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

Republic of Sri Lanka

-Vs-

C.A. Case No. 107/2012

H.C. Panadura
Case No. 2092/2006

1. **Gamage Prabhath Janaka Nayana Priyantha Perera,**
   Mahagedarawatte, Raddegoda,
   Paragasthota.
2. **Rajapaksha Pathirage Jayathissa,**
   Bogahawatte,
   Millewa.

ACCUSED

And Now

Gamage Prabhath Janaka Nayana Priyantha Perera,
Mahagedarawatte, Raddegoda,
Paragasthota.

1ST ACCUSED - APPELLANT

-Vs-

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

BEFORE	:	**Vijith K. Malalgoda, PC. J. (P/CA)** and **A.H.M.D. Nawaz, J.**
COUNSEL	:	Amila Palliyage with Eranda Sinharage for the Accused-Appellant. Sarath Jayamanne, PC, ASG for the AG.
Argued on	:	23.01.2015 and 16.02.2015
Decided on	:	27.05.2016

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

By an indictment dated 30th November 2005 the Attorney General indicted the following Accused to stand trial in the High Court of Panadura for committing the murder of one **Gallage Don Premaratne** *alias* **Kalu Preme** on or about 21st February 1992 at Kananwila-an offence punishable under Section 296 of the Penal Code read with Section 32 of the said Code.

1. Gamage Prabhath Janaka Nayana Priyantha Perera
2. Rajapaksha Pathirage Jayathissa

After a trial before a Judge, both these two accused were found guilty of the lesser charge of culpable homicide not amounting to murder and on 25th May 2012, the learned High Court Judge of Panadura imposed a sentence of 7 years' rigorous

imprisonment with a fine of Rs.25,000/- on the 1st Accused and a sentence of 12 years' rigorous imprisonment along with a fine of Rs.25,000/- was imposed on the 2nd Accused.

Whilst the 1st Accused (hereinafter referred to as 'the Appellant') has preferred this appeal against the aforesaid conviction and sentence, the 2nd Accused has not made an appeal to this court. In the circumstances the determination of this appeal will focus on the propriety of the conviction and sentence pronounced against the Appellant.

Before I deal with the questions of law arising in this appeal a compendious narrative of facts becomes apposite.

The principal evidence for the prosecution to drive home the capital charge against both accused emerged through a non-summary deposition of an eyewitness to the incident namely; **Munasinghe Wimalaratne Silva** who had since passed away at the time of the trial. The prosecution placed this evidence before the High Court of Panadura by virtue of Section 33 of the Evidence Ordinance.

According to the non-summary deposition of the said Munasinghe Wimalaratne Silva (hereinafter sometimes referred to as 'the witness' or 'the eyewitness'), whilst he was proceeding towards Kahatapitiya, he met the Appellant, the 2nd Accused (the accused who has not preferred an appeal) and one Siripala who were all drinking in a rubber estate. Ajantha who was the 3rd Accused at the non-summary inquiry but was later discharged by the Hon. Attorney General after committal, joined the drinking binge. In the end the bacchanalian party constituted a group of five persons comprising the Appellant, the 2nd Accused, Siripala, Ajantha and the witness himself.

Giving a detailed account of their nocturnal escapades in search of intoxicants to which the witness was accosted, the witness describes as to how both the Appellant and the 2nd Accused armed themselves on this fateful day namely 21st February 1992.

Whilst the 2nd Accused picked up a gun from a drain, the Appellant pulled out a *manna* knife. Then the witness Munasinghe Wimalaratne Silva speaks of the arrival of a push bicycle which was stopped by the 2nd Accused and immediately the cyclist was set upon by Siripala and dealt a blow.

As the cyclist went away after he was manhandled, there arrived on the scene a motorcycle with three riders thereon, one of whom was the deceased Premaratne aka *Kalu* Preme. The eyewitness deposes in his deposition that the deceased got off the motorcycle calling out *Tissa*–the2nd Accused in the case. It has to be recalled at this stage that the widow of the deceased who was called to testify at the trial as to the identification of the dead body also stated in her evidence that her deceased husband had known *Tissa*–the 2nd Accused in the case as they hailed from the same village.

According to the non-summary testimony of Munasinghe Wimalaratne Silva, the deceased told the other two riders on the motorcycle to leave. Thereafter Tissa (the 2nd Accused), Parabath (the Appellant) and the deceased were in conversation on the road.

The witness next states that he saw the Appellant assaulting the deceased with his hand whereupon the deceased took to his heels shouting – "don't kill me" and he ran along the bank of a canal. The Appellant and Tissa (the 2nd Accused) gave chase to the deceased whilst the witness, Ajantha (the 3rd accused in the non-summary inquiry who was later discharged by the Attorney General) and Siripala followed the Appellant and the 2nd Accused. The deceased had shouted back saying "Don't kill me. Please allow me to go and I will have my wound dressed up" but the Appellant and the 2nd Accused kept chasing after the deceased. In response to a plea of the deceased, the 2nd Accused shouted back, "I cannot do anything, you are going to be killed".

The witness next states that he saw Prabath (the Appellant) attacking the deceased with the *manna* knife and that blow felled the deceased. The witness states that when he saw this episode with the aid of moonlight on that fateful night, he was standing at a distance of 5 feet away from the scene. He saw the Appellant deal a blow again to the deceased who was now lying fallen. He couldn't remember as to how many blows the Appellant dealt the deceased Premaratne.

Thereafter the Appellant had come towards the witness and others intimidating to kill them if they divulged the heinous act to anyone. The same fate were to befall them if they squealed on him. This witness stated that as a result of these death threats, he couldn't make a prompt complaint to Police. However the pang of guilt was gnawing at his conscience for a while but it was the death threats that kept the witness away from reporting this incident. It has to be pointed out that all three Accused at the non-summary inquiry (the Appellant, 2nd Accused and Ajanta) were represented by Counsel who conducted their own individual cross-examination of this witness at the inquiry.

Belated Statement of the Eyewitness to Police

The witness did not report the incident to police immediately. At the non-summary inquiry the witness admitted to a lapse of about eighteen months before he gave information pertaining to the killing. According to the Assistant Superintendent of Police who testified at the trial, the witness came to the police station voluntarily and made a statement. Upon being questioned in cross examination in the Magistrate's Court as to why he delayed reporting this incident, the witness Munasinghe Wimalaratne Silva reiterated that his reluctance was due to the fear of death instilled into him. By the time the witness plucked up courage to make a statement to police a period of about eighteen months had elapsed since the incident on 21st February 1992.

Merely because a witness maintains silence for more than a year after he has witnessed violent acts on another, the court is not entitled to reject such testimony *ipso facto.* Why the witness did not reveal a dastardly act or otherwise is a fact for him or her to explain and in fact if the explanation is plausible and credible the Court must act on the testimony albeit belated.

It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness in the course of investigation the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed statement is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion made by the trial court for accepting the belated testimony.

Our Courts have emphasized the underlying rationale in several decisions. No doubt the well known tools of assessing the credibility of a witness such as tests of spontaneity, contemporaneity and promptness enhance the testimonial trustworthiness of the witness but they do not operate as inflexible rules. There exists an exception to these rules-namely if a belated testimony is proffered by the prosecution, the Court has to proceed to scrutinize the reasons for the delay-*vide* the percipient observations of T.S. Fernando J in ***Pauline de Croos v. The Queen***,[1] and the perceptive comments of Frederick Ninian Dimitri (F.N.D) Jayasuriya J. on the tests for credibility in regard to the belated testimony of an eye witness called Chulasiri in ***Ajith Samarakoon v. The Republic*** **(Kobaigane Murder Case)**.[2]

At pages 246, 251 and 252 of the appeal brief there is enough testimony as to the fear entertained by the particular witness that explains the delay is not reporting this incident to the Police Officers.

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[1] 71 N.L.R 169 at 180
[2] 2004 (2) Sri.LR 209 at 220

The witness avowed that there was no enmity between him and the accused. There was no friendship or family relationship with the deceased. In the absence of ill will towards the accused or affection with the deceased and having regard to the testimony of the police witness who spoke to voluntary nature of the witness's statement albeit belated, this Court finds the reason given by the witness for belatedness plausible and acceptable.

It cannot be gainsaid that the non-summary testimony of Munasinghe Wimalaratne Silva established that the deceased Premaratne came by his death at the hands of the Appellant and the 2nd Accused in this case.

Impugnation of Section 33 Evidence

The Counsel for the Appellant *though* sought to impugn this evidence placed before the High Court on several grounds. It was contended that the narrative of Munasinghe Wimalaratne Silva needed corroboration as he did not fully testify to all the events that occurred on the day in question. In fact the learned Counsel for the Accused-Appellant drew the attention of this Court to the evidence of another witness namely Gunapala who refers to three different events on the day in question. According to Gunapala who was a resident close to the scene of murder, five persons had come into his compound on the night of the day in question and made noise threateningly. Thereafter these persons raided a nearby den of hooch (*kassippu)* and the witness heard them manhandle some of those who were imbibing liquor. Gunapala who was led as a 2nd witness at the trial spoke of three events on the night of 21st February 1992. The first event pertained to the above story of five people arriving at his house and rushing towards the *kassippu* den. The witness Gunapala spoke of a second incident where he heard an assault on a cyclist about quarter an hour later on the same night. He heard the bicycle falling with somebody shouting "Do not hit me." Then the cyclist went away. Thereafter the witness refers to a third incident of the arrival of a motorcycle and subsequent assault on a person

who had been detained after the arrival of the motorcycle. The following morning he saw the deceased lying with cut injuries on his neck in the paddy field located somewhere in front of his house. It has to be noted that Gunapala never identified the five people who came into his compound on the day in question. He was not able to connect the accused in the dock to these three events. According to him he was watching all these events from his house in darkness from and even though the second and third events namely the arrival of a bicycle followed later by a motorcycle resonate to some extent with the version given by Munasinghe Wimalaratne Silva, in my view it is the non-summary deposition (Section 33 evidence) that unfolds the narrative as to the killing. But the learned Counsel for the Appellant contended otherwise.

Juxtaposing the testimony of Gunapala vis-à-vis the non-summary deposition of Munasinghe Wimalaratne Silva, the counsel argued that the eyewitness account of Munasinghe Wimalaratne Silva which emerges through the testimony of his non-summary deposition is not corroborated at all by Gunapala and therefore the court should be slow to act on the uncorroborated evidence of Munasinghe Wimalaratne Silva.

This Court takes a contrary view to this argument of Counsel and highlights a salient difference between the two witnesses. Whilst Gunapala never identified any of the Accused, Munasinghe Wimalaratne Silva witnessed the killing at the scene. He identified both the accused and the deceased. If a witness speaks of incidents on the day in question but cannot identify the accused or connect them to the incidents, we would bear in mind that the elements of the offence would not be borne out by that particular witness. In those circumstances the non-eyewitness testimony cannot render the eyewitness testimony unworthy of credit. It is true that there were two other riders on the motorcycle, who arrived with the deceased on the day in question. But there is evidence that the deceased told them to leave and the

deceased was in the company of the Appellant, the 2nd Accused, Ajantha, Siripala and the eyewitness whose lower court testimony was admitted at the trial. If the other riders left the scene at the bidding of the deceased, they would not be able to unfold the narrative that took place subsequently. They can only speak to their arrival along with the deceased. This initial arrival of the deceased is spoken to by Munasinghe Wimlaratne Silva whose lower court testimony was admitted under Section 33 of the Evidence Ordinance. In those circumstances there was no duty on the part of the prosecutor to summon the other riders on the motorcycle as witnesses. If other witnesses (the riders who went away) are not going to state anything new, the prosecutor cannot be faulted for not calling the other riders because the evidence of Wimalaratne Silva who speaks to the same fact has already been placed before Court. In such a situation the invocation of a Section 114(f) presumption under the Evidence Ordinance would not arise and in fact it is our view that Section 33 evidence unfolded the narrative before Court. There was no warrant in such a situation to draw adverse inferences as the principle on drawing of adverse inferences, as adumbrated in ***Walimunige John v. The State,***[3] would not be applicable in this case. Merely because the prosecution does not lead a witness whose name appears on the back of the indictment, it does not necessarily lead to adverse inferences being drawn against the prosecution in terms of Section 114(f) of the Evidence Ordinance. Adverse inferences are invoked when a witness is essential to complete the narrative but the witness is not led at the trial. The prosecution is not bound to call all the witnesses on the back of indictment. But if a material witness, essential to the unfolding of the narrative is not called, and no satisfactory explanation is given, the Court can draw the presumption under Section 114(f) of the Evidence Ordinance[4]. In this case the eyewitness Wimalaratne Silva completes the

[3] 76 N.L.R 488

[4] *See R v. Stephen Seneviratne* 38 N.L.R 208 at 221; The *King v. Chalo Singho* 42 N.L.R 269 at 217; *The King v. Wegodapola* 42 N.L.R 459 at 464; *The Queen v. Abeyratne* 64 C.L.W 68; *Gunasekara v. AG* 79 (1) N.L.R 348 at 351-352

narrative *in extenso* and no other witness could have stated anything new as they had not witnesses the whole incident which culminated in the termination of life of the deceased.

One cannot seek corroboration from a witness who does not establish directly or indirectly either *mens rea* or *actus reus* on the part of an accused. Neither would an eyewitness who gives a credible testimony of what he saw, heard and perceived require corroboration.

In a murder case, based on direct witness account, it is necessary to examine the testimony of an eyewitness in order to ascertain whether he did really see the occurrence and whether the statement given by him appears to be natural and truthful and whether such statement found in corroboration with the medical evidence on record and other circumstances advances the guilt of the accused or diminishes it. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses led do not speak to the occurrence under scrutiny. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable.

Merely because the eyewitness testimony at the trial emerges from a Section 33 conduit, it does not lose its weight if it contains sufficiently probative material. At this stage the criteria for admissibility under Section 33 of the Evidence Ordinance need recapitulation.

Admissibility of Evidence under Section 33 of the Evidence Ordinance

Section 33 of the Ordinance provides one of the exceptions to the hearsay rule, when it states that evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant in a subsequent judicial proceeding, or in a later stage of the same proceeding provided the conditions and safeguards

laid down in Section 33 are present. Such evidence is relevant for the purpose of proving the truth of the facts which it states.

> *"A criminal trial or inquiry is deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."*[5]

Let me briefly touch on the preconditions prescribed in the Evidence Ordinance for the reception of the non summary deposition of a witness who is not available to give evidence when the High Court trial comes around.

Condition of Admissibility under Section 33[6]

Condition (A) - *The evidence should have been given in a judicial proceeding or before any person authorized by law to take it.*[7]

Condition (B) - *The witness who gave the evidence – is dead*

Condition (C) - *The proceeding must be between the same parties or their representatives in interest.*[8]

Condition (D) - *The adverse party in the first proceeding should have had the right and opportunity to cross-examine.*[9]

The section draws a distinction between the right to cross-examine and the opportunity to cross-examine. There is ample evidence on the record that the aforesaid preconditions were fulfilled for the reception of the non-summary deposition. As I said before in this judgment, at the non-summary inquiry there was individual cross-examination conducted of the eyewitness on the part of all the Accused including the Appellant.

Substantive Evidence through Section 33

It has to be noted that the evidence that is admitted through Section 33 of the Evidence Ordinance is received as substantive evidence of the testimony given in the

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[5] Explanation to Section 33 of the Evidence Ordinance
[6] *See* Stephen, Digest , 4th Ed., Art.32
[7] *Bihari Singh Madho Singh v. State of Bihar A.I.R.* (1954) SC 692; (1954) Cr.L.J. 1742
[8] Proviso (a) to Section 33
[9] Proviso (b) to Section 33

former judicial proceedings. Substantive evidence, as is understood in the Law of Evidence, is intended to prove the truth of the facts stated. Though Sir James Fitzjames Stephen-the progenitor of Indian Evidence Act and our own Evidence Ordinance limits evidence to oral and documentary evidence in the Evidence Ordinance,[10] evidence in a trial does not necessarily come through these two modes alone. The Evidence Ordinance is inclusionary in that exceptions to hearsay are recognized in Sections 17 to 38 of the Evidence Ordinance that enable the reception of hearsay evidence for truth contained in that evidence to be acted upon and believed for its veracity.

Evaluation of Section 33 Evidence

The considerations that arise when such a deposition is tendered in evidence under Section 33 of the Evidence Ordinance are different from those attending the use of statements in the Magistrate's Court or High Court to contradict a witness. In the former case, the statements come in as substantive evidence, whereas when they are used to contradict, they cannot be used as substantive evidence.[11] It would be incorrect to apply cases relating to contradictions to depositions admitted under Section 33 as substantive evidence, except as provided in Section 158 of the Evidence Ordinance. When the witness is present, his evidence in a former judicial proceeding may always be used to corroborate or contradict him. If the witness is dead by the time the High Court trial comes about, the former testimony at the non-summary inquiry could be acted upon as substantive evidence to establish the truth of what that evidence contains.

Has the Former Testimony been Impeached?

The question arises as to how this evidence has been dented by the defence. This question has to be answered by taking the whole statement into consideration vis-à-

[10] See Section 3 of The Evidence Ordinance

[11] Cf. *The King v. Sudu Banda* (1946) 47 N.L.R. 183; *The King v. Punchi Banda* (1946) 47 NLR 203; S.S. *Fernando v. The Queen* (1953) 55 NLR 392

vis other evidence available in the case. Has, the Section 33 testimony on which a Court can act for its veracity, been in any event impugned or attacked on its testimonial trustworthiness?

The answer lies in an evaluation of how it has been confronted by the Appellant in the Magistrate's Court and what other evidence enhances or diminishes its probative value. Let me begin with the cross-examination conducted in the Magistrate's Court. The cross-examination on behalf of the Appellant had proceeded on the basis that the witness was uttering a falsehood and it was him who was responsible for the murder. This bare suggestion is not borne out by evidence. In the absence of any basis for those suggestions the integrity of the evidence stood uncontradicted and uncontroverted in the Magistrate's Court. It has to be observed that when counsel makes suggestions to a witness in court, it has to be well founded-*see* Section 149 of the Evidence Ordinance. Therefore acceptance of Section 33 evidence for its truth was well founded and the learned High Court Judge was quite right in acting on the Section 33 evidence.

Unsworn Statement and its Evidentiary Value

When one traverses the trajectory of totality of evidence given in the High Court of Panadura, one comes across the dock statement made by the Appellant which has to be evaluated because as consistently laid down in our Courts such an unsworn testimony is looked upon as evidence subject to the infirmity that the Accused has deliberately refrained from giving sworn testimony, and the jury or the judge in this instance must be so directed. But it has to be borne in mind that:-

a) If the trier of fact believes the unsworn statement it must be acted upon.

b) If it raises a reasonable doubt in his mind about the case for the prosecution, the defence must succeed.

c) It should not be used against another accused.

See the *cursus curiae* in ***Queen v. Kularatne***[12] and ***King v. Vallayan Sittambaram*** wherein Bertram C.J allowed the appeal of the Accused-Appellant because one of the grounds was that the Trial Judge had refused to the accused the opportunity of making an unsworn statement,[13] ***Queen v. Buddharakitha,***[14] ***Gunapala and Others v. The Republic of Sri Lanka,***[15] and ***Kathubdeen v. Republic of Sri Lanka.***[16]

I must refer to the cogent evidence given by the medical officer who conducted the post-mortem examination. This evidence is corroborative of the prosecution case. The expert spoke of four injuries out of which the 1st injury which was 5 inches long had cut the vertebrae. The cut injuries were deep and inflicted on the neck. According to the medical doctor, all four injuries could have been caused by a weapon with a sharp cutting edge and long blade. This corroborates the testimony of Wimlaratne Silva who stated in no unmistakable terms that he saw the Appellant inflict these injuries with a *manna* knife. Emanating as it was from an independent witness who was disinterested and impartial, the evidence of the doctor was not challenged.

Dock Statement made by the Appellant

The dock statement made by the Appellant teems with inconsistencies. Apart from a mere denial of any knowledge about the killing which was proclaimed from the dock, the Appellant denied any knowledge of the deceased. The Appellant spoke of going to see a musical show which was not mentioned when his counsel cross-examined the witness in the non-summary inquiry. The Appellant refers to 2nd July 1992 as the date of his musical entertainment whereas the offence took place on 21st February 1992. If he was pleading a defense of *alibi,* it is not made out on the evidence as

[12] 71 N.L.R 529 at 551 (a judgment of the full bench of Court of Criminal Appeal)
[13] *See* 20 N.L.R 257 at 266
[14] 63 N.L.R 433
[15] (1994) 3 Sri.LR 180
[16] (1998) 3 Sri.LR 107

prosecution evidence establishes his presence on the date of the offence at the scene. It is our view that alibi is an afterthought.

No reference was made or suggested in the dock statement as to any enmity with the eye witness except for a reference to one *Chamila Silva Munasinghe* who was allegedly introduced by police to testify against him. Though it is not clear whether *Chamila Silva Munasinghe* referred to in the dock statement and the eyewitness is one and the same person or different persons this allegation of a frame-up was not at all suggested to the two police officers who gave evidence at the trial. The Appellant gives the date of his arrest as 5th June 1993 whereas the Police Officer testified that the Appellant was arrested on 16th June 1993-a discrepancy that was never resolved by clarifying it with the police evidence.

The Appellant made allegations in his dock statement that after his arrest the police intimidated and assaulted him in order to extract the truth about the murder. This position was never suggested to police officers nor was this the appellant's case in the Magistrate's Court. Thus the case of the Appellant suffers from inconsistency *per se* and *inter se*. If *Chamila Silva Munasinghe* and the eyewitness *Munasinghe Wimalaratne Silva* were one and the same, why was not, the allegation that he was planted by police, put to him when he was giving evidence in the Magistrate's Court? It has to be recalled that police evidence was to the effect that *Munasinghe Wimalaratne Silva* came to the police station, though belatedly, to bare it all. Why weren't the police officers confronted with a police fabrication when they gave evidence?

A witness is normally considered to an independent witness unless he springs from the sources which are likely to be tainted such as enmity or relationship and which make him inclined to implicate the accused falsely. Nothing has been shown or established before us as to why this eyewitness should be inimical towards the Appellant.

Was the Eyewitness an Accomplice?

In our view the witness was not a *particeps criminis*. On a perusal of the totality of evidence in the case, he does not come within the definition of an accomplice. He falls far short of the requirements which would confer on him that status.

In ***Chetumal Rekumal v. Emperor***[17] the definition of an accomplice was propounded.

> *"An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is, admittedly,* ***not every participation in a crime which makes a party an accomplice*** *in it so as to require his testimony to be confirmed."* (Emphasis added)

This meaning was adopted by Basnayake J. (as he then was) in the case of ***Pieris v. Dole***[18]. Basnayake J. also refers to the words of Chandravarkar J. in ***Emperor v. Burn***[19]

> *"No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice, and his testimony must be judged on principles applicable to ordinary witnesses."*

So as correctly submitted by the learned Additional Solicitor General, Wimalaratne Silva was not a witness for whom Court should look for corroboration.

Failure to Explain Incriminating Evidence

The Appellant has not explained away several items of incriminating evidence which the eyewitness spoke of. On the 22nd February 1992 the eyewitness places the Appellant at the scene. He was in the company of the deceased and three others including the witness. He was armed with a *manna* knife. According to the witness he

[17](1934) AIR Sind p.185 at 197; 1934 SCC OnLine Sind JC 52
[18]49 NLR 142
[19]11 Bombay Law Reports 1153 at 1155; *Emperor v. Percy Henry Burn* 4 Ind Cas 268

chased after the deceased and dealt him blows. After doing Premaratne in, the Appellant intimidated the eyewitness and others present at the scene. The mere declaration that the Appellant did not know the deceased and that the witness committed the murder himself would not suffice in the teeth of these items of incriminating evidence.

Evidential Burden on the Appellant

The dock statement is devoid of material facts explaining away the incriminating items of evidence stemming from the prosecution evidence. Such a failure to offer an explanation irresistibly leads this Court to inferences and presumptions founded on common sense and logic. This court is not certainly placing or imposing a legal burden or a persuasive burden on the Appellant to prove his innocence or that he did not commit a criminal offence. The court is merely imposing an evidential burden either by giving evidence or making a dock statement of explaining away the highly incriminating circumstances and inferences established by the prosecution against him. Several decisions of our Courts have emphasized this evidential burden beginning with seminal precedents such as ***King v. Geekiyanage John Silva***[20] and ***Albert Singho v. The Queen.***[21] This burden could be discharged either by giving evidence or calling witnesses or even in the course of a dock statement since the making of an unsworn statement is a long recognized right of an accused in this country.

A useful illustration of the rationale for the evidential burden in the context of giving evidence appears in the judgment of the House of Lords in ***Murray v. DPP***,[22] a case concerned with the provisions relating to silence in a Northern Ireland legislation. In fact Murray appears to me to be one of the cases reflecting a modern version of the Ellenborough dictum that our Courts have oftentimes alluded to in their decisions.

[20] 46 N.L.R 73
[21] 74 N.L.R 366
[22] (1993) 97 Cr.App.R 151 HL

This Court holds that the Appellant failed to discharge his evidential burden of explaining away the incriminating circumstances against him.

Thus the dock statement made by the Appellant barely bears scrutiny by this Court and we proceed to reject it as self serving and devoid of exculpatory evidence that throws doubt on the prosecution case.

Defence called by the Appellant

The Court now turns to the evidence of a witness called by the Appellant namely one Ajantha who had been a co-accused with the appellant in the non summary inquiry. As I have stated before in this judgment, Ajantha was the 3rd Accused who was discharged by the Hon. Attorney General after committal. This witness does not advance the case of the Appellant as is quite evident from the unsatisfactory evidence he gave at the trial. According to the non-summary deposition of the eyewitness, Ajantha was one of those who was a member of the five member party on that fateful night. But in the trial he denies his presence. There was a culpable omission on his part to take up this position at the Magistrate's Court when his individual cross-examination of his accompanying companion Wimalaratne Silva–the eyewitness took place. Having omitted to assert his absence from the party of five men on the date of the offence, he testified at the trial that he was never there with the group on the day of the offence His contradictory stance does not induce confidence in his testimony and he could not have been so amnesiac at the trial. We are in agreement with the learned High Court Judge that the evidence of Ajantha does not take the case of the Appellant anywhere near exculpation.

So in totality it is our view that the case of the Appellant does not throw any doubt on the prosecution.

So this Court finds no misdirections of law and fact in the judgment of the learned High Court Judge of Panadura as she has indulged in a comprehensive analysis of the

evidence and law in convicting the Appellant of the lesser offence of culpable homicide not amounting to murder and sentencing him to a term of 7 years' rigorous imprisonment. The learned High Court Judge has not reached a perverse or unsustainable verdict and it is our view that the Appellant has suffered no miscarriage of justice.

We have given careful consideration to the evidence placed before the High Court and the judgment pronounced by the learned High Court Judge. We have given our anxious attention to the comprehensive arguments advanced before us by both the learned Counsel for the Appellant and the learned Additional Solicitor General.

We would reiterate that it is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. We do not find such deliberate embroideries as would throw overboard the case of the prosecution.

It is necessary, to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

We conclude that there is a ring of truth that resonates with the prosecution version in the main and we proceed to affirm the conviction and sentence pronounced in the case. In the circumstances we dismiss the appeal of the Appellant.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, PC. J. (P/CA)

I agree

PRESIDENT OF THE COURT OF APPEAL