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

In the matter of an Appeal under Section 154(p) of the Constitution read with Section 331 of the Criminal Procedure Act No 15 of 1979

Hon. Attorney General,
Attorney General's Department, Colombo 12

Court of Appeal
Case No. 75-76/2014

Complainant

High Court of Negombo
Case No. HC 65/2006

-Vs-

1. Horanage Ajith Priyantha, (Dead)
   No. 26/6, Gotabhaya Mawatha, Hunupitiya, Wattala
2. Hewa Dewage Cyril Priyaratne alias Lokka,
   No.572, Wanawasala, Kelaniya
3. Bulathwelage Sajeewa Priyantha alias Ranga,
   No. 26/6, Gotaghaya Mawatha, Hunupitiya, Wattala
4. Bopearachchige Nandapala Perera,
   No. 27A, Gotabhaya Mawatha, Hunupitiya, Wattala

Accused

AND NOW BETWEEN

1. Hewa Dewage Cyril Priyaratne alias Lokka,
   No.572, Wanawasala, Kelaniya
   2nd Accused Appellant
2. Bulathwelage Sajeewa Priyantha alias Ranga, No. 26/6, Gotaghaya Mawatha, Hunupitiya, Wattala
   03rd Accused Appellants
3. Bopearachchige Nandapala Perera,
   No. 27A, Gotabhaya Mawatha, Hunupitiya, Wattala
   04th Accused Appellants

-Vs-

Hon. Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Neranjan Jayasinghe with Isansi Dantanarayana for the 02nd Accused – Appellant

Anil Silva PC with Thaia Rulihan for the 03rd Accused – Appellant

Saliya Peiris PC with Navindi Ekanayake for the 04th Accused – Appellant

Madawa Thennakoon, DSG for the Complainant-Respondent

Written Submissions: By the 02nd Accused – Appellant on 21.09.2017

By the 03rd Accused – Appellant on 04.10.2017

By the 04th Accused – Appellant on 06.10.2017

By the Complainant-Respondent on 05.03.2021

Argued on: 09.02.2021

Decided on: 02.08.2021

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Negombo, dated 20th March 2014, by which, the three accused-appellants, who are before this Court, were convicted and sentenced to death for having committed murder of one Maldeniyage Vinod Idunil Krishantha (the deceased).

The accused-appellants, together with the first accused (who had died prior to commencement of the trial) had been indicted on two counts which charged them with,

1. having committed murder, by causing the death of the deceased above-named on 9th January 2001, thereby committing and offence punishable under section 296 read with section 32 of the Penal Code and
2. having voluntarily caused hurt to one Hettiarachchige Namal Geeth Kumara (PW5) on the same day, at the same time and during the course of the same transaction, thereby committing an offence punishable under section 314 read with section 32 of the Penal Code.

The trial had commenced on the 8th of July 2009, during which the prosecution had, led evidence of ten witnesses, marked documents X-1 to X-3 and produced a trouser, knife, motor bicycle and two three-wheelers. Once the prosecution had closed its case, the second and fourth accused-appellants had made statements form the dock.

At the conclusion of the trial, the accused-appellants had been found guilty on the first charge and acquitted on the second charge. With reference to the said conviction and sentence the learned counsel for the accused-appellants stated as follows.

Counsel for the second accused-appellant contended that,

1. the learned Judge of the High Court had failed to take into consideration the three contradictory versions of evidence given by Mathakadeera Arachchige Ramyalatha (PW1), Mathakadeera Arachchige Kusumalatha (PW6) and PW5,
2. the learned Judge of the High Court had failed to take into consideration the principle relating to common murderous intention and that
3. the learned Judge of the High Court had failed to evaluate the statement made from the dock by the second accused-appellant and had failed to give reasons for rejecting the same.

Counsel for the third accused-appellant contended that,

1. the third accused-appellant had been denied a fair trial,
2. the learned Judge of the High Court had failed to analyse the evidence led by the prosecution and thereby caused a miscarriage of justice and that
3. the learned Judge of the High Court had erred in law by continuing with the trial when he had previously requested the Chief Justice to appoint the predecessor.

Counsel for the fourth accused-appellant contended that,

1. the learned Judge of the High Court had failed to satisfy the test of credibility by analysing the consistency of the testimony of witnesses and therefore had erred in law by convicting the fourth accused-appellant on the evidence led by the prosecution;
2. the learned Judge of the High Court had erred in his judgment by rejecting the omission marked by the counsel for the defence which would assail the case of the prosecution;

The events that preceded the case before the High Court had been unveiled by the prosecution thus, on or about the 9th of January 2001, at around 5.30 in the evening the deceased and PW5 had attended a funeral of their uncle at Gotabaya Road. Whilst they were waiting on the road, the accused-appellants along with the first accused had arrived in a three-wheeler and a bike armed with knives and cleavers. The first accused had called PW5 near the three-wheeler and when he had got closer to the three-wheeler, he had been dragged inside and assaulted by the first accused and accused-appellant who had been inside the vehicle. In the meantime, the deceased had fled from the scene and had run towards the funeral house where he had been stabbed to death by the accused-appellants and the first accused.

The learned counsel for the third accused-appellant argued that the third accused-appellant had been denied a fair trial principally owing to the fact that, during the trial, the learned Judge of the High Court had rejected the letter of authorization produced before Court by the counsel, who seemed to have received instructions from the third accused-appellant to represent him, since it had no valid reference to the third accused-appellant. The learned counsel further argued that the learned Judge of the High Court had acted contrary to the well-

established principle which is that, when a counsel makes an application to defend an accused who is not present in court no further proof is required from him.

Since this question requires analysis of the right of an accused person to a fair trial, the manner in which the law relating to the principle of fair hearing has developed over the years can be laid out as follows;

The Constitution in Sri Lanka expressly guarantees this right by Article 13(3) which states that;

> "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court."

What is meant by the right to a fair trial had been examined by the Supreme Court in Attorney General Vs. Segulebbe Latheef and Another 2008 (1) SLR 225; wherein the following had been stated thus;

> "Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified. The right to a fair trial amongst other things includes the following."

1. The equality of all persons before the court.
2. A fair and public hearing by a competent, independent and impartial court or tribunal established by law.
3. Presumption of innocence until guilt is proven according to law.
4. The right of an accused person to be informed of promptly and in detail in a language he understands of the nature and cause of the charge against him.
5. The right of an accused to have time and facilities for preparation for the trial.
6. The right to have a counsel and to communicate with him.
7. The right of an accused to be tried without much delay
8. The right of an accused to be tried in his presence and to defend himself or through counsel.
9. The accused has a right to be informed of his rights.
10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.
11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.
12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.
13. The right of an accused not to be compelled to testify against himself or to confess guilty.

In Zahira Habibullah Sheikh and Others Vs. State of Gujarat [Appeal (crl.) 446-449 of 2004] the Supreme Court of India held that,

"…fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

Needless to say, that this right of an accused person to a fair hearing is now being recognized universally by almost every criminal justice system in the world and international instruments starting with Magna Carta in 1215 to other conventions and treaties such as Universal Declaration on Human Rights since 1948, European Convention on Human Rights since 1956 and International Covenant on Civil and Political Rights since 1976.

With regard to the present matter in question, on perusal of the transcripts of the proceedings in the High Court, it is apparent that the third accused-appellant had been tried in absentia since he had been absconding trial without making any acceptable representation by a counsel. The third accused-appellant had failed to state his name in the letter of authorization which is the bare minimum he could have done to represent himself in Court. The learned Judge of the High Court had on a subsequent occasion had offered an opportunity for the third accused-appellant to prove the authenticity of the above letter, which had not been made avail of. Thereafter, the learned Judge of the High Court had further reinforced his stance after giving reasons for doing so.

It must be noted that this right of an accused person to defend himself in person or through legal assistance is not absolute and can be waivered by the accused or restricted by Court. It had been held by the European Court of Human Rights through a number of authorities that a waiver can be made good provided that it amounts to a 'knowing and intelligent waiver'; Ibrahim and Others Vs. United Kingdom (Applications no 50541/08, 50571/08, 50573/08 and 40351/09).

In the case of the third accused-appellant, it is evident that he had been spending time overseas absconding trial and had failed to give adequate instructions to his counsel to represent him at the trial. Such actions tantamount to knowing and intelligent waiver of his rights. Therefore, no error had been committed by the learned Judge of the High Court in rejecting a letter of authorization having regard to the overall fairness of the hearing, which had failed to provide clear representation of the third accused-appellant.

On this question relating to the right of an accused to a fair trial, words of Siva Selliah J in Sudharman De Silva and Another Vs. Attorney General 1985 (2) SLR 12 is worth mentioning.

"It is my considered view that rights cannot exist in a watertight compartment independently of duties which are enjoined by the law. In construing rights this court cannot throw into jeopardy the entire fabric and administration of law and justice, nor can it condone or encourage accused persons who choose to be fugitives from justice seeking to invoke the law only when it suits their advantage. Fundamental concepts and duties must be preserved at all costs and one such fundamental concept is that the appellant must submit to the law and the courts and not abscond from them. Rights cannot be separated from duties enjoined by the law as to do so would lead to a disruption of the Rule of Law and the Administration of Justice."

The learned counsel for the third accused-appellant asserted that the learned Judge of the High Court had erred in law by continuing with the trial when he had previously requested the Chief Justice to appoint the predecessor. He was of the view that, having taken such a decision, thereafter it was not permissible in law, since section 48 of the Judicature Act No. 2 of 1978 does not empower such a course of action for the learned Judge of the High Court to hear the case and therefore the entire proceedings from then onwards should be void. He further submitted that the consent of parties cannot confer jurisdiction in those circumstances.

Section 48 of the said Act states the following;

> "In the case of death, sickness, resignation, removal from office, absence from Sri Lanka or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:
>
> Provided that where any criminal prosecution, proceeding or matter except on an inquiry preliminary to committal for trial is continued before the successor of any such judge, the accused may demand that the witnesses be re summoned and reheard."

Priority should be given to the phrase which states that the succeeding Judge 'shall have power to act on the evidence already recorded' which empowers with clarity the succeeding Judge to adopt evidence led before his predecessor. As per the wording of this section formal adoption of evidence by the succeeding Judge is not mandatory albeit the practice had been to do so. In this instance, the learned Judge of the High Court had taken steps to formally adopt evidence judiciously with the consent of the accused. The fact that the learned Judge of the High Court had made a request to the Chief Justice to appoint the predecessor to conclude the trial is immaterial and had not in any way caused prejudice to the case of the defence nor the case of the third accused-appellant. Justice, is what should be served. Any attempt to scrutinize each and every action of the Judiciary is therefore unnecessary and inappropriate.

The High Court of Patna in Rajesh Gupta Vs. The State of Bihar [Criminal Appeal (SJ) No.308 of 2011; Criminal Appeal (SJ) No 247 of 2011] had aptly held thus,

> "…the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a research for the truth and not a bout over technicalities and must be concluded under such rules as will protect the innocent and punish the guilty."

The next issue that had been addressed by all learned counsel who had appeared before this Court in relation to this appeal is with regard to the manner in which the learned Judge of the High Court had evaluated the evidence led by the prosecution to arrive at his decision. Counsel for the second accused-appellant professed that PW1, PW5 and PW6 had given three completely different versions of the same incident and the learned Judge of the High Court had

erroneously concluded that the evidence of PW1 had corroborated with the evidence of PW6. The Learned Counsel went on to state that the learned Judge of the High Court had flawed in deducing PW1 to be the sole eye-witness to the incident and thereby had failed to consider the evidence given by PW5 and PW6. Counsel for the third accused-appellant contended that the testimonial trustworthiness of PW1 is questionable given the vital omissions, that had been brushed aside by the learned Judge of the High Court, that were marked during the cross examination as to, whether the first accused had stabbed the deceased and whether the third accused-appellant had chased after PW1. Moreover, counsel for the third accused-appellant maintained the position that the testimony of PW5 should not be admitted in any way since his evidence in relation to the second count was considered unreliable and had failed to secure conviction of the accused-appellants on the second count. Counsel further argued that non-consideration of the above had deprived the third accused-appellant of a fair trial.

The Learned President's Counsel for the fourth accused-appellant too maintained the stance that the positions of the above witnesses of the prosecution were contradictory on how the incident began, on the annotation of events that took place and on the issue of the fourth accused-appellant's participation in causing the death of the deceased. The Learned Counsel claimed that the learned Judge of the High Court had erred in law, by rejecting the omissions marked by the counsel for the defence in the course of the trial and by admitting uncorroborated evidence that had failed the test of credibility.

At this point, the law essayed in the landmark judgment delivered by the Supreme Court of India in Bhoginbhai Hirjibhai vs. State of Gujarat; AIR 1983 SC 753 is relevant, whence, it can be concluded that;

> "discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all-important probabilities factor echoes in favour of the version narrated by the witnesses. The reasons are: By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is overtaken by events. The Witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attuned to absorb the details. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."

> "The witnesses had testified eight years hence the incident in question, during which time a person's memory might have failed. It is common sense that the trauma created by an overwhelming situation could lead to memory loss which in turn might impair accurate recollection of sequence of events, things and people that would have been present.

As regards the death of the deceased, PW1 had remained the sole eye-witness of the incident and had seen the deceased being stabbed to death by the first accused whilst being held by the third accused-appellant. She had further testified to the fact that all accused-appellants had been actively present armed with knives at the scene of the crime when the deceased was being stabbed. The learned Judge of the High Court had addressed his mind to the fact that throughout the examination-in-chief and the cross-examination, PW1 had consistently maintained the above position. Therefore, the learned Judge of the High Court had correctly disregarded the contradictions and omissions that were present in her testimony.

The decision of the Indian Supreme Court in State of U.P vs. M.K. Anthony; AIR 1985 SC 48 is significant in stating that;

> "appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as whole."

Evidence of PW5 and PW6 had corroborated the evidence of PW1 in proving that all accused-appellants were conscientiously present at the scene armed with knives. Trivial contradictions as to the number of three-wheelers that were brought by the accused-appellants to the scene of crime or as to whether the third accused-appellant had chased PW1 and PW6 armed with a knife or had not affected the root of the case of the prosecution that had been established through the evidence of the above witnesses. It is obvious that the eye-witnesses had been narrating the connecting events of the same incident. When considering the totality of the evidence, PW5 and PW6 had seen the incident prior to the stabbing of the deceased whereas, PW1 had seen the latter part of the incident in which the deceased had been stabbed by the first accused in the presence of the accused-appellants. In light of this, the fact that the incident had different versions to it, cannot be held to have resulted owing to unreliable evidence.

On the issue of whether the witnesses had failed the test of credibility, criteria that need to be looked into had been set forth as follows in Bhojraj Vs. Sita Ram: (1936) 38 BOMLR 344.

> "The real tests are: how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case."

What is meant by credibility of a witness had been closely examined by the Court of Appeal in Ontario, Canada, in R Vs. Morrissey; (1995), 22 O.R. (3d) 514, 80 O.A.C. 161 (Ont. C.A.) in which it was held thus;

> "Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point..."

The evidence of PW1 as to the death of the deceased had been consistent with itself during the examination-in-chief and cross-examination and had managed to fit in with the versions of PW6 and PW5. In a similar vein to the above, the evidence of PW5 and PW6 had established the active involvement of the accused-appellants. PW5 testified to the fact that the accused-appellants together with the first accused had arrived in a three-wheeler to the place where the offence had been committed and had assaulted him and the deceased. Evidence PW6 had sailed along with the evidence of PW5 in stating the arrival of the accused-appellants to the crime scene and their involvement in harassing PW5 and the deceased. Nothing in the testimony of any of the witnesses had indicated insincerity or any reluctance to testify on their part.

Learned counsel for the respondent in his submission stated that the learned Judge of the High Court had acquitted all four accused on the second charge. It had been observed that PW5 had neither produced a medical report nor had he produced any evidence with regard to the injuries sustained by him. Counsel for the respondent argued stating that, although the evidence of PW5 had not contributed in proving the second charge, the law does not prohibit the adoption of his testimony with regard to proof of other material facts.

In support of the above premise, the reasoning given by the Privy Council in Vadivelu Thevar Vs. The State of Madras, A.I.R. (1957) S.C. 614 can be considered.

> "Generally speaking, oral testimony in this context may be classified into three categories namely",
>
> (1) wholly reliable,
>
> (2) wholly unreliable and
>
> (3) neither wholly reliable nor wholly unreliable.
>
> "In the first category of proof, the Court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above approach of suspicion of interestedness, incompetence of subordination. In the second category, the court equally has no difficulty in coming to

> its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial."

Owing to the above reasoning, the learned Judge of the High Court had not erred in adopting the evidence of PW5 in order to fortify the evidence of PW1 in establishing the first charge since his evidence had been corroborated by the evidence of PW6.

Having stated the above, it must be borne in mind that the number of witnesses does not decide the strength of the case of the prosecution.

In Laxmibai and another Vs. Bhagwantbuva and others (2013) 4 SCC 97**;** it was observed by the Supreme Court of India that,

> "…in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses are to be examined to prove or disprove a fact. It is a time-honored principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses…"

Therefore, on this premise, the conviction on causing the death of the deceased can be secured solely on the evidence of PW1 even if the evidence of PW5 were to be brushed aside completely.

Learned counsel for the second accused-appellant submitted that the learned Judge of the High Court had not come to a conclusion that the second accused-appellant had acted with common murderous intention. Similarly, learned counsel for the third accused-appellant expressed the view that hence there was some doubt as to whether the third accused-appellant had come together with the other accused-appellants, it would have created a serious doubt as to whether the third accused-appellant entertained a common intention with the others to cause death of the deceased.

Whether the second and third accused-appellants had entertained the common murderous intention in causing the death of deceased can only be inferred from the facts and circumstances of this case. The law relating to the concept of common intention is set out in section 32 of the Penal Code.

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

An update on the law relating to section 32 of the Penal code was spelt out in Galagamage Indrawansa Kumarasiri and 3 others vs Attorney General, S.C. TAB Appeal No.02/2012 and the following guidelines had been arrayed.

(a) The case of each accused must be considered separately.

(b) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(c) Common intention must not be confused with same or similar intention entertained independently of each other.
(d) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.
(e) It must be noted that the common intention can be formed in the 'spur of the moment'
(f) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.
(g) The question whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact.
(h) The prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred
(i) The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.

It had been held by the Supreme Court of India in Rishideo vs. State of Uttar Pradesh (1955) (AIR 331) that,

> "the existence of common intention said to have been shared by the accused is, on an ultimate analysis, a question of fact."

The evidence of PW1 was that the deceased had been stabbed by the first accused when he was held by the third accused. Therefore, the most probable inference that can be drawn is that the third accused-appellant had shared the common murderous intention of the first accused. Furthermore, the active participation of the second accused-appellant had been sufficiently established by the prosecution. All three witnesses had testified as to the presence of the second accused-appellant at the place where the crime had been committed armed with a knife. From the evidence of PW5 and PW6, it had been elicited that all three of the accused-appellants had arrived at Gotabaya Road and had started assaulting and harassing the deceased and PW5, thus establishing the participatory presence of the third accused-appellant which in turn establishes the requisite common intention in relation to the charge of murder.

Further submissions were made by the counsel for the second accused-appellant as regards the statement made by the accused-appellant from the dock. Counsel contended that the learned Judge of the High Court had failed in evaluating the said statement and had failed to give reasons on rejecting the same.

A dock-statement, though considered as evidence, is subject to the infirmity that it was not given under oath and thus cannot be subject to cross-examination.

In The Queen Vs. Buddharakkitha Thera and 2 Others 63 NLR 433**,** it had been held that;

> "the right of an accused person to make an unsworn statement from the dock is recognized by our law. That right would be of no value unless such a statement is treated as evidence

> on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination."

The manner in which such a statement should be evaluated was analysed in The Queen v. Kularatne 71 NLR 529 as follows;

> "We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,
>
> (a) If they believe the unsworn statement, it must be acted upon,
> (b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed, and
> (c) That it should not be used against another accused."

The Supreme Court in Karunanayake v. Karunasiri Perera 1986 (2) SLR 27 held thus with regard to the facts that should be taken into account in rejecting a dock-statement.

> "These principles must be satisfied in order to reject a dock statement and can be summarized as follows:
>
> 1. It must be deliberate;
> 2. It must relate to a material issue;
> 3. The motive for the lie must be realization of guilt and a fear of truth;
> 4. The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated."

The case Sarath Vs. Attorney General 2006 (3) SLR 96 too had shed light on the issue of how a dock- statement must be evaluated, wherein, it had been held that;

> "one must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?"

Keeping in mind the case established by the prosecution in this matter, the dock-statements made by the accused-appellants were mere blanket denials of involvement. No specific plea of defence had been raised by any of the accused-appellants neither had any fresh material or evidence been introduced into the case formulating novel issues. In this regard, the learned Judge of the High Court had not occasioned any failure of justice by rejecting the dock-statement.

Counsel for the second accused-appellant in his submission asserted that the learned Judge of the High Court in failing to give reasons for rejecting the dock-statement of the second accused-appellant had not properly considered the case of the defense. The duty of a Judge to give reasons for his decisions is based on the premise that a trial judge has a duty to give

adequate reasons for his decision that facilitate review, accountability and transparency. However, judicial discretion should not be interfered with in the absence of any blatant miscarriage of justice.

It was held by the Canadian Supreme Court in R V Sheppard [2002]1 S.C.R. 869 that;

> "the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job at of expressing itself in fact the duty goes no further than to render a decision which having regard to the particular circumstances of the case is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision. In the words of the Supreme Court, to quash a decision on the basis of inadequacy of reasons the appellant must show not only that there is deficiency in the reasons but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case."

Dock statement is an unsworn statement lacking the probative value of formal evidence tested and filtered through cross examination. It is still evidence of a lesser weightage recognized in our law. Credibility of a witness may be impugned by employing the tests of probability and improbability consistence and inconsistence, interestedness and disinterestedness and spontaneity and belatedness. It is important to note that evidence must be weighed and never countered, in reviewing the veracity of a witness appellate Courts enforce certain rules and guidelines as they do not have the benefit of observing and questioning the witnesses first hand. We should not forget that credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge.

Where untainted evidence could be safely separated from inaccurate evidence due to faulty observation, exaggerations and embellishments, Court is entitled to act on such untainted evidence and discard and sever inaccurate and false evidence. Appellate Court should examine whether the trial Judge has drawn proper inferences from specific facts that are proved. Due weight should be attached to the opinion of the trial Judge.

Careful perusal of the evidence led reveals that there is evidence to establish the nexus between the two incidents took place connecting each other and also that there was a pre-arranged plan among the accused to act in concert by sharing a common intention to kill the deceased. Trial Judge has not misdirected himself in arriving at this conclusion what is based on substantial evidence but not on mere conjecture.

In the present scenario, the learned Judge of the High Court to expressly reject the dock-statement could not have caused any prejudice to the accused-appellants for, apart from a flagrant denial the defence had not raised any material issues at the trial which would have required serious deliberation.

In conclusion, in light of the reasons aforesaid, having regard to the facts and legal principles involved in the present matter in question, this appeal has failed to hold any merit. Thus, the conviction should stand and therefore is affirmed.

Appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal