. The prosecution, with the enthusiastic agreement of the angry judges, had the witnesses charged with perjury and immediately remanded. Their case was heard on 28 August 2003, at which point they were each sentenced to two years of rigorous imprisonment. According to a number of sources, the witnesses who refused to testify had in fact been threatened, as they had claimed. So, according to unconfirmed reports, had some of those who did testify.

being posted at the main entrance to the camp, or those in charge of one of the detachments sent to guard various other locations around the camp.

This prosecution strategy had three major problems. The first and most obvious was the failure to charge either of the two senior officers with any crimes. The prosecution thus chose to endorse the ASP Dayaratne's and HQI Seneviratne's position and make them into crucial state witnesses, despite the incriminating evidence available from the Commission Report and other sources. [13] Second, the Prosecution's choice of police accused meant that at least some of those who were stationed at the camp entrance, including some of those responsible for the shootings of the fleeing inmates, were not charged.

Finally, and more generally, the prosecution strategy had another major drawback: it choose to press only the most serious charges – murder and attempted murder – and yet supported it with no other evidence than eyewitness testimony, which was either from other interested parties (e.g., the HQI and ASP) and thus of questionable value, or from those easily intimidated.[14] This was a high-risk strategy, as later developments in the Supreme Court made clear.

The Judgment of the High Court

Of the eighteen who remained accused when the trial concluded and the judges began their deliberations, nine were residents from the local area. Of these, the Trial-at-Bar convicted three. Each was convicted of being a member of an unlawful assembly, and, through their sharing in the crowd's common motive of death and destruction, each was held responsible for multiple counts of murder, one count of attempted murder, and multiple counts of assault. Each was sentenced to death.

The three convicted local residents were those whom the court was able to find some convincing evidence of having actually been involved in the attack within the camp, rather than simply being part of the larger crowd surrounding the camp, which the Trial-at-Bar held was not sufficient to make one a part of the unlawful assembly. Instead, they held, active manifestation of one's criminal intention was required: in all three cases it was that of being seen within the camp premises while the attack was ongoing; in two cases, the accused was seen with a weapon.

Thus, the fourth accused, Munasinghe Arachchige Sammy, was spotted by an eyewitness first outside the camp, standing with a club in his hand within the grounds of the Teachers' Training College (referred to in Sinhala as the Vidyapeetaya) which bordered the Rehabilitation Centre. This same witness later saw him inside the camp, still with the club in his hand. Later, as the witness was helping to rescue one of the younger inmates from the burning camp, he was struck from behind by a club. When he looked up, he saw a number of armed persons near him, among them Sammy. Thus, the judges of the Trial-at-Bar conclude that there is strong evidence that Sammy, by choosing to enter the camp armed with a weapon, had entered into the common motive of the unlawful assembly. The

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[13] The Commission had established that at least six officers – ASP Dayaratne, HQI Seneviratne, Inspector Karunasena, and Sub-Inspectors Ratnayake, Abeynarayana, and Walpola – were all implicated in the police failure to act while the crimes were under way. Of these six, the four lower ranking officers all stated to the Commission that the ASP and HQI were there at the scene; the HQI and the ASP each blamed the junior officers. When asked in a personal interview why the HQI and the ASP were not charged, the State Counsel leading the prosecution, Priyantha Nawana, stated that they could find no evidence against them. For those not privy to the CID report and the statements it contains, nor to what testimony other witnesses might have agreed to give in court, it is hard to reject this claim out of hand.

[14] The prosecution did enter into evidence a number of photographs taken by a police photographer sometime around 9:15 am, when the attack was over or just winding down. These pictures clearly show police – including officers identified as Ratnayake and Karunasena – standing along side numerous club wielding attackers. The High Court judgment makes no mention of the photos, perhaps because they were taken after the attack was (largely) concluded.

second of the three local residents, accused number thirteen, D.M.S. Dissanayake, was seen by another eyewitness emerging from the Centre grounds with a club in his hand, as the barracks were burning and the attack was coming to an end.

Finally, the twenty-first accused, R.M. Premananda, a taxi driver in the town of Bandarawela, was convicted after two witnesses described driving with him to the camp, seeing Premananda enter the camp while the attack was ongoing, then seeing him reemerge fifteen to twenty minutes later with a bleeding hand, after which one of the two witnesses drove him to a private clinic where his hand was sutured. The doctor at the clinic who treated his hand also testified at the trial and was able to identify the accused.

With respect to the role of the police officers in the attack, the Trial-at-Bar accepted the prosecution's argument that police inaction amounted to an illegal omission that made them into willing members of the unlawful assembly. In its words;

> *"by allowing a large group of people to gather around the camp, allowing them to enter the camp and burn the halls inhabited by the inmates, allowing them to be present with weapons, allowing them to attack the inmates and kill them, allowing them to attempt burning the bodies to tamper with evidence, while silently watching, shows that the police aided these actions."*

Crucial to its judgment on this issue was its finding that, since the attack included the burning of the inmates' bodies, it must have, from beginning to end, taken something on the order of an hour. This would have given the officers plenty of time to make at least some arrests or otherwise express their rejection of the crime.[15]

Equally important was the testimony from the survivors that after they had told the police stationed at the camp that they were afraid that the gathering crowd would attack them, they were told to remain in their billets and the police would protect them. Thus the police on duty had ample forewarning and yet had done nothing to disperse the crowd – which the judges hold, would have been easily done – or otherwise prevent the attack. For instance, the judges suggest that the police could have chosen to station some or all of its men immediately around the barracks to which they had themselves asked the inmates to retreat. Instead, once the attack was underway, the police not only did nothing to prevent it, they actually took part by firing on the fleeing inmates.[16]

Of the nine police officers still charged when the case went to the bench for judgment, only two were convicted. These were Inspector S.J. Karunasena (the 32nd accused) and Sub-Inspector T.R. Ratnayake (the 41st accused). Both officers were convicted in large part because the judges were convinced that they were stationed at the main gate throughout the attack and therefore were at the center of the action: their failure was manifest.

Karunasena, in addition, bore the burden of the fact that it was believed that he had been placed in overall command of the police detachment at the Rehabilitation Centre. Thus, to some degree, the judges implicitly relies on a notion of "command responsibility" to hold Karunasena accountable,

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[15] The judicial reasoning, then, would seem to implicate the ASP and HQI in illegal omissions as well, since according to the evidence gathered by the Commission, the ASP and HQI were at the scene within ten minutes of the start of the attack.

[16] It is important to note, however, that a number of the inmates were saved by police officers, though neither the Commission nor other investigators were able to identify which officers these were. There were also a number of brave local residents who rescued at least two of the younger inmates.

repeatedly emphasizing his role as the commanding officer and blaming him for the overall failure to protect.[17]

> *"This Panel of Judges conclude that defendant 32 had the ability and the means by way of troops to control this situation, and as he failed to do so, he is considered to hold criminal responsibility."*[18]

In addition, Karunasena is specifically taken to task for the deadly shots that were fired at the inmates running for their lives. In an effort to show that he had in fact taken some action to disperse the crowd, Karunasena stated in his dock statement at the very end of the trial that he had ordered his men to shoot in the air. If this is so, then it might suggest that the killing of the inmate was accidental. Yet if that is the case, the judges ask; why was it that only inmates were shot, not any villagers?

Further, they write;

> *"On the other hand, defendant 32 has not stated that anyone shot outside of his orders. Accordingly, this Panel of Judges has to conclude that shooting at the inmates occurred with the knowledge of defendant 32."*

Sub-Inspector Ratnayake, in turn, is also argued to have been at the main gate with Karunasena at the time of the attack. Two witnesses, both of them police constables, are cited as giving testimony that locates Ratnayake at the main gate. His inaction, like Karunasena's, is said to have made him a full member of the unlawful assembly and thus criminally liable.

Both Karunasena and Ratnayake made dock statements in which they stated that the ASP and HQI were present at the start of the attack, and that it had been the duty of their superiors, not them, to order action taken against the attackers. Attempting to escape responsibility, the ASP and HQI had blamed them instead. In both cases, the judges ruled that both defendants and their lawyers had had ample time to cross-examine the HQI and ASP when they were giving their testimony, but none did. The fact that they both raised this issue for the first time only in their dock statement (where they cannot be cross-examined) is further reason to discount their claims, they reason.

The other seven officers were all acquitted. This included Sub-Inspector Jayaratne, the 33rd defendant, who was stationed under Karunasena's command at the main gate, but whom the court believed had telephoned the HQI and the ASP to alert them to the attack and thus could not be said to have shared the motive of the attacking mob.[19] The remaining six officers were all judged to have been located too far away from the interior of the camp to have known what exactly was happening.

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[17] The legal principle of "command responsibility" is increasingly recognized in international human rights and humanitarian law. The principle holds that personal culpability can attach to a superior officer for actions committed by those under his command. A commander's failure to take action to prevent crimes he knew of, or should have known were likely, makes those crimes his own. The growing acceptance and application of the principle – most recently in a number of landmarks cases before the International Criminal Tribunal for the Former Yugoslavia – is due in large part to its ability to break with the sad tradition in which lower level soldiers or officers are convicted while their superiors who planned or approved their actions remain untouched. In the Bindunuwewa High Court's judgment, the principle of command responsibility remains only implicit. It is not named or relied upon as such – and its application noticeably fails to reach to the top of the chain of command.

[18] Judgment, p. 50. Earlier, the Court has stated that "had defendant 32 had a group in Police Uniform with broomsticks in their hands, he would have been able to prevent this crime."

[19] *Ibid.* p. 56. It is worth noting that the Commission had earlier determined that Karunasena had alerted the HQI much earlier that a large crowd was gathering and that action needed to be taken. By the High Court's own reasoning, this would seem possibly to absolve Karunasena as well. However, this evidence was not presented before the High Court, either by the prosecution or the defence, and Karunasena never testified under oath.

Unanswered Questions

The judgment, and the trial as a whole, while welcomed by many for the much needed precedent it seemed to set for the punishment of official misconduct and anti-Tamil violence, nonetheless left a host of unanswered questions, some of which were taken up during the appeal to the Supreme Court's appeal, though others were not. These questions can be grouped into two general categories: questions of fact, and questions of law, procedure, and fairness.

Questions of Fact

1. The first important question concerned the basis of the conviction of one of the two police officers, Sub-Inspector Ratnayake. The prosecution case for locating Ratnayake at the main gate during the attack on the Centre was surprisingly uncertain. It depended on the testimony of two police constables, but neither had actually been able to locate Ratnayake unambiguously near the main gate at the start of the attack. We do know with certainty that Ratnayake was at the main gate after the attack. He was present while the injured, and perhaps bodies of the dead, too, were placed in a police truck at the conclusion of the attack, some time after 9 am. We know this from a photograph taken by a police photographer, and confirmed by the eyewitness identification of Ratnayake and Karunasena by Police Constable R.D. Mangalasiri. But this is after the attack. And however damning the pictures are – they show the police officers standing at ease next to numerous club-wielding villagers with bodies of victims lying on the ground -- they were clearly taken after the attack had largely concluded, so they tell us nothing about where Ratnayake was at the time the attack began. What remains unclear, then, is why the prosecution was unable to offer a stronger case for Ratnayake being at the main gate, or at some other strategic position, when the attack happened. The Commission, for its part, was convinced that Ratnayake was at the main gate. During the Commission hearings, one of Ratnayake's colleagues, SI Walpola, located Ratnayake at the main gate at the start of the attack. However, as one of the accused, Walpola did not testify against Ratnayake. It is thus not surprising that the prosecution at the very start of the appeals process in June 2004 agreed not to contest Ratnayake's appeal, accepting his claims that there was insufficient evidence to convict him. He was immediately acquitted of all charges. (As a result, his case was not even considered in the Supreme Court judgment of May 2005.);

2. The use of photographic evidence by the prosecution also raises a number of important questions. The prosecution accepted that the photographs were taken after the attack had taken place and show no specific crimes being committed. Yet the photos were obviously meant to influence public perception in respect of the attitudes displayed, and actions (not) taken, by Karunasena and Ratnayake towards the attacking mob, large numbers of whom can be seen in various photographs submitted in evidence. A further set of questions arises here: if the point of submitting the photos into evidence was to show that the police took no action in the wake of the attack, even as armed attackers were still comfortably mingling amongst the police within the camp, then the photos would seem to implicate the HQI and ASP as well, since they were unquestionably on the scene – even by their own testimony – at the time that the photos were taken. In addition, why was the whole roll of negatives, preferably the originals, not submitted? Based on the testimony of police photographer P.A. Kurukulasooriya, we know that not all of the photographs taken were submitted into evidence and we know that the photos that were submitted were made from negatives that were themselves not the originals, but copied from the first set of "positive" photographs. That second set of negatives was cut up, with only some photographs put into evidence. What, or who, was shown on the missing negatives?

3. This leads us to the most crucial question of fact: why were no charges filed against the HQI and the ASP? It would seem, based on the findings of the Commission and numerous witnesses interviewed over the past two years of independent investigation, that a strong case might have been made against both officers for having been on the scene from the beginning of the attack.

But at the very least, clear evidence existed for charging them with various crimes once the attack had begun. This would include the obvious dereliction of duty in making no arrests, in allowing the deaths of inmates in the police truck parked at the main entrance, in allowing some inmates to be shot, and for the suppression of evidence involved in moving the dead bodies before the magistrate was able to arrive and perform post-mortem examinations. The High Court judgment cited this last crime in particular, but blames it instead on Karunasena, despite the ASP's own admission that it was he who gave the order to dispatch the bodies. Why, then, were no charges filed against the senior officers? Was it because, as one of the State Counsels involved in the case stated in an interview, there was no evidence against them? Would no one have testified against them? Karunasena and others certainly did so in their testimony before the Commission of Inquiry. The fact that HQI Jayantha Seneviratne has now been promoted is viewed with great suspicion among many in the Bandarawela area. (ASP Dayaratne is now retired.)

4. Closely related is the failure to challenge the position of the HQI and the ASP through cross-examination, especially by defence lawyers representing Karunasena and Ratnayake. Why was not Karunasena and Ratnayake allowed to testify and state their cases under oath, rather than waiting until their much weaker interventions from the dock? Was it because their lawyers imagined – based on the historical record and what they thought was a weak case against their clients – that the police would be acquitted and so didn't need to take the risk that such testimony would entail (at the very least to their careers as police officers)? Why did they not call as a witness, the Bandarawela Divisional Secretary, who testified to the Commission that the ASP was there in the camp very early on in the attack? Could these decisions be explained in part by the fact that the lawyers for Karunasena and Ratnayake were also the lawyers for SI Jayaratne, who escaped conviction solely on the basis of the HQI's own testimony that it was Jayaratne who alerted him to the mob attacking the camp?

5. The shooting of the fleeing inmates is another crucial point in regard to which there still remain more questions than answers. The inmate who was shot to death had six bullet wounds on his body from at least three separate bullets, though apparently only one bullet was recovered from the body. According to testimony given to the Commission by Mrs. K.K. Joowzir, who was the Assistant Judicial Medical Officer who performed the autopsy, she gave the bullet to "an investigation officer" whom she was later unable to identify. This was a violation of proper legal procedure, and the bullet never reappeared. As a result, there was no evidence to connect the shooting and death of the inmate to any particular police officer. Toward the end of the trial, the prosecution did try to introduce into evidence three T-56 rifles and various used cartridges. But under cross examination by the justices, the Government Analyst could not show any clear, uncontaminated, chain of evidence linking the rifles and cartridges to specific police officers. The justices therefore refused to allow the evidence to be submitted. The prosecution's written submission stated that they were not able to learn who was using which gun. But is this true? And if so, why? Are no such records kept? One source in the Attorney General's office explained that it wasn't possible to match the spent cartridges found at the scene to particular guns, only to the general type of gun. But if this is so, why attempt to submit these three guns into evidence in the first place? These would all seem to be crucial questions, but what kinds of investigations, if any, took place, and by whom, remains publicly unexplained.

Questions of Law, Procedure, and Fairness

1. The general line of defense taken by Karunasena, Ratnayake, and their police colleagues was to challenge the fairness of prosecuting them for illegal omission that rendered them part of the unlawful assembly. To convict someone of murder and attempted murder should require direct evidence of specific actions by specific individuals. Instead, they argue, first, that they were merely following orders and, second, that they were unable to control the crowd – in large part because the HQI and the ASP had not given them the necessary resources: anti-riot equipment,

rubber bullets, tear gas, or enough men. How one judges their claims to have been unable to control the crowd depends to some degree on how many people were among the crowd, and of these how many were actually armed. Many witnesses testified to crowds of 2,000 to 3,000 people, yet these would seem to be exaggerated figures for the space involved, and clearly not all the crowd entered the camp, nor was the entire crowd armed. Furthermore, none of the attackers were carrying firearms;

2. In defense of his clients, their counsel argued that there is an established principle of law that would hold in this case that the prosecution must show that their interpretation of police (in)action – i.e., that the police shared the common motive of the unlawful assembly -- is the only possible or necessary inference from such (in)action. In this case, that standard has not been met, he argued, as there are other possible inferences: e.g., that the police were paralyzed with fear, or that they were too scared, especially given their lack of resources, to shoot and kill the attackers, for risk of making the huge crowd turn on them. This is a line of reasoning, as we will see, that the Supreme Court makes central to its acquittal of Karunasena;

3. The first question is immediately involved in a second one, which concerns the failure to examine the degree of involvement of the HQI and the ASP. The fairness of the verdict was clearly undermined by the obvious involvement of the HQI and ASP (whether they arrived before the attack or soon after it had begun). If the judges' intention was to convict those they felt were effectively in charge of protecting the camp, then it clearly was a problem that they did not have the option to convict HQI Seneviratne and ASP Dayaratne. On the other hand, if the intention was to convict those people who facilitated the mob to do their work, then it would have been better to have more specific evidence of actual acts committed – such as who fired the deadly shots, or who allowed the killings to take place in the police truck. The lack of direct evidence linking specific people to specific criminal acts was clearly one of the reasons why the indictment of the police personnel was framed as it was, namely by charging the police with vicarious responsibility through sharing in the common motive of the unlawful assembly. Yet if this was to be the route to justice, stronger evidence of the exact location of the specific officers would have been beneficial. Assuming the prosecution's version of events is accurate, then Karunasena and Ratnayake surely were not the only police officers committing an illegal omission in allowing the crowd to enter the camp;

4. Finally, theses issues raise basic questions about the prosecution's high-risk strategy of choosing to prosecute only the most serious crimes – murder and attempted murder – but with relatively weak evidence against many of the accused. With hindsight, this does not seem to have been the wisest, or most just, strategy. Would it not have made sense to include other lesser charges as well, as suggested above: suppressing evidence, aiding and abetting the crowd, dereliction of duty, even if this might have given the Court the chance to convict on these lesser charges instead of murder and attempted murder?

5. While the prosecutions' gamble paid off in the courtroom of the trial-at-bar in the form of convictions, it may well have contributed to the Supreme Court's ultimate acquittals. It certainly exacted a high political price even before the appeals process began: the message sent by having some police officers sentenced to death on indirect evidence, even as the HQI and ASP remain untouched, turned out to be far from conducive to either harmonious ethnic relations or to faith in the formal system of justice.

The Supreme Court Acquittals

What the SC decided and why

With the death sentences came an automatic appeal to the Supreme Court. A five-member bench, originally headed by High Court Justice J.A.N. Silva, began hearing the appeals from all five of those convicted in June 2004. Sub-Inspector Tyron Ratnayake was almost immediately acquitted of all charges, after the Attorney General's Department agreed that there was insufficient evidence against them. With Justice Silva having to leave the panel before deliberations had concluded, the bench was reconstituted under the leadership of T. B. Weerasuriya and arguments heard again in their entirety in November of 2004.

On June 1st 2005, the five-member bench of the Supreme Court announced the acquittals of the remaining four persons – M.A. Sammy, Sepala Dissanayake, R. M. Premananda, and Inspector of Police Jayampathi Karunasena. The court held that the three civilians and one police officer were wrongly convicted by the High Court given the lack of evidence that any of the four were actually members of the unlawful assembly that had committed the massacre.

In the case of Sammy, the Court held that the one witness who testified against him could place him at the scene of the crime only towards the end of the attack. Given that there were many understandable reasons for people to have been drawn into the crowd without therefore becoming members of the unlawful assembly, the Court held that it was "safer" to require some clear evidence that Sammy had shared the mob's intention to harm the camp inmates. In the absence of such evidence, his mere presence in the camp was not sufficient to render him a member of the unlawful assembly.

In the case of Sepala Dissanayake, the Supreme Court was even more emphatic: the credibility of the sole witness who testified against him had been so seriously undermined in the course of cross-examination that his testimony could not reasonably be relied upon.

As for R. M. Premananda, the Court held that the High Court had failed to take into account a whole range of evidence that called into question Premananda's membership in the unlawful assembly. The Supreme Court further held that the High Court had been wrong to apply two separate legal principles that were used to further establish Premananda's guilt. As a result, he, too, had been unfairly convicted.

Finally, in the case of IP Karunasena, the Supreme Court held that the judgment of the Trial-at-Bar had misinterpreted a range of evidence presented at the trial and had failed to take into account many ways in which the police detachment under Karunasena's command had in fact done its best to prevent and mitigate the attack on the detainees. As a result, there was insufficient evidence to hold that Karunasena had, either through illegal omissions, specific illegal acts, or general intentional failure to discharge his legal duty, joined in the intention of the unlawful assembly to do harm to the camp inmates.

Setting the Stage

Before turning to the specific arguments the Supreme Court makes to support its acquittals, it is important to analyze the way in the Court frames the events leading up to the attack on the camp, as this is crucial to their understanding about what motivated the crowds that gathered around the camp and what distinguishes the bulk of the crowd from the smaller group that constituted the unlawful assembly.

One of the most striking – and consequential – aspects of the successive steps in the legal process from the High Court to the Supreme Court is the radical transformation of the the portrait of the situation preceding the massacre that emerges from the exhaustive investigations of the Presidential Commission of Inquiry, as supplemented by the interim report of the Sri Lankan Human Rights Commission and independent research conducted by this author and others. Thus, in the Supreme Court, the attacking crowd is presented as having gathered for peaceful purposes and as merely reacting to the inmates' threatening and provocative actions.

Thus, it is presented as fact, the disputed claim that the inmates had tried to grab weapons from the guards in the camp on the evening of the 24th. It is accepted as fact the discredited and counter-intuitive claim that it was the inmates who initiated the stone throwing, not the crowd around the camp. It is contended in this regard that the crowd was made up only of "villagers" who had gathered to stage "a peaceful Sathyagraha" calling for the removal of the camp, implying that this "gathering" had been planned prior to the incident in the camp and neglecting to mention that many of the posters "calling for the removal of the camp" also called for the murder of the inmates.

While the scene is set in this respect on the morning of the 25th, only the weapons held by the inmates, not those many more weapons held in the hands of the gathering crowd are mentioned, nor the fact that among the "villagers" who had gathered were many brought in by vehicle to Bindunuwewa from Bandarawela and the surrounding area. It is also argued that that the actions of the crowd posed no threat to the inmates, despite the forty one young men being completely surrounded by large, hostile, armed, and entirely Sinhala crowds and Sinhala police armed with guns. In painting this portrait of a peaceful crowd some of whom were eventually provoked into murderous fury by the actions of the inmates, the clear evidence that the detainees actively pleaded for peace from the crowd: for instance, their displaying a banner that announced that they had no quarrel with the villagers, only with the camp authorities, became of no account..

The Court states in this connection;

> *"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 the camp with all their fury... 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."*

Citing the relevant section of the Sri Lankan Penal Code, the Court establishes that to become a member of an unlawful assembly, one must be shown to have joined intentionally, knowing the common unlawful object of the group.

Once this is established, an individual can be held vicariously responsible for any of the actions of the unlawful assembly if they can be shown to have been committed in prosecution of the common objective or to have been offences that members of the unlawful assembly knew were likely to be committed in the prosecution of that common objective.

Making use of a number of established legal commentaries, the Court holds that, on the one hand, mere presence in a crowd is not enough to render one a member of an unlawful assembly. This is particularly true in rural societies, they argue, where many people may gather at times of social tension merely out of curiosity, and some innocent bystanders may be caught up in the midst of events whose animating objective they have no intention of sharing.

On the other hand, the Court acknowledges that no overt act by an individual is required to establish his membership in the unlawful assembly. Nonetheless, the Court ultimately stresses the argument of one legal scholar that-

> *"it will be safer to look for some evidence of participation by him [i.e., a given suspect] before holding that he is a member of the unlawful assembly."*

Acquittals of the Civilians

The Court makes much of how there were many non-criminal reasons – from curiosity to fear to desire to remove the camp non-violently – that people might have had for being part of the crowd watching the events. The Court stresses how easy it would have been for innocent people to get caught up in the crowd.

In so far as the first appellant-accused, M. A. Sammy, is concerned, the Court takes the view that contrary to the claims of the prosecution and the High Court, the primary witness against Sammy, E. A. C. Ariyasena only places him in the camp at the very end of the attack, since Ariyasena testifies that the detainees' billets, in which most of them were seeking refuge during the attack, were already on fire.

As against this position, it is relevant that the inmates' billets were set on fire relatively early in the attack and that much killing and mob destruction continued while they burned. As Ariyasena's uncontested testimony establishes, there were still at least two boys to be rescued from the fires and the mob at the time he reported seeing Sammy – so the precise "stage" of the attack at which Sammy was seen in the camp becomes somewhat uncertain.

The judges stress the fact that according to Ariyasena's own testimony, at least one person within the camp at the time Ariyasena saw Sammy was willing to assist in rescuing the boys. To the court's mind, this proves that not all of those in the camp during the attack shared the murderous intention of the unlawful assembly.

Three points are relevant here, however. First of all, there is nothing within the law of unlawful assembly that rules out the possibility that a member of the unlawful assembly can also choose to refrain from taking other criminal acts. To have helped rescue two of the inmates is not necessarily inconsistent with also being a member of the unlawful assembly. Second and more generally, the line between where the crowd as a whole gathered and where the mob did its violence was quite clear. One had to make a conscious choice to cross that line and enter the camp; most did so either by climbing the hill that leads up to the main entrance, or by climbing down from the *Vidyapeeta* playing fields that overlooked the camp. And third, the area in which the murders and destruction took place was quite restricted. To have crossed the line into the camp and the scene of the crime is necessarily to have become aware of the terrifying violence that was taking place: there is no way to have been so close to the attack without knowing what was happening.

In the end, the fact remains that Sammy was identified as being within the camp, with a weapon, while the attack was still ongoing and crimes were being committed. While the Court concludes that this is not sufficient, as of itself, to convict him beyond all reasonable doubt, the implied requiring of evidence of specific acts of violence or EXPRESS DECLARATIONS of criminal intent be provided in order to prove membership in the unlawful assembly may be reasonably argued to expose a fundamental ambiguity in the law relating to unlawful assembly and the manner in which it is applied to the facts of a particular case.

In the case of the third appellant-accused, R.M. Premananda, the Court accepts that there is no dispute that he went to the camp voluntarily, entered the camp while a "commotion" was going on,

was inside for ten to fifteen minutes, emerged from the camp with a bloody gash on his wrist, and then lied about his identity to the doctor who treated him. Nonetheless, the Court holds that there is insufficient evidence to find that Premananda went into the camp with any criminal intention. Indeed, they argue that the evidence in his favor undermines even the prima facie case against Premananda that the High Court believed existed. It was on the basis of this belief that the Court applied the so-called Ellenborough Dictum, according to which when an accused has the power to explain his behaviour but refuses to do so, it is justifiable to conclude he is silent because speaking would harm his case.

On what grounds does the Court dispute the existence of a prima facie case against Premananda? Crucial to the Court's position is the testimony of Premananda's friend, Padmananda, who held that it was he who had relayed to Premananda the story that the inmates were attacking the village, and he, Padmananda, who had suggested driving to the camp. The court also accepts as fact Padmananda's self-serving testimony that when he and Premananda and their other friend, Sugath Jayantha were on their way to the camp they had not discussed "anything pertaining to the incident in the camp suggestive of any positive act either offensive or defensive in nature." (This despite their certainly having seen the many posters along the road to Bindunuwewa calling for the violent removal of the camp and its inmates.) Together with the fact that Premananda entered the camp unarmed and that "at the time he went into the camp, there was a commotion," the Court holds that;

> *"it would appear that their visit to the camp was solely motivated by curiosity on the information that the detainees were attacking the village."*

One striking aspect of the Court's argument here is its willingness to accept as established fact the claims of Premananda's friends that they went to the camp with no violent intentions, but only curiosity. While it is certainly fair to note that no evidence was presented that suggests, much less proves, they first went to the camp with criminal intent, it seems quite different to use their own narrative as proof of the absence of criminal intention,

Equally notable is the Supreme Court's rejection of the High Court's use the so-called Lucas Principle, which holds that a statement made in or out of court that is proved or admitted to be false and can be shown to be motivated by the fear of truth and the realization of guilt, can be taken as corroboration of other incriminating evidence or testimony. The false statements that the High Court panel had in mind were the false name that Premananda gave to the private doctor to whom his friend took him immediately after leaving the burning camp, and Premananda's denial that he ever entered the camp which latter denial, the Court itself at one point implicitly rejects.

With respect to Premananda's providing the doctor with a false name, the Supreme Court rejects the idea that this is any evidence that Premananda was afraid of revealing his guilt. They cite the fact that the friend who brought him in for treatment was well known to the doctor, thus making it easy enough to trace Premananda's real identity. The Court also finds it relevant that there is no evidence that Premananda either gave a false address or tried to suppress the evidence of his friend who drove him to the doctor. However, one may justifiably ask the question as to whether the fact that Premananda's lie was a weak and unconvincing one should automatically infer also that it was not motivated by a desire to protect himself from being caught? Also relevant in this regard is another suggestive bit of evidence, which the High Court made much of: the fact that Premananda chose to be treated in a private hospital rather than a free public hospital, even though Premananda had to borrow money from his friend to pay for the treatment.

Then again, that no medical evidence was presented that contradicted Premananda's claim that his injury was caused by aluminium sheeting – buttressed by the fact that there were, indeed aluminium sheets within the camp, could be argued to lose much of its force when considering that the metal sheeting in the camp was used to construct the billets in which the inmates were housed – and killed –

which would place Premananda inside the camp. The High Court had focussed on the glaring contradiction between this and Premananda's own testimony on the witness stand that he had never entered the camp at all, but had only watched from near the tube well close to the driveway that leads to the main entrance

In the end, then, the fact remains that Premananda was proven to have entered the camp voluntarily while the attack was ongoing, to have remained amidst the terrible violence for 15 minutes or so, to have been injured, and to have lied about it both immediately afterwards and during the trial.

Acquitting the Police

With respect to their acquittal of Karunasena, the Supreme Court is on firmer ground. From a fair reading of this evidence presented at trial, it is clear that there was not sufficient evidence to prove beyond a reasonable doubt that Karunasena had shared the intention of the unlawful assembly to harm the detainees.

According to the Court's understanding of the evidence against him, Karunasena was being charged for three different categories of actions which both individually and together were taken to prove that he shared the intention of the unlawful assembly: 1) a general intentional failure to comply with his legal duty to protect the detainees (as evidenced by the failure to take actions to repel the invading crowd and protect the inmates); 2) specific illegal omissions (the failure to arrest any of those responsible for the violence, and the failure to take action when detainees were attacked while in the police truck); and 3) specific illegal acts (shooting at the detainees and the removal of dead bodies with a view to destroying evidence of the crimes).

The Court reasons that the prosecution's reliance on circumstantial evidence means that "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." In fact, the Court convincingly shows, there was enough uncertainty and ambiguity in the evidence presented against Karunasena (and originally nine other police officers as well) to make it impossible to hold that his joining the unlawful assembly was the only reasonable inference that could be drawn from it.

The value of the Court's decision with respect to Karunasena lies in its undoing the mistake of the Trial-at-Bar, which was to hold Karunasena and Ratnayake responsible for all the failures of the police, without having adequate evidence that they either had the power to prevent the attack or the authority to get the police as a whole to act otherwise. (As mentioned in an earlier section of this essay, the prosecution thus effectively holds the two officers accountable on the basis of command responsible, but without articulating the principle or defending it with evidence).

In fact, however, the heart of the Supreme Court's judgment goes much further than this: the substance of their detailed analysis of the actions of the police holds not only that there is insufficient evidence to prove Karunasena's involvement in any of the supposed illegal (positive) acts and illegal omissions, but that taken overall, the police can be shown to have done their duty as best they could under difficult circumstances.

Where the prosecution and the High Court held Karunasena and Ratnayake legally accountable for all the various illegal omissions of the police, the Court instead finds that, since Karunasena and some of the other officers on the scene took some useful actions, it is therefore wrong to say that the police failed at all.

This latter conclusion however, comes at a cost.

1. For instance, the Supreme Court panel emphasizes a number of small positive acts taken by some of the police so as to make it seem to prove that Karunasena and/or the whole police were doing their duty. The Court, in this way, makes much of the evidence that the police did in fact shoot in the air in an attempt to disperse the mob as it first stormed in – though the number of spent cartridges found at the scene suggests not many shots were fired. The Court also praises the fact that some police officers drove away some villagers as they attempted to enter the camp, that some police officers ultimately assisted some of the detainees, and that the injured who survived the attack were eventually sent to hospital. However, while the acts of the police in this regard need to be commended, the colossal failure of the police to protect the inmates in the first place remains equally if not more significant;

2. It is also stated that despite his initial claim that he and others were deliberately shot at by the police the surviving detainee Ganeshamurthy Ashokan ultimately admits that the police had done so accidentally while firing to disperse the crowd chasing the detainees. However, when one reads Ashokan's testimony closely, it is unclear what one is to make of this "admission," given that it comes as an abrupt and unexplained statement after much repeated and confusing cross-examination – which took place, it is worth remembering in a language that Ashokan did not understand and in a court room guarded by Sinhalese police and composed predominantly of Sinhalese spectators.

3. The survivor Kandasamy Chandrasekeran's statement that the police had told the detainees to remain in their billets at the initial stage of the attack is presented this as if it contradicted Chandrasekeran's claim that the police had not done anything to save them. That the police had told the detainees to remain in the very place where most ended up being attacked and killed, and then failed to protect all but a few of them – this is hard to accept as convincing evidence in their defence. Likewise, Karunasena's decision to post more than half of his sixty five officers far from the eventual scene of the attack and his failure to have them redeployed in time to control or lessen the violence, or at least to arrest some of the attackers, hardly seems like the best way of preventing the attack. Similarly, Karunasena's order to his men not to shoot unnecessarily remains ambiguous; as the failure of the police to shoot or take any other strong actions against the attackers seems, on one interpretation, to be at the heart of the police negligence;

4. The Court chooses to reject the testimony of two survivors – accepted as true by the Commission of Inquiry – that they were each attacked by the mob while they were inside a police vehicle within sight of numerous police officers. The Court states instead that their stories are contradicted by a sole Sinhala witness who "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 that point." It is worth pointing out, of course, that even if this witness is to be believed, his testimony does not necessarily contradict the survivors' claims, as it is not clear that they are all speaking of events that took place at the same time. Finally, the Court also dismisses the claims of the survivor Perumal Easwaran that his two fingers were blown off by a gunshot wound when the police shot towards a group of inmates fleeing attackers. While they cite the evidence of a Judicial Medical Officer that "clearly showed" his wounds were caused by sharp weapons, they make no mention that an earlier JMO report, submitted as part of the prosecution's case, referred to Easwaran being sent to Badulla hospital after the attack for treatment of "gunshot wounds." (The Commission of Inquiry held that at least three inmates were shot by the police.);

5. Then again, when considering the question of the police failure to arrest any of the attackers, there is no mention of the photographs, taken by a police photographer who arrive at the camp around 9:30-9:45 am, that clearly show senior police officers – whom, according to the testimony of the photographer, included Karunasena and Ratnayake – milling around the camp alongside armed attackers, as a dead or injured detainee lies at their feet. While these photographs, as mentioned in earlier sections of this essay, were taken after the attack was largely concluded and

are not without their questions and ambiguities, they show with stark clarity that the police were taking no action to detain armed members of the mob who were mere feet away from them. Also of some importance is the fact that the autopsy report of the one inmate clearly killed by police firing showed his body had six bullet wounds, which would mean that he was struck by at least three bullets. This hardly seems a typical case of accidental shooting. The High Court made much of: the fact that the attackers were able to burn the bodies of many inmates beyond recognition suggesting that the attack was not over and done with quickly. For the bodies to be burned so completely, the High Court reasoned, would have required the acquiescence of the police. This is an apparently minor, but nonetheless devastating, detail, especially when considered in the context of the shocking ferocity of the attack as a whole and the particularly gruesome ways in which the inmates were killed – all of which is a far cry from the attack being a spontaneous response to the provocative actions of the inmates.

6. Finally, it is worth mentioning a whole series of other questions that were not evidenced during the hearing. With regard to the failure of the police to arrest any members of the unlawful assembly, there is no mention of the testimony that showed the police and the crowd were mingling together before the attack. Far from keeping the crowd at a clear distance so as better to control it, at least some of the police seem instead to have been part and parcel of the gathering crowd. It is never asked as to why there were so few shots fired "in the air," or why no bullets were ever found (as we know, at least one was though it eventually "disappeared") and displays no curiosity about other missing evidence – i.e., why virtually no physical evidence of the attack was ever apparently recovered. (Eyewitness accounts gathered through independent investigations have revealed that in fact the police had gathered a large number of weapons used in the attack, many with remains of the bodies of the murdered inmates stuck to them, but left them out overnight in the rain and eventually destroyed them.);

Beyond the Limits of the Law

As some of these last examples suggest, it is important, if only for the historical record, not to remain entirely within the confines of the case as it was presented to the Supreme Court, but to consider the entirety of the evidence gathered from other sources.

While this evidence was not within the purview of the Supreme Court and thus cannot be used to challenge the validity or procedural fairness of their acquittals, it nonetheless has a bearing on any determination of the ultimate "truth" of their judgment. Foremost among this evidence is the fact, as established by the Presidential Commission of Inquiry and other independent investigations, that ASP Dayaratne and HQI Seneviratne were at the camp either from before the attack began or soon upon its commencement. This clearly renders their testimony at the Trial-at-Bar utterly unreliable.

According to the report of the Commission of Inquiry, their credibility was already shattered by various inconsistencies and lies in their testimony to the Commission. Equally important is the disappearance of the bullet found within the one inmate clearly established to have been shot by the police. That such evidence was able to be "disappeared" suggests the deliberate suppression of evidence and should prompt thoughts of what other evidence might have been lost or tampered with. Finally, there are the various bits of evidence, mentioned in earlier sections of this essay that suggest a significant degree of premeditation.

Even without having access to all this evidence, it was clear to the three members of the Trial-at-Bar that the police had failed miserably and had collectively been involved in a grave injustice. Despite their unjust convictions of Karunasena and Ratnayake – based on the mistake of holding them responsible for actions they were not proven to have been able to control – the High Court judgment made clear the collective failure of the police.

In comparison, rather than simply making the justifiable argument that there is inadequate evidence to hold Karunasena responsible for the clear failures of the police as a whole, the Supreme Court choose to deny that the police failed at all.

Conclusion

The moral and political failure in the official state response to the Bindunuwsaewa massacre began, of course, long before the case reached the Supreme Court. It began with the inadequacy of the initial police investigations and was followed by an unnecessarily weak case presented by the Attorney General's Department.

And while the procedures of the criminal law have now run their course, there do remain – at least in principle – other avenues for some degree of justice. Thus there remains a crying need for disciplinary hearings to be held on the conduct of the HQI and the other police officers involved (the ASP has since retired and is thus presumably beyond the reach of such a process). The Commission of Inquiry strongly recommended that disciplinary hearings be held against ASP Dayaratne, HQI Seneviratne, IP Karunasena, SI Ratnayake, SI Jayaratne, SI Walpola, and SI Abeynarayana. It also recommended investigations into the conduct of Captain and Lieutenant Abeyratne. At the time of writing, no such investigations or hearings had been held. This situation would seem ripe for at least some degree of public pressure.

A preliminary step would be to call for President Kumaratunge to finally publish the Commission report, ideally in Sinhala and Tamil as well, so that all Sri Lankans would have a chance to read it. For despite its serious flaws, it presents the most accurate and critical accounting of the attack so far that helps us to determine the historical meaning of what happened at Bindunuwewa.

The Tale of Two Massacres

The relevance of Embilipitiya and Bindunuwewa to Conflict Resolution in Sri Lanka

Basil Fernando[♦]

Introduction

In Sri Lanka, hardly anyone has looked at the massacres, killings and other types of violence that have occurred in the country during the past several decades from the standpoint of justice or the absence of it. Instead, each such event is looked upon as confirmation of this or that ideological perspective; for instance, 'Tamil killed by Sinhalese', 'Sinhalese killed by LTTE', 'JVP rebels killed by military' or 'political opponent killed by the JVP'. With such conclusions, the event itself gets buried and reference to it thereafter, would only be made to reaffirm such ideological positions.

This may be the main reason that there is little mention these days of the Embilipitiya school children's massacre in the late 80s. It cannot be explained from the standpoint of any of the four ideological stances mentioned above. The 48 children killed were Sinhalese. They were not JVPers nor were they suspected of being JVPers. They died at the hands of Sinhala officers of the Sri Lankan Army. And they were detained, before being killed, in a predominantly Sinhalese area. Details of the Embilipitiya students' abduction case revealed that there were two main reasons for the children's arrest. One, some of the boys had teased a schoolmate -- who was also the son of the School Principal -- over a love affair. Second, several students had protested over a transfer of a part of their school land to a businessmen, who had been a chum of a local politician.

In June 2005, the Asian Human Rights Commission video recorded the statement of one of the missing boy's father, Shelton Handuwela, who was also a founding member of the Association of Disappeared Schoolchildren at Embilipitiya. Among other things, he related the following incidents in his taped interview:

The Loss of a Son

One day, Mr Handuwela received a message from an army officer to bring his son to a particular place at a designated time, which he did. The officer met him and requested he bring the child to a nearby army camp near Udawalawe, where he was to meet with the Colonel who was the officer-in-charge of the camp. This also, the father did. The Colonel had spoken to him politely and calmly and asked him to leave his son for one week at the camp. The father was also requested to bring a towel, and a toothbrush for his son.

Before the end of the week however he had received a call to come to the Army camp immediately and when he went the Colonel told him that the boy had swallowed some keys and glass and needed medical treatment. The father was to take the child to a doctor, then bring him back to the camp in one week. But the son told his father that he was tortured whilst in the camp and forced to swallow some keys and pieces of glass. He was treated by a doctor, but one week was not enough for proper treatment. So the father brought the boy back to the Colonel and begged for more time. He was told to keep his son and bring him back the next week.

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When Mr. Handuwela returned with his son the next week, he noticed a yellow colour Lancer car parked at the camp entrance. When he reported inside with his son, the camp authorities hurriedly turned them away and told them to come the next week. So he alighted his motorcycle with his son and left. On the way, the yellow Lancer car halted before them and some persons who got out of the car walked up and hit him. When he fell, his son was forcibly taken away. His son, Prasanna, who was one of the 48 Embilipitiya schoolchildren to disappear, was never seen again.

To me, several obvious questions arise from this narration. Why did Shelton Handuwela take his adolescent son to the Army camp in the first place? Why did he leave him at the mercy of the soldiers for a whole week? And why did he take his son for the second and the third time, despite the child having complained of being tortured during his first week's stay? This too when considering that Mr. Handuwela was not a simple villager. He was a Deputy Director of education and was an experienced educationalist with a career spanning over several years. His specialty was also English, so he could comfortably communicate in the language used by the more powerful players in society and bureaucracy. But when asked this question, the only reply he gave was, "we had faith in them; we never thought they will do something like this".

In retrospect, we may ask other questions: Could he have done anything other than what he did? For instance, could he have hidden his son somewhere? Under the circumstances prevailing at the time it was quite unlikely that anyone would have taken such a risk. Anyway, even if he did, what would have happened to his other two children? For the father would have known that if the authorities did not get the child they wanted, they could have easily taken his other children or even destroyed his entire family. But, could he not have fled to some other part of the country with the whole family? Again, no part of the country was safe at the time, as terror had spread to all parts. Furthermore, such a move would have put many others at risk. Finally could the father have not sought the help of the courts? No, because the courts those days hardly had any influence over such matters with at least 30,000 deaths taking place in the South of the country alone, with little intervention by the courts, to prevent them.

The Predicament of the Common People

The predicament faced by this father was no different to that faced by the parents of the 47 other children. He was a Sinhala father desperately trying to protect his son from a Sinhala Army and miserably failing to do so. A moment's reflection on these events would show the nature of the military operations in Sri Lanka at the time. There was little control over what the military could do or not do. After all, boys teasing one another over a love affair, was hardly a matter requiring military intervention. But even in such matters they were given the authority to arrest – which in this case was by way of 'an invitation' to the father to hand over his son to the military. They were given powers of indefinite detention over 16-17 year-old schoolboys. They could engage in the cruelest forms of torture and thereafter tell the parents to look after the medical treatment.

When the decision was made to eliminate the boy, they were at liberty to organize his abduction from the Army camp itself and once killed, dispose of his body. How the boys were killed or where their bodies were buried has never been revealed. To me, this extent of absolute power over people that prevailed in these circumstances finds little parallel anywhere else in the world. Yet this was not a strange phenomenon in Sri Lanka because at least 15% of those who disappeared in the South during that time were below the age of 19.

Imposing of Minimum Safeguards

Let us consider the situation of this father if at least a minimum degree of rule of law existed in the country. Then, he could have inquired into the reason his son was wanted for questioning and under

what provision of the law he was detained. Also, if no reasonable explanation was given he could have resisted arrest.

Notwithstanding, if the military proceeded to arrest his son, he could have retained a lawyer and sought the assistance of a court of law. He could have also sought the help of the media, civil society organisations and even politicians to save his son. And he would have acted with greater intent and indeed success once it was made known his son was forced to swallow dangerous objects. Hence if even the basic tenets of the rule of law prevailed, with a little effort, he could have dealt with the military. And when 48 families found themselves in the same plight, they could have virtually brought the military to their knees and saved the children. However none of these possibilities were available for the parents of Embilipitiya.

Conversely, in Bindunuwewa, the detainees among whom numbered children were in a detention camp in a Sinhala residential area when they were attacked and hacked to death by a Sinhala mob that descended upon the camp. The officers in charge of the camp who were Sinhalese, failed to protect them. The tormentors were Sinhalese and the victims were Tamils. Also when the parallel is taken a little further it is not difficult to imagine the ferocity with which the Sri Lanka Army would have acted towards the Tamils in the North and East. The lack of restraint and despotic terror they demonstrated at Embilipitiya would have been very much worse in the conflict zones.

So are the atrocities committed at Embilipitiya and Bindunuwewa (or for that matter in the North and East) really that different? Is the unleashing of terror by the military purely a matter of race? Or is it not the almost uncontrolled nature of military operations in the country and the ruthlessness in which they are permitted to operate, the underlying factor instead?

And is not the failure of the justice system to deal with such excesses – whether they happen in the South or the North – also a factor that has some relevance? While in the Embilipitiya case there is no gainsaying that ultimately, the Supreme Court did uphold the convictions of some of the accused, (unlike in the Binudunuwewa case), the extent of the justice meted out, coming as it did long years later, was undoubtedly pitiful as would be referred to in a later part of this analysis.

At the core of this denial of justice to a greater or lesser degree both in the Binudunuwewa and Embilipitiya incidents, is the absence of the protection of the rule of law. If the rule of law guarantees had been accorded its due respect, neither incident would have happened.

Disposing of Racial Paradigms

The explanations proffered for violence in Sri Lanka has been mostly based on racial paradigms. For that reason, such explanations have not enabled us to develop insights into finding lasting solutions to the menace of violence. Thus it is high time that those who engage in theoretical discussions on the causes of violence in Sri Lanka look also into common factors that contribute to such violence whether the victims of violence are those who perished at Embilipitiya or those who were massacred at Bindunuwewa.

Mr. Handuwela who lost a son at Embilipitiya sees the fate that befell his son and 47 other schoolchildren, very much akin to that of the Bindunuwewa victims. According to him, the overall failures of accountability that made the Embilipitiya massacre possible definitely contributed to the massacre at Bindunuwewa. He is convinced that his country has not changed much, and the circumstances that cruelly snatched his son still prevails, even more than 15 years later. And only those theories that can provide an explanation to him as to how those circumstances could be brought to an end will convince him of the validity of any such theories. And if his agony is forgotten as irrelevant to the ongoing conflicts in Sri Lanka, will he – and countless others like him - take notice of such theoretical discussions?

The Holding of Military Inquiries

In most armies, the world over, the incidents complained of by this father would have led to an internal inquiry. Particularly, the discovery that 48 children were arrested, tortured and then disappeared from a military camp would have been sufficient to lead to an immediate and thorough inquiry into the allegations. After all, the military had its own police and investigation mechanisms. And investigations into such allegations are very much part of how strict discipline is enforced within the Armed Forces. Thus, where charges were serious and supported by ample evidence, the culprits could have been tried before a military tribunal and punished.

But in the case of the massacre of 48 schoolchildren, there was neither an internal military inquiry nor tribunal. It can also be said that this was not the only occasion in which elementary military practices were seen fit to be discarded. Then same predominates in regard to most complaints against Armed Forces personnel in the North and East. Hence we have this strange but wholly abominable situation where our military is allowed to function without even the basic discipline being maintained and with no consequences for military excesses and abuses.

Of course, we may presume that had there been an internal inquiry into this shocking incident, documents pertaining to the arrest and detention of the 48 boys as well as what eventually happened to them, would have gone on record. For example, when Mr. Handuwela was told to hand over his son to the military camp, the fact may have been recorded by the Colonel in charge as well as by the camp staff. There should also be records of the complaint of being forced to swallow dangerous objects, the boy's release to obtain medical treatment and his eventual disappearance. And the list of such recordings relating to 48 boys would have been a very long one indeed. There may also be records of who ordered what throughout the whole sickening episode. Tese documents would have provided sufficient material to establish the eventual fate of the boys.

However, in all probability, no such recordings were ever made at this military camp where the children were detained. Or else records were made, but when a hue and cry was made over the missing boys, the perpetrators were given ample time and opportunity to destroy or falsify the documents. Thus, what happened at one Army Camp in the South could have easily happened in any of the other camps maintained in the South, North or East.

Understanding Conflict in Sri Lanka

Over the past 20 years or so, a large amount of literature has been generated on peace and conflict resolution in Sri Lanka. These have dealt mostly with the North and East, more specifically, the conflict between the State Forces and the LTTE rebels.

In most of these writings, the emphasis has been on the racial terminology of 'Sinhala' and 'Tamil'. Of course, such differentiation may be useful to indicate the racial element which aggravates military repression. However, if employed without distinction, these terms can also be misleading in understanding the general nature of repression and conflict within Sri Lanka.

If we go back to the repression of the parents of Embilipitiya by the Sri Lanka Army and place it also in the context of the Northern conflict, we begin to see the larger picture – the main factors that contribute to this conflict. To put it simply, can anyone be expected to trust an Army that has been given the 'freedom of the wild jackass' to unleash their terror, with near-zero control of abuses by its personnel? Moreover, if the parents of the abducted Embilipitiya children have no reason to trust such an Army, can we expect the Northern Tamils -- who belong to a different ethnic category -- to have such trust? The same reasoning applies in the case of the police structures as is evidenced in the Bindunuwewa incident.

And the crux of the problem is that such trust is unlikely to be built unless visible and radical reforms are made within the armed forces and the police both in terms of external legal control and strict internal discipline. People in the South would assuredly not want 'their' military in their areas, until and unless such legal controls are established? In other words, would anyone in the South want to face the fate of the parents of Embilipitiya and what reason do they have to believe that it will not be otherwise in the future? This same logic applies, of course, with greater force in the North.

This brings us to a question relating to State institutions that are an integral part of the ethnic conflict. If the acts of army officers or police officers cannot be brought within the controls of the justice system, can there be any solution to the crisis that Sri Lanka faces? An average citizen would answer that this is not possible. However, foreign scholars, who read into conflicts certain assumptions about the performance of State institutions – which they may have acquired through living in more developed societies, where there is, at least, a basic institutional framework in place – may not consider the distrust citizens have of these institutions, as having much bearing on the conflict. Instead they find it easier to define conflicts in terms of religion or ethnicity. Certainly religion and ethnicity are noteworthy components of conflict, but such factors alone cannot explain conflicts unless they are related back to the actual context within which such factors make their impact felt.

Now we may return to the Bindunuwewa massacre where the victims were Tamils. The mob that slaughtered them was Sinhalese. The controllers of the detention facility were also Sinhalese. There is no doubt that the motivation for the killing was entirely racial. However, does that alone explain the Bindunuwewa massacre? Why was it that the State was unable to provide adequate protection for the detainees? Why were not the police and the Armed Forces mobilized in a manner that made such an attack impossible and even if attempted could have been prevented from escalating? However, given the type of the Armed Forces and the police that is prevalent and the nature of disciplinary control, (or rather its lack thereof), it is clear that there is little possibility of such competent, quick and efficient action being carried out by them.

Symbolic Justice is no Justice

A possible reaction of some to the comparison between the Embilipitiya and Bindunuwewa massacres is that in the former case there was 'at least some justice' whereas the latter ended without any justice.

The reference being made here is obviously to the fact that a few people were charged and convicted with the abductions of the Embilipitiya students whereas those charged in the Bindunuwewa case were all acquitted. Usually 'some justice' refers to a system of justice that functions at, at least a minimum level of credibility. But in this instance 'some justice' refers to some form of punishment being meted out without reference to basic levels of justice. That is, the Embilipitiya parents do not still know when there children were killed and though it is presumed that the boys were in fact killed, even this is not known with certainty. They also are oblivious to where their children were buried or burned and they do not know who killed them. So, what does 'at least some justice' mean under these circumstances?

It is true that the Embilipitiya case became quite an important event in whipping up political opposition to the ruling party at the time – the United National Party (UNP). The horrible details no doubt legitimized the demands of the opposition political parties, to overthrow by legal means the existing government. As a result, scores of disappearances, which were not spoken of and even justified on the basis 'that they were members of the *Janatha Vimuthi Peramuna* or Southern terrorists' found expression through the Embilipitiya schoolchildren's disappearance case and thus contributed to the political momentum in the South.

Conversely it is true that the Bindunuwewa massacre did not create any political momentum and did not lead to political change in the South. And though there was almost unanimous official condemnation of the act, such condemnation was not followed by any real action. Thus the fact that young Tamil men were slaughtered without any political implications, demonstrates some of the fundamental problems of the political process in the country.

However, the main point of this article is that unless there is a system of justice that functions at least at basic levels of credibility, no political process can be transformed to deal with the basic issues of human rights abuses – regardless of whether the affected group is Sinhala, Tamil, Muslim or other. It means that a discourse purely based on the politics of ethnicity without reference to the functioning of the justice system and institutions cannot bring about a breakthrough in the tautological reasoning involved in such political discourses.

Politics vs. Justice

A discourse on justice is separate from a discourse on politics. This does not mean that the two are unrelated – only that they are distinct. And, for the discourse in justice to influence the political discourse in a country, thereby breaking its tautological nature, there must first exist something akin to a discourse on justice. However sadly, such a discourse is quite absent in Sri Lanka. Such a discourse was also missing in the discussions involving the massacres of Embilipitiya and Bindunuwewa.

Class and ethnicity are also fundamental factors in the discourses of politics and justice, and the purpose of this essay is not to dispute this, in anyway. However in the absence of a separate discourse on justice, there is little medium through which the political discourse can be enlightened beyond trashy political rhetoric and propaganda literature. Stressing on the importance of a dialogue on justice is meant to bring out the totality of the crisis affecting everyone and places the specific problems of class and ethnicity within the larger problem of the absence of justice.

When the issue of justice is reduced to 'at least some justice' what is really being discussed is what kind of response could be generated by pure political pressure on some issue, which remains neglected, if such pressure is not exerted. To discuss some parallels, there is currently, a strong lobby criticizing the political failure to reduce crime. This pressure has resulted in a willingness on the part of the political establishment to condone extra judicial killings of those described as 'dangerous criminals'. This satisfies at least some sections of the lobby, which even celebrate such killings. And those in opposition to such extra judicial killings are described as either stupid or conniving with the criminals. And if allowed to continue, such pressure could lead to situations where even lynching would be tolerated. Therefore as the law enforcement of the country fails to deliver justice to those aggrieved by robberies, kidnappings and other forms of violence, the victims in turn demand that the State allow them to mete out justice themselves. Thus if they catch a person stealing, they may simply lynch him instead of handing him over to the police.

But this only amounts to 'symbolic justice' and means little other than a serious collapse of the justice system as a whole. Sometimes, such symbolic justice can also be granted through the courts *viz.* by sending someone to prison without much regard to the norms of justice, so as to avoid political embarrassment. Under those circumstances all that people can demand is "some justice", meaning some symbolic act to make them feel, there was some response from society to their suffering.

However, it is only a sick society that is appeased by 'symbolic justice', for true justice, in order to facilitate the reasonable resolution of conflicts within society, must operate through institutions that carry on irrespective of political pressures. Justice institutions acting basically independently from the political establishment is an essential part of a sane society. Without such sanity, society can become like the one that currently prevails in Sri Lanka – in the South, North and the East. And

however much we demand symbolic justice for any group, the situation in Sri Lanka will not change. Instead what is needed, is for the discourse in justice to be consciously reinstated into the stagnating social and political discourses in Sri Lanka.

All this points to the fact that a discourse on peace and conflict resolution in Sri Lanka needs to be far more comprehensive than at present, and needs to address the fundamental problems regarding the nature of the State and its institutions. To treat the Sri Lankan State as an entity that has basic checks and balances to deal with its problems is mere fallacy. And reflection and recommendation based on this fallacy is unlikely to contribute in an effective manner to bring forth practical solutions to the country's crises.

After the defeat of Germany in World War II, there began a serious discussion in Germany as to why it was not possible – under the constitutional framework of pre-war Germany – to prevent the rise of Hitler and him dragging the country to war. It was decided that new State mechanisms and institutions were needed to prevent a similar fate in the future. This line of thinking gave rise to the German constitutional court together with its extensive powers to handle constitutional matters. Therefore, preventing future disasters was not left to politicians alone, instead a new framework of justice was developed and novel legal institutions were created. I believe, it is such a discourse that is needed in Sri Lanka today. Here, it is not suggested that the country replicate the German constitutional court in Sri Lanka. Instead what is meant and urged is that the review of the entire legal framework in the country should take centre place in any discourse on peace and constitutional reform in the country.

Conclusion – Some Priority Concerns

In the light of the above, I suggest that the following be given priority in studies relating to peace, conflict resolution, democracy and human rights in Sri Lanka.

Chief among these concerns is the study of the conduct of the Armed Forces in military operations in post-independent Sri Lanka, particularly since 1971. Besides documentation of the abuses resulting from these operations (i.e. extra-judicial killings, torture and other gross abuses of human rights), the internal and external controls (or lack thereof) over such military actions and activities should also be included. For example, what internal reports exist about such operations and what is the mode of recording such activities within the armed forces?'

Additional questions include looking at the available avenues for making complaints and obtaining quick redress regarding the excessive behaviour of the Armed Forces and police at moments of tension or conflict and the constitutional strengths and defects of such available avenues.

We need also to measure the controlling influence exercised by Parliament in this regard, together with the strengths and defects of such controls. Importantly, we need to clarify the manner in which courts – both superior and lower – act to safeguard the rights of the people during times of turbulence. What are the inherent defects in the system and the operations of courts that make them unable to play a decisive role amidst conflict? Underlying this analysis is, of course, the basic question as to the role played by political allegiances including ethnic bias, in modifying the reactions of the courts to violations of citizen's rights by the State?

It is in this manner that the implications of over thirty years of conflict in the South, North and the East of the country on the legal fabric of the country, needs to be studied. The institutional framework of administration of the country - of the police, the Attorney General's Department and of the judiciary – needs special emphasis. Essential constitutional provisions that strengthen the higher judiciary, so that they could lead the interventions to protect the country from sliding into catastrophic disasters appear to be mandatory.

Importantly, the part played by the more elite sections of the Sri Lanka middle class in their reactions to gross abuse of rights by the Armed Forces and the police deserve closer scrutiny. In recent history, what has been their response in condemning gross violations? Do their reactions amount to encouragement and condonation of human rights abuses? Finally, critical analysis of the role of the media is this context needs to be of particular note.

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