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

In the matter of an appeal against an order of the High Court in terms of Sec. 331 of the Code of Criminal Procedure Act No.15 of 1979

1. Manikam Pedige Priyantha
2. Pitipana Kankanamge Sudantha
3. Mohamed Uwaisdeen
4. Nawasiwayam Ganesh Murthi alias Roshan

C.A. Case No. CA/HCC/41- 42/2015 **accused**

H.C. Kegalle Case No.2965/10 **Vs.**

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant

And now Between

1. Manikam Pedige Priyantha
2. Pitipana Kankanamge Sudantha

accused-Appellants

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**
&
R. Gurusinghe J.

counsel: Sharon Seresinhe AAL for the 1st accused-appellants

A.S.M. Perera PC for the 2nd accused-appellants

Riyaz Bari, Senior State Counsel for the complainant-respondent

Written Submissions: By the 1st accused-appellants on 12.03.2018 and 05.10.2021

By the 2nd accused-appellants on 11.05.2018 and 04.10.2021

By the complainant-respondent on 19.09.2018

Argued on : 30.07.2021

Decided on : 22.11.2021

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kegalle, dated 11.02.2015, by which, the 1st and 2nd accused-appellants, who are before this Court, were convicted and sentenced to death for having murdered one Kiriella Arachchilage Sirisena.

The accused-appellants, together with the 3rd and 4th accused (who were acquitted by the High Court) had been indicted on 31.05.2010 in the High Court of Kegalle for committing the murder of Kiriella Arachchilage Sirisena on or about 28.09.2000, which is punishable in terms of section 296 read with section 32 of the Penal Code.

The trial had commenced on 22.07.2014, during which the prosecution had, led evidence of 8 witnesses, marked documents එ - 1 to එ - 6. Once the prosecution had closed its case, the 3rd and 4th accused were acquitted. The 1st and 2nd accused-appellants had made statements from the dock. At the conclusion of the trial, the 1st and 2nd accused-appellants had been found guilty on the murder charge and sentenced to death. Aggrieved by the said decision both accused-appellants preferred this appeal.

Grounds of appeal set forth on behalf of the accused-appellants are as follows;

(i) The learned High Court Judge had failed to take into account the safeguards that he should have looked for in order to rely on such evidence.

(ii) The learned High Court Judge had failed to consider the delay in making a complaint to the police by the first prosecution witness and to ascertain whether he had acted in good faith in the incident.

(iii) The learned High Court Judge had failed to consider omissions and contradictions of the first prosecution witness's testimony and the nature of the inadequate corroborative evidence.

(iv) The learned Trial Judge had convicted the accused for murder when the evidence of the first prosecution witness was not credible.

Eyewitness, Nihal Prabath Manamperi (PW 01) had given a statement to the Police 11 months after the incident. Learned Counsel for the 1st accused-appellant says that it was not a voluntary statement. When PW 01 was arrested in connection with a vehicle fraud by Nochchiagama Police, he had given the said statement. He was the 1st accused in the Magistrate Court Case according to the B Report filed. Thereafter, he was given a conditional pardon by the Hon. Attorney General as there were no other eyewitnesses.

According to the non-summery brief on 21.08.2003, Nihal Prabath Manamperi (PW 01) had been made the 5th suspect. There is an entry to the effect that “action had been taken against the 5th accused (Nihal Prabath Manamperi) under section 256 (1) of the Criminal Procedure Code on the advice of the Attorney-General". A conditional pardon had been granted to Nihal Prabath Manamperi (PW 01) on 18.09.2003.

Nihal Prabath Manamperi (PW 01) had stated that he was running a business relating to the selling of motor vehicles. The 2nd accused was introduced to him by an employee of his business. PW 01 had sold a motorcycle to the 2nd accused-appellant on payment by instalments. Since the 2nd accused had defaulted, PW 01 visited the 2nd accused's house at Kiribathkumbura on 28.09.2000 to collect the dues. The 2nd accused was not available at home on that day, he had waited there and then the 2nd accused had come home at about 7.00 p.m. in a van. Then the witness PW 01 had asked for the money due and the 2nd accused had requested him to stay there during that night and go back on the following morning.

The 2nd accused-appellant had promised to give money to the witness PW 01 on the next day. This witness PW 01 had agreed to that and then they had gone to a restaurant at Peradeniya to have their dinner. According to this witness PW 01, the 1st and 3rd accused were also with them at that time. After having dinner, all of them had come back to the 2nd accused's house and the 4th accused was there in that house. It was revealed in evidence 4th accused was also taken into the van by the 2nd accused, by force.

Then at about midnight all of them had gone to the house of the 2nd accused's mother in Kegalle. The 2nd accused had gone into the house and come back while 4 others had remained in the van. The van which was hired by the 2nd accused-appellant from a private company was driven by the witness PW 01, at that time. After 15 minutes they had come to Kegalle town and the 1st and 2nd accused had gone to a boutique and brought coffee for the witness PW 01. Thereafter only the 2nd accused-appellant came back to the van.

They have proceeded to Galigamuwa and the 2nd accused-appellant had informed the witness PW 01 that he had to collect some money from a friend and the witness PW 01 would be dropped at his house after collecting that money. At that time the van had been driven by the 2nd accused Sudantha from Galigamuwa to Avissawella for about 6 km and the witness PW 01 was seated on the left side of the driver's seat. According to this witness PW 01, the van had followed a three-wheeler for some time and at one point, it overtook the three-wheeler and obstructed it. Then the 2nd accused Sudantha had got down from the van and gone close to the three-wheeler on foot. The witness had seen the 1st accused Priyantha in the three-wheeler who also got down. The three-wheeler driver was dragged out by two of them. Witness PW 01 had seen this incident with the help of the headlight of the van. Witness PW 01 had further stated that the three-wheeler driver was dragged by force by the 1st accused Priyantha and put into the van by the 2nd accused Sudantha.

Witness PW 01 had questioned why this was being done? He had been told that the person concerned had done something wrong and he should be dealt with. Then the 2nd accused had asked the witness PW 01 to drive the van. When he refused to do so, he was threatened by the 2nd accused-appellant pointing a pistol at him. It is evident that when PW 01, said that he couldn't drive the van, he was threatened by the 2nd accused. Thereafter, PW 01

drove the van and went across a rubber estate. While going, the driver was beaten with a wheel brace and beer bottles. PW 01 was asked to stop near a bus stand. Sudantha got down and dragged the driver out and put him on the ground. Sudantha hit his head with the wheel brace. Blood splashed to the van. The three-wheeler driver fell face down on the ground.

They heard the noise of a jeep. Sudantha directed the van to drive towards Anguruwella. Then PW 01 was asked to drive back to Kiribathkubura. On the way, he stopped near a salon in Pilimatalawa near the river. Sudantha got down and washed the bloodstains in the van. Then he went to his house in Kiribathkumbura. Nobody got down from the van. Sudantha went inside and brought some clothes and a bag. Then, they proceeded to Nuwara-Eliya to a friend's estate bungalow. All of them got down there. PW 01 said that he didn't get his money. He was told that he could get it later and the next morning he came back home by bus.

This witness PW 01 had further stated that the deceased was assaulted by the 1st and 2nd accused-appellants inside the van, on the way. When the van was stopped near the bus halt, the deceased was taken out by the 2nd accused-appellant, dragged and put down near the bus halt. The deceased had been assaulted with a wheel brace by the 2nd accused. While he did so, a sound of a jeep had been heard and they all had moved away from the scene of the crime in the van.

They have come to the Anguruwella junction and there the 2nd accused-appellant had suggested proceeding to Kiribathkumbura. On the way, the van had been stopped at Pilimathalawa near a stream and the bloodstains of the van were washed by the 2nd accused-appellant. After that, they had gone to the 2nd accused's house at Kiribathkumbura once again and having gone into the house he had come back with a travelling bag. Thereafter, they had gone to a house of a friend of the 2nd accused in Nuwara Eliya and stayed there during that night. This witness PW 01 had further stated that on the following day he had left the said place and was warned by the 2nd accused not to inform the police regarding the incident. PW 01 had stated that he didn't inform about this incident to the police due to fear. It is evident that 10 months after the incident, the witness PW 01 had been arrested by the Nochchiyagama Police for some other crime.

In the cross-examination, witness PW 01 had admitted that there were several cases against him at Negombo Magistrate's Court and he was found guilty in some of those cases. He had stated that he resided at several addresses at different times and he further admitted that he didn't make a complaint to the police regarding the incident even after all 4 accused were taken into custody. PW 01 had only made a statement to the police after 10 months of the incident when he was arrested by the police as a suspect in the said murder.

Witness U.G.Subadra Podi Menike (PW 02) had stated that she is the wife of the deceased. A part of her house was rented to one Jayanthi Mallika and she was aware that there was a love affair between her husband and the said Jayanthi Mallika. As a result of that love affair, her husband had deserted her since October 1999. This witness PW 02 had identified the body of the deceased at the Kegalle hospital.

The next witness called by the prosecution was Police Inspector A.H.M. Asantha Chandana Alahakoon (PW 07). He had stated that he was the Officer-In-Charge of Dedigama Police

Station at the relevant period and he had received the 1st information from a bus conductor, saying that there was a dead body at a bus halt at Bulath athukanda junction along Pallegama-Kegalle road. This witness had done the preliminary investigations about the murder of the deceased and some productions (a vest, a pair of slippers and a bus ticket) had been taken into custody by him at the scene of the crime. They were marked as පැ 1, පැ 2 and පැ 3, in the course of the trial. No accused had been taken into custody by this police witness.

Dr. Palitha Dahanayake Yapa (PW 13) had done the post mortem examination and prepared the post mortem report, which was marked as පැ 4 in the course of the trial. He had identified 10 injuries on the body of the deceased. Injury numbers 1 and 2 had resulted in the death of the deceased. The witness had opined that death was caused by assaulting the head with a heavy blunt weapon.

The next witness was Police Inspector W.M.Sirisena Wanninayake (PW 10).

He had stated that he was the In-Charge of Crime Investigation Unit - Kegalle Division in 2001 and he was ordered to do the investigation concerning the alleged incident by the SSP. He had arrested the 1st and 2nd accused.

Police Inspector Kalapuge Don Senarath Balasuriya (PW 16) had stated that, he was the Officer-In-Charge of Dedigama police since 30.05.2010 and he had arrested the 3rd and the 4th accused. Thereafter Police Inspector Herath Pathirannehelage Nihalsighe (PW 15) gave evidence and said that he had recorded the statements of the 3rd and 4th accused on instructions by PW 16.

The next witness called by the prosecution was Adhikari Arachchilage Prasad Ranadewa (Interpreter mudlier). This witness had stated that there had been 5 accused in the non-summery case in the Magistrate's Court and the charge sheet was marked as 2 වි 11.

The learned counsel for the 1st accused-appellant argued that when the evidence of the PW 01 was not credible, it is not fair for the learned High Court judge to convict the 1st accused-appellant for murder.

PW 01 did not make a complaint to the police after the alleged incident. He gave a statement to the police one year after the alleged incident. It was not a voluntary complaint. He was arrested for another offence by the Nochchiagama police. He stated that he did not make a complaint because there were threats to his life. He could have made a complaint when he was set free on 18.09.2003. His explanation is not plausible. Therefore, it was argued by the learned counsel for the 1st accused-appellant that the evidence of PW 01 is not credible and cannot be relied upon.

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 the 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. A witness whose evidence on a point is not credible cannot give reliable evidence on that point..."

The contention of the learned counsel for the 1st accused-appellant was that there was no evidence of any pardon given to PW 01, on record. The brief does not contain the non-summery proceedings. This confession had not been produced at the trial nor listed in the indictment as a document relied upon by the prosecution.

A dead body was found face down in the bus stand adjoining the rubber estate on 28.09.2000 at 5.10 am. The police officer who visited the scene described it as a "very dark and lonely place". A bus conductor who saw the dead body informed the police.

The learned counsel for the 1st accused-appellant says that PW 01 had cases in Negombo Magistrate's Court and Warakapola Magistrate's Court. Therefore, he was hiding from the police. He had some animosity with the 2nd accused appellant which was not disclosed during the trial.

Further, it was revealed that in the Magistrate's Court, while giving evidence, PW 01 stated that he "waited till 2 o clock till Sudantha came".

In his evidence in the High Court, he had stated that "he waited till 9 in the night till Sudantha came". It was argued by the 1st accused-appellant that this is a material contradiction. It was marked as "1 වි 1". If Sudantha came at 2 o'clock he would have taken his money or else without his money PW 01 could have left. The whole incident revolves around him going in the van with Sudantha, having dinner and meeting Priyantha, which was an afterthought. According to his evidence, he had not seen Priyantha before this. It is my view that there was no reason for PW 01 to falsely implicate Priyantha for this crime.

The learned counsel for the 1st accused-appellant argued about the contradictions marked by the 1st accused and credibility of PW 01 in the following manner;

(i) PW 1 in the Magistrate's Court evidence had stated: "After that, we came to Kegalle Galigamuwa direction. That time the person who drove was Sudantha". But later in the High Court trial, he stated: "Up to Galigamuwa it was I who drove". this was marked as "1 වි 2". His evidence had failed the test of credibility.

(ii) In the Magistrate's Court as evidence, PW 01 stated that "Priyantha got into the vehicle at Kegalle Molagoda area". In the High Court, he testified that "Priyantha

was right along in the vehicle with Sudantha". This was marked as "1 වි 3". His evidence cannot be relied upon and is not credible. Priyantha was never in the scene, he was falsely implicated.

(iii) When he was cross-examined by the 2nd accused PW 01 admitted that he didn't make a complaint to any police station for nearly 10 months. It was suggested by the 2nd accused that he didn't make a complaint because he aided in committing the said offence. He had given 4 addresses to avoid people coming to his house.

(iv) If they had spent about 1.5 hours at the restaurant in Peradeniya having dinner, PW 01 would have known what the accused were talking about and planning. If he did not want to take part in the said offence, he would have avoided and gone away without being noticed by anyone. Although he had ample opportunity to get away, he did not do so. He even had the opportunity to go to Peradeniya Police Station in a three-wheeler. According to him, both the accused were drunk. This gives the inference that PW 01 had been a party to it.

(v) PW 01 in the police complaint had stated that " he didn't ask Sudantha why he put the driver inside the van". In his evidence in the High Court, he came out for the first time stating that "he asked why... " which was marked as an omission. Sudantha had stated that his family had a problem with the driver. Because of that, he wanted to beat him 2-3 times and leave him off.

(vi) In the High Court, giving evidence PW 01 stated that Sudantha kept a pistol on his head and threatened him. In the Magistrate's Court, he had answered the same in the negative. He admitted in the High Court that, he was coming out with the truth. He could have driven straight to Kegalle Police Station.

(vii) In the High Court, giving evidence for the first time he broke out the fact that he had stated: "Innocent man, why are you beating him?" In his statement to the police, he had failed to state so.

(viii) He stated in the High Court, giving evidence for the first time that the driver was beaten with a wheel brace and they had driven with the inside lights on. In the police complaint, he had not mentioned it. Thus, the fact that the small light was on, is highly improbable.

The learned counsel for the 1st accused-appellant says that there were many contradictions and omissions marked by both accused-appellants. These go to the very root of the case which the learned High Court Judge had not considered. When I consider those contradictions and omissions, I am unable to agree with the learned counsel for the 1st accused-appellant as they do not seem to damage the root of the case.

It was emanated from the evidence that Priyantha knew the deceased or had a motive to kill him. It shows that Priyantha got off near a tea boutique at Galigamuwa and he did not join with the others in the van when they were proceeding along the Avissawella Road from Galigamuwa junction. Priyantha came in the three-wheeler, which was driven by the driver who was assassinated later, from Galigamuwa junction onwards. It cleared all doubts that Priyantha and Sudantha were working with a common intention to harm the three-wheeler driver.

According to medical evidence, there were 10 injuries. The 1st and the 2nd injuries to the head were necessarily fatal. It had been caused by a blunt weapon. The learned counsel for the 1st accused-appellant argues that there was no evidence to prove that Priyantha caused these injuries or he was involved in committing the said offence. But at the same time, it is important to note that there was no evidence to say that Priyantha actively participated to stop Sudantha from attacking the deceased three-wheeler driver. It is my view that if Priyantha wanted to rescue the deceased three-wheeler driver he should have done something positive to stop attacking the deceased.

The learned counsel for the 1st accused-appellant says that the 14th witness named in the indictment Krishnan Jayanthi Nelson Mallika was important.

Had he given evidence, PW 01 Manamperi's credibility could have been tested. The deceased three-wheeler driver Sirisena's wife Podi Menike testified that Mallika was having an illicit affair with the deceased. The deceased had left Podi Menike on 07.10.1999. Thereafter his whereabouts were not known. It is not clear from the evidence, whether the deceased was living with Mallika or elsewhere at the time of this incident. It was Mallika who informed Podi Menike about Sirisena's death.

The learned President's Counsel for the 2nd accused-appellant argued that only 2 civilian witnesses had given evidence for the prosecution other than the police witnesses. The said 2 witnesses were Nihal Prabth Manamperi (PW 01) and the wife of the deceased Subadra Podi Menike (PW 02). The only eyewitness who had given evidence about the incident was PW 01. Subadra Podimenike had given evidence only about the identification of the body. Evidence of PW 01 had not been corroborated by any other witness. There are a series of decided cases by the apex court how the evidence of an accomplice should be taken into account by the Trial Judge when arriving at a decision. The learned President's Counsel submits that it is not safe to arrive at a conviction upon the uncorroborated evidence of the accomplice as set out in the following judgements;

In Queen vs. G.K. Jayasinghe 69 NLR 314, Sansoni CJ had held that;

> "Where the trial Judge, in his directions concerning accomplice evidence, lays unusual stress on the point that corroboration of such evidence is not an essential requirement, he must stress the gravity of a decision to convict on uncorroborated accomplice evidence. If the accomplice's evidence is very nearly uncorroborated and is false on some material points, the Judge has to direct the Jury to consider whether it would be safe to convict upon the accomplice's testimony."

It was held in Illangathilake and Others vs The Republic of Sri Lanka 1984 (2) SLR 38;

> "While it is legal to convict upon the uncorroborated evidence of an accomplice it is a rule of practice which had become virtually equivalent to a rule of law to regard it as dangerous to so convict. What is required is some additional evidence rending it probable that the story of the accomplice is true and that is reasonably safe to act upon it."

When I consider the evidence of PW 01 Manamperi, I am unable to trace any piece of evidence which suggested that PW 01 had given false evidence on material points. It is important to note that there was additional evidence rendering it probable that the story of

the accomplice could be true. PW 01 Manamperi's evidence was corroborated by the evidence of PW 07, PW 10 and PW 13.

Several omissions had been marked during the cross-examination of PW 01, on material facts. Although PW 01 Manamperi had stated in his evidence that he questioned the 2nd accused-appellant as to why an innocent man was assaulted, the reply had not been mentioned in his statement to the police and it was marked as an omission. Furthermore, PW 01 had stated that he was threatened by the 2nd accused with a pistol pointed at him. But, this too had not been mentioned in his statement to the police. It was also marked as an omission. He had further stated that there was a light inside the van but it was also marked as an omission. He had also stated that the deceased was assaulted on the way, by the 2nd accused with a wheel brace and beer bottles inside the van. That fact too was marked as an omission. The bloodstains on the van were washed by the 2nd accused at Pilimathalawa and this was also marked as an omission.

In Aadam Kasam Shaikh vs. The State of Maharashtra, 2006 Cr LJ 4585 (4589), the Court held that;

> "The evidence of a witness cannot be discarded merely because he had made improvements over his police statements by stating some of the facts for the first time in his deposition before the court, if the facts stated for the first time before the court is in the nature of elaboration, do not amount to a contradiction, and the evidence of witness does not militate against his earlier version".

The learned Trial Judge had considered the aforementioned legal stance and had arrived at a conclusive finding that the contradictions and omissions highlighted had not created any doubt in the PW 01 Manamperi's evidence.

In the case of Mohamed Niyas Naufer and others v. Attorney General (Sc. 01/2006 decided on 08/12/2006), the Court observed that;

> "When faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness."

In Banda and Others vs Attorney General 1999 (3) SLR 168, it was held that;

> "The right to mark omissions and proof of omissions is related to the right of the Judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. The rule regarding consistency and inconsistency is not strictly applicable to omissions. The judge who had the care of the information ought to use this Book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his Police statement in the discharge of his judicial duty and function."

In the course of the trial, PW 01 had stated that the deceased was assaulted with a wheel brace by the 2nd accused. But he had mentioned in his statement made to the police that, the deceased was assaulted by an iron bar. The learned President's Counsel for the 2nd accused-appellant argued that this witness had stated that he is involved in the business of

selling vehicles and he should have been well aware of the difference between a wheel brace and an iron bar.

learned High Court judge had Justified these omissions, on the basis that, the statement was made after about 10 months since the incident and he had given evidence in Court after about 13 years since the incident. When evaluating the weight of the evidence, it is my view that the learned Trial Judge had considered the trustworthiness of the testimony and the demeanour and deportment of witnesses, and had rightly concluded that the contradictions and omissions do not go to the root of this case.

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 a 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 a whole."

This case is based essentially on the evidence given by Nihal Prabath Manamperi (PW 01) who is an accomplice. The learned Senior State Counsel who appeared for the respondent informed Court that the letter by which such pardon was granted is not in his file. Further, he stated that there was no minute to that effect in his file.

About the said statement made in Court by the learned Senior State Counsel, the learned President's Counsel for the 2nd accused-appellant submitted that;

(i) The defence had had no opportunity to probe into the said issue,

(ii) In any event, a pardon is granted at a time before the indictment is prepared in the Attorney General's Department and there may be an earlier file (maintained in the Attorney General's Department) through which such letter was sent, which may not have been incorporated into the main High Court file which is in the possession of the learned Senior State Counsel.

The Court Mudliar said in his evidence that there is an entry to the effect that action had been taken under section 256 (1) of the Criminal Procedure Code in relation to the 5th accused, Nihal Prabath Manamperi (PW 01) to whom that a pardon had been granted on the advice of the Attorney-General(AG). The said extract 2 වී 35 had been marked through the Court Mudliar in the High Court. Page 80 of the non-summery brief shows that, as of 21.08.2003, Nihal Prabath Manamperi (PW 01) had been named as a suspect with an entry. On page 81 there is an entry to the effect that "action had been taken against the 5th accused Nihal Prabath Manamperi under S. 256 (1) on the advice of the AG". Thereafter an

amended plaint had been filed without the name of the said suspect Nihal Prabath Manamperi.

The learned State Counsel who prosecuted in the High Court had admitted the fact that the Attorney General had given a conditional pardon to this witness. The witness himself admitted that he got a pardon even though he later said that he couldn't remember whether he had signed a document regarding that at the Warakapola Magistrate's Court. In the aforesaid circumstances, it is clear that the said Nihal Prabath Manamperi had been granted a conditional pardon. Further, when one takes into consideration the evidence led by the prosecution, it becomes clear that the witness is an accomplice.

The learned President's Counsel for the 2nd accused-appellant argued that whether the Court could have convicted the 2nd accused-appellant relying on the evidence of an accomplice. In this respect, the attention of this Court is drawn to sections 114 (b) and 133 of the Evidence Ordinance.

Section 114 (b) of the Evidence Ordinance is as follows;

> 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.
>
> Illustration - The court may presume;
>
> > That an accomplice is unworthy of credit, unless he is corroborated in material particulars;
>
> But the court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it;
>
> > as to illustration(b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.
> >
> > as to illustration(b)—a crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable.'

Section 133 of the Evidence Ordinance is as follows;

> 'An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.'

There is no doubt that uncorroborated evidence of an accomplice is admissible in law. However, the learned President's Counsel for the 2nd accused-appellant submits that it had

been a recognized rule of practice that it is extremely dangerous to convict an accused person on the uncorroborated testimony of an accomplice.

The judgement in Rex v Baskerville 2KB 658 and (1916 — 17) AER 38 it was held that;

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence that implicates him, that is which confirms in some material particular not only the evidence that the crime had been committed but also that the prisoner committed it. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence that shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime had been committed, but that it was committed by the accused."

The evidence of the police officers who gave evidence may corroborate the fact that the dead body of the deceased was found near a bus halt. However, the learned President's Counsel argues that there is no evidence whatsoever which corroborates that it is the 2nd accused-appellant who committed the said crime.

The attention of the Court is drawn to the fact that witness Nihal Prabath Manamperi (PW 01) had been involved in criminal activities, including drug offences in which he had been found guilty and punished. The learned President's Counsel for the 2nd accused-appellant submits that even though PW 01 stated that he witnessed this crime, he had not made a complaint to the police until he had been arrested by police, 10 months after the said incident. PW 01 had stated that he did not make a complaint due to threats that had been made to him by the 2nd accused-appellant.

The learned President's Counsel says that it is on record that even after the other suspects were taken into custody, he had not made any complaint to the police about this alleged incident. Further, assuming his allegation of being threatened was true, at least for his protection he should have made a statement to the police. It is also on record that he had been constantly changing his residences. There are several contradictions and omissions marked concerning the evidence given by PW 01 at the trial.

The 1st and the 2nd accused-appellants had made dock statements denying the allegation against them. The 2nd accused-appellant had made a lengthy dock statement which contains 12 pages. He stated that there was some displeasure created between himself and witness Nihal Prabath Manamperi (PW 01) relating to the sale of a Motor Cycle. In the said circumstances, learned President's Counsel for the 2nd accused-appellant says that it is extremely unsafe to convict the 2nd accused-appellant based on the uncorroborated evidence of an accomplice.

Further submissions were made by the learned President's 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 for 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 present case, there is nothing in substance in the dock statements of the accused-appellants that is worthy of being considered as creating a doubt in the prosecution version. They are all merely exculpatory.

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."

How 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 defence 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 about the facts that should be taken into account in rejecting a dock statement.

> "These principles must be satisfied 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 a realization of guilt and 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 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.

The learned President's 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 defence. The duty of a Judge to give reasons for his decisions is based on the premise that a trial judge had a duty to give adequate reasons for his decision that facilitate review, accountability and transparency. However, judicial discretion should not have interfered with in the absence of any blatant miscarriage of justice.

At this point, the landmark judgment delivered by the Supreme Court of India in Bhoginbhai Hirjibhai vs. The State of Gujarat; AIR 1983 SC 753 is relevant, where 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 photographic memory and to recall the details of an incident. It is not as if a videotape 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 had an element of surprise. The mental faculties therefore cannot be expected to be 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 that take place in rapid succession or a short period. A witness is liable to get confused, or mixed up when interrogated later on."

The witnesses had testified after 13 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 the sequence of events, things and people that would have been present.

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 researched for the truth and not about over

technicalities and must be concluded under such rules as will protect the innocent and punish the guilty."

The learned counsel for the 1st accused-appellant argued further that if PW 01 Manamperi was not arrested, the story of the prosecution would have been a different one. His evidence came by chance to the prosecution case. The learned Trial Judge did not consider this aspect. It is my view that PW 01 Manamperi was arrested and therefore justice was done for the deceased three-wheeler driver.

It was only after the arrest of Manamperi (PW 01) that the roots of a tragic crime that could have been buried in the sands of time were discovered. Being able to bring the perpetrators of that crime to justice and punish them properly can be considered as doing justice to the murdered three-wheeler driver.

In light of the reasons aforesaid, having regard to the facts and legal principles involved in the present matter in question, this appeal had failed to hold any merit.

Accordingly, we affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal