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

An appeal filed in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Vs.

1. Batahira Arachilage Samarasiri alias Samare Mama
2. Dissanayaka Mudiyanselage Upul

Accused

C.A. Case No. HCC 080/21

High Court of Monaragala

Case No. 018/16

AND NOW BETWEEN

Batahira Arachilage Samarasiri alias Samare Mama

1st Accused –Appellant

Vs.

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

Complainant-Respondent

BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)
WICKUM A. KALUARACHCHI, J

COUNSEL : Kapila Waidyaratne, PC with Nipuna Jagodarachchi and Akkila Jayasundara for the Accused-Appellant

Shaminda Wickrama, SC for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 01.04.2022 (On behalf of the Accused-Appellant)

25.07.2022 (On behalf of the Respondent)

ARGUED ON : 28.07.2022

DECIDED ON : 31.08.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant and the second accused were indicted in the High Court of Monaragala on the following charges.

1. On or about 22-05-2012, the appellant caused the death of one Ranjith Dharmasiri, thereby committed the offence of murder punishable under section 296 of the penal Code.
2. In the course of the same transaction, the second accused aided and abetted the appellant to commit the offence stated in (1) above, and as a result, the offence stated in (1) above was committed, and thereby committed an offence punishable under section 296 of the Penal Code read with section 102.
3. In the course of the same transaction, the appellant attempted to commit the murder of one Deepa Lalanthika, thereby committed the offence of attempted murder punishable under section 300 of the Penal Code.

4. In the course of the same transaction, the appellant caused hurt to one Maliduwa Liyanage Wimalawathi thereby committed an offence punishable under section 315 of the penal Code.
5. In the course of the same transaction, the appellant caused hurt to one Hewapuwak Pitiyage Achini Iresha thereby committed an offence punishable under section 315 of the Penal Code.

The second accused was acquitted in terms of section 200(1) of the Code of Criminal Procedure Act after the prosecution case was closed. After the trial, the learned High Court Judge convicted the 1st accussed-appellant for 1st, 3rd, 4th and 5th counts. Accordingly, the 1st accused-appellant (hereinafter referred to as the "appellant") was sentenced to death on the first count. Further, On the 3rd count, he was sentenced to a term of 10 years rigorous imprisonment and to pay a fine of Rs.10,000/- carrying a default sentence of 6 months simple imprisonment and on the 4th count to a term of 1-year rigorous imprisonment and to pay a fine of Rs.5000/- carrying a default sentence of 6 months simple imprisonment. On the 5th count he was sentenced to a term of 1-year rigorous imprisonment and to pay a fine of Rs. 5000/- carrying a default sentence of 6 months simple imprisonment.

This appeal is preferred against the said convictions and sentences.

Written submissions on behalf of both parties have been filed prior to the hearing. At the hearing, the learned President's Counsel for the appellant and the learned State Counsel for the respondent made oral submissions.

The deceased, Ranjith Dharmasiri lived with his wife, Deepa Lalanthika (PW1), his daughter, Achini Ishara (PW2) and his mother, Wimalawathi (PW3). On the date of the incident, the deceased, PW1 and PW2 slept in separate rooms in the same house, while PW3 slept

on the sofa in the living room. As a result of the incident occurred on that day, PW1 sustained a head injury that endangered her life, PW2 and PW3 sustained injuries caused by a blunt weapon. The deceased died due to craniocerebral injuries caused by a weapon with a cutting edge.

Grounds of Appeal

The learned President's Counsel for the appellant advanced his arguments on the following grounds.

1. The Appellant's presence and identification have not been proved beyond a reasonable doubt.
2. The improbability of the prosecution evidence.
3. Not considering the inter-se and per-se contradictions.
4. Not considering the dock statement and the defence case.

The learned President's Counsel made oral submissions in length on the aforesaid grounds indicating the relevant items of evidence.

In reply, the learned State Counsel for the respondent stated that the following facts; outside lights were turned on, the inside lights were turned off, the places where the deceased and the witnesses slept, and that the witnesses knew the appellant for a considerable period were not in dispute.

The learned State Counsel also contended that there was no time for the witnesses to falsely implicate the accused or fabricate a story because the witnesses have made their statements to the police promptly. The learned State Counsel pointed out the relevant items of evidence and contended that, despite a few discrepancies and shortcomings, it appears that prosecution witnesses are truthful when the entire evidence is considered. Therefore, he contended that no reasonable doubt would be cast on the prosecution case.

Evaluation of the Dock Statement

In dealing with the grounds of appeal urged by the learned President's Counsel for the appellant, I wish to consider first, the ground of not considering the dock statement. It is to be noted, that the appellant made a short unsworn statement from the dock and there was no other evidence led on behalf of the defence. Therefore, the defence case has been confined to the dock statement. Also, it is to be noted that the learned Judge who delivered the judgment has heard only the evidence of the last prosecution witness namely the court interpreter's evidence and the dock statement. All other evidence was led before his predecessors.

Undisputedly, the learned High Court Judge has stated only one sentence about the dock statement in his entire judgment. On page 6 of the judgment, the learned Judge stated that the appellant had made a dock statement on 11.01.2021. Apart from that, nothing was mentioned in the judgment about the dock statement or the defence case. That is why the learned President's Counsel contended that the dock statement has never been considered and for this reason alone the impugned judgment should not be allowed to stand.

Submitting the case of Kumara De Silva and 2 Others v. Attorney General – (2010) 2 Sri L.R. 169 the learned State Counsel contended that the learned High Court Judge has impliedly rejected the dock statement. It is correct that in the aforesaid case, it was held that "Even though the learned trial Judge has not formally rejected the above dock statements in so many words, a perusal of page 266 of the original record would reveal that impliedly she has rejected the dock statements". The contention of the learned State Counsel was that by stating "පළමු චූදිත නොවන වෙනත් කිසිවකු විසින් එම වරද සිදු කරන ලද බවට අනුමිතියක් ගොඩ නගා ගත හැකි කරුණු නඩු විභාගයේදී අනාවරණය වී නැත" (Last page of the judgment) the learned High Court Judge has impliedly

rejected the dock statement and thus no prejudice has been caused to the appellant.

Section 4(d) of the "International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007" states that "A person charged of a criminal offence under any written law shall be entitled to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him." In the instant action, the appellant did not call any witnesses on his behalf. He has chosen to present the defence case by making a dock statement.

It was held in P. P. Jinadasa v. The Attorney General - C.A. 167/2009, decided on 21.11.2011, that the Court must consider the dock statement as evidence subject to the infirmities that the dock statement is not under oath and the dock statement is not tested by cross-examination.

In the case before us, the appellant denied his involvement in the incident in his short dock statement which amounts to an alibi. The said position taken up by the dock statement has been put to the PW1 and PW2 in cross-examination (see pages 139 and 185 of the appeal brief). So, it appears that the appellant had maintained one position throughtout the case. However, not a single word is stated in the judgment in analyzing the dock statement. At least, there is no single word in the impugned judgment whether the said dock statement is accepted or rejected.

In the case of Karunadasa v. O.I.C. Motor Traffic Division, Police Station, Nittambuwa – (1987) 1 Sri L.R. 155 it was held that "I accept the evidence of the prosecution, I disbelieve the defence." is insufficient to discharge the duty cast on the Judge. Section 283(1) of

the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. In the instant action, with regard to the defence version not only the reasons were not given to reject it, it was not even mentioned whether the defence is believed or disbelieved.

In the circumstances, I regret that I am unable to accept the argument of the learned State Counsel that the learned Judge's statement that "facts were not disclosed in the trial to draw the inference that no other person other than the accused had committed the offence" is an implied rejection of the dock statement. If the learned Judge has stated in the judgment about the improbability of the defence version or some other reason why the dock statement cannot be relied on but did not specifically mention that he rejects the dock statement, it can be assumed that the dock statement has been impliedly rejected. But certainly, the aforesaid statement in the judgment pointed out by the learned State Counsel does not imply a rejection of the dock statement. The learned trial Judge has come to the said finding by analyzing only the prosecution evidence. Therefore, this is a judgment given without considering the defence version.

In Pantis v. The Attorney General - (1998) 2 Sri L.R.148, it was held that "The burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies courts or at least is sufficient to create a reasonable doubt as to the guilt".

In the case before us, the appellant has given an explanation although it is a mere denial. Accepting or rejecting the said explanation is entirely up to the learned trial Judge. However, the learned Judge should set out reasons for his decision and should state in his judgment whether he accepts the defence version or not. So this is a

judgment that was delivered without considering the defence case. As stated previously, the dock statement must also be considered as evidence subject to the aforesaid two infirmities. Since this is a judgment given without analyzing the evidence adduced by both parties, this cannot be considered as a legally sustainable judgment. However, this court decided to consider the entire evidence in this case, to determine whether the learned High Court Judge's findings could be allowed to stand.

Main Issue in the Appeal

Apart from the evidence of the doctors and other official witnesses, PW1, PW2 and PW3 have given evidence in respect of the incidents pertaining to the charges against the appellant.

The main contention of the learned President's Counsel for the appellant and the main issue to be decided in this appeal is the identity of the first accused-appellant. In other words, this court has to see whether it has been proved beyond a reasonable doubt that the appellant and no one else has committed the offences described in charges 1, 3, 4 and 5.

At this stage, attention has to be drawn to the fact that the Honourable Attorney General has indicted the second accused with aiding and abetting the first accused to commit the murder. It should also be noted that the second accused has been brought in as an accused in this case not on the basis that he aided and abetted without participating in the incident but as a person who participated in the incident. PW3 stated in the history given to the doctor that two persons had come inside the house. In addition, the learned President's Counsel for the appellant pointed out that 2nd accused's statement in terms of section 127 of the Code of Criminal Procedure Act had also been recorded.

The Count No. 5

The simple hurt charge in count number 5 has been brought against the appellant for causing hurt to PW2. She has not seen who assaulted her, according to her evidence. She said when she was sleeping at night, she felt something cold on her head. When she touched her head she felt wetness. Therefore, she did not see who assaulted her. Only after the injury had been caused, she felt wetness on her head, according to her evidence. Thereafter, she heard someone threatening to kill them and she said that she recognized that voice as "Samare Mama's" voice. PW2 identified the appellant as the "Samare Mama".

Voice identification would be considered later in this judgment. At this stage, it is important to consider what PW2 has stated to the doctor who examined her. What she told the doctor has been recorded in the short history given by patient in the medico-legal report pertaining to her and the said history was confirmed by the doctor when the doctor testified. Although it is not stated in her evidence, PW2 has stated to the doctor that she could not remember whether one person came or two persons came. In addition, she stated that there was a person who covered his face with a black cloth. Hence, it is apparent that the person she recalls had covered his face with a black cloth. Also, it is vital to be noted, at least, she has not stated to the doctor that "Samare Mama" or any other known person came. She told the doctor "somebody came and hit" ("කවුද ඇවිත් ගැහුවා"). Anyhow, even according to her evidence, Samare Mama shouted just after she was injured but there was no evidence who caused the injury to her. In addition, as pointed out by the learned President's Counsel for the appellant, it is apparent by perusing her evidence that she has not stated anywhere that the person or persons came had entered her room. Also, in cross-examination, she stated that the said shouting was heard from the living room. (page 179 of the appeal brief). In the absence of any other

witness's evidence as to who caused the injury to PW2, there is no evidence that the appellant caused the injury to PW2. Therefore, I hold that the learned High Court Judge's decision to convict the appellant for the 5th count is wrong.

The Count No. 3

Now, I proceed to consider the conviction in respect of the 3rd count. It's an attempted murder charge based on the injury caused to PW1. There is no issue regarding the nature of the injury that resulted in attempted murder. The issue is regarding the identity of the person who caused the injury. According to PW1's evidence, after she went to sleep, someone came to her room and demanded money. She said that she does not have any. She was then hit on her head. PW1 stated that she recognized the person who hit her as "Samare Mama" by his voice. So, the appellant has been identified by the voice only because she said that there was no sufficient light to see and identify a person. The relevant question and answer appear as follows:

ප්‍ර: කාමරයේ ඉන්නේ කව්ද කියලා හඳුනා ගන්න තරම් ආලෝකයක් තිබුනේ නැහැ?

උ: නෑ.

(Page 128 and 129 of the appeal brief)

PW1 stated further that she knew "Samare Mama" very well. Although she said that she identified the appellant by his voice, she also stated in evidence in chief that somebody demanded money from her.

"පස්සේ කියන්නේ ඒ වෙලාවේ නෙවේ, ඉන් පස්සේ තමයි මගේ සල්ලි ඉල්ල ගත්තා කව්රු හරි. ඊට පස්සේ මම සල්ලි නෑ කිව්වාට පස්සේ ගැහුවා එව්වරයි දන්නේ." (Page 73 of the appeal brief). If the person demanded money was the "Samare mama", she could have said so without saying, "somebody" demanded money. When she said "somebody", it appears that she stated about an unknown person. PW1 has also stated that she couldn't remember whether one or two persons came. She could be believed if she said she didn't see whether two persons or one person came. If she said

she couldn't identify the people who came, she could be believed. Also, on an occasion where several people came and couldn't remember exactly how many people came, that also could be accepted. However, when she says she can't remember whether one or two persons came, this is a statement that's little hard to believe because whether it was one person or two is not a matter that can be forgotten.

Apart from these issues, the short history given by PW1 to the doctor who examined her, casts serious doubt on her voice identification evidence. PW1 has told the doctor that she was "assaulted with a weapon by a known person." It is obvious, that if she had identified the appellant by voice, she could have stated that "Samare Mama" assaulted her because "Samare Mama" was a well-known person to her and the other two witnesses as well.

The gravity of the said doubt would be bolstered by the evidence of PW16, the doctor who examined PW1. Marking the medico-legal report as P3, the doctor stated specifically that PW1 told him that the assailant was a known person but she did not know his name (page 229 of the appeal brief). It is precisely clear that if the assailant was the first accused-appellant, whom she referred to as "Samare Mama," she would have mentioned his name to the doctor and would not say the name of the person is unknown because she knew him and his name very well. In the circumstances, there is a reasonable doubt whether the mention of appellant's name was an afterthought.

The learned State Counsel appeared for the respondent argued that no such contradiction was marked and omission was brought to the notice of the court by the defence. It should be noted that in criminal cases, the accused is not required to prove, disclose or explain anything. His innocence is presumed by law until proven guilty. As the aforesaid improbabilities or doubts have arisen from the evidence

presented by the prosecution itself, the court must consider them whether or not they were pointed out by the defence.

Evidentiary value of Voice Identification

Under the aforesaid circumstances, I proceed to consider whether voice identification could be accepted in this case. Following some appellate court judgments in Sri Lanka and India, the learned High Court Judge acted upon the voice identification evidence adduced in this case to convict the appellant on all four counts against him. At this juncture, it is pertinent to examine the law governing voice identification.

In the Indian case of Dalbir Singh v. State of Haryana, Criminal Appeal No. 899 of 2008 decided on 15th May 2008, the accused was the grandson of the witness. Therefore, the voice identification was accepted.

In Kedar Singh and Others v. State of Bihar, 1999 Cri L. J. 601, Jt 1998(9) SC 398 decided on 18th September 1997 although it is mentioned that "Identification possible by voice too", the court relied on eye witness's evidence stating that there was sufficient light to see the incident.

In the case of Kishnia and Others v. State of Rajasthan Case No: Appeal (crl) 120 of 1998 decided on 10th September 2004, voice identification has been accepted. In this case, witnesses had previous acquaintance with the appellants as their properties were situated close to the field of the deceased. In the case before us also, appellant was residing close to the place where the witnesses were residing but the incident occurred when the witnesses were sleeping at night.

In Sri Lankan judgment Hatangalage Ariyasena v. The Attorney General CA 68/2011 decided on 21st February 2013, the witness *Kalyani* was living in her ancestral house and the accused was living in the same land. So, it was held that *Kalyani* could identify accused's voice. In this case, the decision of the Indian case Kirpal Singh v. The State of Uttar Pradesh - AIR 1965, 712 has been cited as follows: "Where the accused is intimately known to the witness and for more than a fortnight before the date of the offence, he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable."

The decision of the Indian case Nilesh Dinkar Paradkar v. State of Maharashtra - Supreme Court Criminal Appeal No.537 of 2009 decided on 9th March 2011 appears as follows: "In our opinion, the evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. This Court, in a number of judgments emphasized the importance of the precautions, which are necessary to be taken in placing any reliance on the evidence of voice identification."

Also, in this case, what is stated in chapter 14 of "*Archbold Criminal Pleading, Evidence and Practice*" with regard to evidence of voice identification has been discussed as follows: "It is emphasized that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to

visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to Judge the ability of such lay listener to correctly identify the voices."

In the case of Gajraj Singh v. The State of Madhya Pradesh, Criminal Appeal No. 1645/2003, decided on 28th November 2014, an observation of the case of Inspector of Police, T. N. vs. Palanisamy @ Selvan, (AIR 2009, SC 1012) has been cited as follows: "where the witnesses were not closely acquainted with the accused and claimed to have identified the accused from short replies given by him, evidence of identification by voice is not reliable".

In another Indian case Mohan @ Mohan Singh v. State of U.P. - High Court of Judicature at Allahabad, Criminal Appeal No. 871 of 1996, decided on 27th May 2020, it was held that "The evidence led by the prosecution must be cogent, positive, affirmative and assertive and must establish beyond all reasonable doubts that the witness had ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only".

The substance of all these judicial authorities in respect of voice identification can be summarized as follows:

i. The court can act upon voice identification evidence but the precautions to be observed in accepting voice identification evidence should be even more stringent than the precautions which ought to be taken in relation to visual identification.
ii. If the witnesses were not closely acquainted with the accused and claim to have identified the accused from short replies given by his evidence of identification by voice is not reliable.
iii. The evidence led by the prosecution must be cogent, positive, affirmative, and assertive and must establish

beyond all reasonable doubts that the witness had the ability to identify voice and additionally there was sufficient opportunity for the witness to identify the assailant by voice only.

In the case at hand, the prosecution evidence is not cogent and assertive. The vital improbability in PW1's evidence is that if PW1 had correctly identified the appellant as the assaulter, she should have mentioned his name to the doctor, but instead, she said a known person whose name is unknown. Because of this critical improbability and the aforementioned major discrepancies, I hold that voice identification, in this case, is unreliable. Accordingly, count 3 against the appellant has not been proved beyond a reasonable doubt because the appellant has not been properly identified. As a result, the conviction on that count cannot stand.

The Count No. 4

Count 4 has been brought against the appellant for causing hurt to PW3. Only PW3 has given evidence regarding the offence pertaining to count 4. Regarding the 1st count of murder also, only PW3 has given evidence. Therefore, establishing the offences specified in counts 1 and 4 is based on PW3's evidence.

In considering count 4, it is to be specifically stated at the outset that when PW3 stated that a person caught her by the left hand and asked where the money was, she did not state the name of the person. She stated that "he was in our houses at that time". (අපේ ගෙවල් වල තමයි ඒ කාලේ හිටියේ. - Page 192 of the appeal brief) So, it is apparent, neither the appellant's nor anyone else's name was mentioned by PW3 in her testimony. However, the learned State Counsel who prosecuted the High Court case implicated the appellant's name as "Samare" and the very next question was asked. He posed the question in the following manner:

ප්‍ර: දැන් මේ සාක්ෂිකාරිය බලන්න ඔය එදා සාක්ෂිකාරියගේ අතින් ඇදලා සල්ලි ඉල්ලපු සමරේ අද අධිකරණයේ ඉන්නවාද කියලා?

(Page 192 of the appeal brief)

PW3 never mentioned the name "Samare." However, after the learned State Counsel asked the aforementioned question, PW3 identified the appellant as "Samare."

It is also very important to be noted that during the examination in chief of the PW3, nowhere she has stated the name of the 1st accused-appellant or the name “Samare”. In all occasions, the learned State Counsel suggested the name “Samare” and asked questions. In perusing the proceedings, it is clear that the name “Samare” appears in the questions posed by the learned State Counsel during the examination in chief but not in PW3’s answers.

So, in this way, the learned State Counsel has presented the prosecution case by implicating the appellant through PW3. To be fair to the prosecution, I must state that thereafter PW3 has also given evidence accepting the position suggested by the learned State Counsel that the appellant was the one who asked for money and assaulted her.

In the case of Junaiden Mohamed Haaris v. Hon. Attorney General - SC Appeal 118/17, decided on 09.11.2018 the prosecution case was that the murder was committed by three persons and not two. A person called “Salam” had said “අපි දෙන්නා මැරුවේ කියා කවුරුවත් දන්නේ නැහැ.” At the trial, immediately after witness Vasudevan had referred to this conversation, State Counsel had shot the question “කවුද මැරුවා කීවේ?” suggesting that the name of the deceased transpired during the conversation which was not the case. The Supreme Court categorically stated in this judgment that the learned State Counsel should never have asked this question and on the other hand, ought not to have been permitted by the learned High Court Judge as up to that point of

his evidence, Vasudevan had not referred to the identity of the dead person.

When PW3 did not mention the appellant's name in the instant action, the State Counsel referred to the appellant's name in framing the question implicating the appellant in the offence. So, the question posed by the learned State Counsel in this case is more detrimental than the question posed by the learned State Counsel in the aforementioned Supreme Court case because the identity of a deceased person was referred to in that case. In this case, the State Counsel directly mentioned the appellant's name when PW3 said nothing about the accused-appellant. The Honourable Attorney General indicted the appellant and another accused in this case. Even though the question was not legally permitted, PW3 was not even given an opportunity by the learned State Counsel to choose which of the accused, first or second, caused the injury to PW3. Also, it was held in the said Supreme Court judgment that "the manner of questioning not only diminishes the evidentiary value of the testimony but also tarnishes the testimonial trustworthiness of the witness." So, the said decision applies equally to the case at hand. Therefore, in this case, PW3's testimonial trustworthiness has been tarnished.

Apart from the matters stated above with regard to the evidence of PW3, the history given by PW3 to the doctor who examined her is important in analyzing her evidence. PW15, the doctor, has confirmed the history given by PW3 in his testimony. In the history given by her, she stated that two persons entered the house and opened the door. Hence, her evidence established the involvement of two persons in the incident. One person among the said two persons is the appellant, she said. But very strangely, when PW3 testified in the High Court trial, she only mentioned the appellant's involvement, with no mention of the other accused or the involvement of any other person.

Furthermore, PW3 stated in her history to the doctor that she was assaulted with something like a knife. However, according to the doctor, her injury was caused by a blunt weapon. Following that, when she testified in court, she mentioned about a blunt weapon. However, there is a contradiction regarding the blunt weapon also because in evidence in chief she stated that she was assaulted with a pole and in cross-examination, she stated that she was hit with the handle of a mamoty.

In this form of assault, it is possible that the victim could not precisely describe the weapon used. However, there could be no confusion as to whether it is a knife or a pole. Undoubtedly, an incident has occurred on that day. As a result PW3, as well as PW1 and PW2, were injured. Another person was killed. However, when the aforesaid deficiencies, discrepancies, and improbabilities of evidence are considered, a reasonable doubt arises as to whether the PW3 in fact saw the incident she described. Because of the discrepancy in describing the weapon used in the assault and the fact that she saw two people enter the house and speaks only about one person's involvement in her evidence, as well as stating that the assailant was a person who was in their houses without mentioning the name of the appellant, it cannot be determined that count 4 has been proved beyond a reasonable doubt.

The Count No. 1 - Murder

PW3 is the only witness who speaks about the murder. PW5, the neighbour, stated the things happened after the main incidents occurred. PW3 stated that she saw the appellant creeping into her son’s room. However, immediately afterwards she had fallen down and lost consciousness. A vital piece of evidence to consider is that before falling down, she shouted that “someone had come to the house to kill

the child”. The relevant answer given by her appears as follows: “ඊට පස්සේ මම දරුවා මරන්න කවුද ගෙදරට ආවා කියලා කෑ ගැහුවා. ඊට පස්සේ මම වැටුනා.”

(Page 194 of the appeal brief) Now, a serious doubt would be cast, because if the well-known "Samare" had entered, she would not have shouted "someone had come to the house." Since she shouted, "someone had come to the house," it appears that an unknown person or a known person whose name is unknown had come to kill her son.

In addition, even if PW3's evidence that she saw the appellant creeping into his son's room is accepted, the only inference that the appellant murdered her son could not be drawn because, according to the history given to the doctor by PW3, another person also entered the house with the appellant. Not only the fact that another person's involvement was disclosed by PW3 to the doctor, but the Honourable Attorney General also indicted the 2nd accused in relation to the offence of murder. So, when the PW3 fell unconsciously, there was a possibility for another person to enter the room and commit the murder.

Since no one witnessed the incident of murder, the 1st count has to be proved on circumstantial evidence. As it was held in the cases of Junaiden Mohamed Haaris v. Hon. Attorney General - SC Appeal 118/17, decided on 09.11.2018, King v. Abeywickrama - 44 NLR 254, King v. Appuhamy - 46 NLR 128, Podisingho v. King - 53 NLR 49 and Don Sunny v. Attorney General (Amarapala murder case) (1998) 2 Sri L.R. 1, in proving a charge on circumstantial evidence, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

In the case before us, other than the 1st accused-appellant, the 2nd accused or any other person who entered the room also had the opportunity to commit the murder, and the prosecution has not excluded the said possibility. Thus, the only inference of appellant's guilt could not be drawn in this case. Therefore, the 1st count of

murder against the appellant has not been proved beyond a reasonable doubt.

PW14, the doctor who performed the autopsy on the deceased expressed his opinion that the injuries that resulted the death of the deceased could be caused by the mamoty marked and produced as a production of this case. However, it is to be noted that the mamoty has not been recovered in terms of section 27 of the Evidence Ordinance upon a statement of the appellant. Hence, the prosecution has failed to establish any connection between the appellant and this mamoty.

The learned High Court Judge has made the following observation in his judgment and has come to the conclusion that the appellant has committed the murder using this mamoty. The learned Judge's observation is "ඒ අනුව පැ.සා.03 ප්‍රකාශ කරන පරිදි පළවන චූදිත ඇයට පහර දුන්නේ උදලුමිටෙන් නම් පළවන චූදිත උදැල්ලක් රැගෙන පැමිණ ඇති බව පැහැදිලි වේ. ..... මේ අනුව පැ.සා.01, පැ.සා.02, සහ පැ.සා.03 ට පහර දුන් පළවන චූදිත විසින් උදැල්ලක් වැනි ආයුධයක් භාවිතා කරමින් මරණකරුගේ හිසට පහරදීමක් සිදු කර ඇති බවට අනුමිතියක් ගොඩනගා ගත හැකි අතර ....." (Page 31 of the judgment) the learned Judge accepted PW3's evidence that she was assaulted by this mamoty and drew the inference that the appellant had used the mamoty and caused this fatal injury to the deceased as well. However, as previously stated in this judgment, PW3 told the doctor who examined her that she was assaulted with a knife. She stated in the evidence in chief that she was assaulted by a pole. During cross-examination, she stated that she was assaulted by a mamoty handle. When there were three contradictory positions, the learned High Court Judge chose to accept her final version without stating any reason and concluded that the appellant was armed with a mamoty and assaulted the deceased with it. I regret to say that this should not be the approach upon which a judicial decision is reached.

According to the prosecution case, the deceased's fatal injury should have occurred inside his room. To conclude that the appellant hit the head of the deceased by using a mamoty, there was no evidence at all that the appellant was possessed with a mamoty when he entered the room of the deceased. PW3 stated that she saw the appellant creeping into her son's room but she did not state that the appellant was armed with a mamoty or any other weapon when he entered the son's room.

It should not be forgotten that the second accused was also indicted in relation to the murder. The prosecution has not excluded the possibility of causing fatal injuries to the deeased by the second accused. No doubt this is a grave crime. One person was murdered, and three women were injured. 76 years old Wimalawathi was one of them. PW1's injury endangered her life. However, there are certain requirements in law to prove criminal charges. A fundamental principle is that the prosecution must prove its case beyond a reasonable doubt. When considering the aforesaid circumstances, prosecution evidence in respect of the murder is consistent not only with the guilt of the appellant. There was a possibility for the appellant to commit the murder, but at the same time the second accused also had the opportunity to commit the murder and the said possibility has not been excluded. In proving a charge on circumstantial evidence, the evidence must be consistent only with the guilt of the appellant and not with any other hypothesis. Therefore, I hold that the 1st count of murder has not been proved beyond a reasonable doubt against the appellant.

Before concluding, it is to be noted that the aforesaid discrepancies, contradictions, and improbabilities have arisen in the prosecution case even after their statements were read over to PW1, PW2, and PW3 in the police station after receiving summons from the courts to

give evidence, which is not legally permitted. PW3 herself has disclosed this in the following manner.

ප්‍ර: සාක්ෂිකාරිය ඔබට මෙම උසාවියෙන් සිතාසියක් ආවාද සාක්ෂි දෙන්න එන්න කියලා?

උ: ඔව්, ආවා.

ප්‍ර: ඒ ආවාට පස්සේ ඔබ කොහේට හරි ගියාද?

උ: පොලීසියට ගියා.

ප්‍ර: පොලීසියට ගියාට පස්සේ මොකද වුනේ?

උ: පොතක් බලලා කිව්වා.

ප්‍ර: කව්ද පොතක් බලලා කිව්වේ?

උ: කව්ද රාළහාමි කෙනෙක්.

ප්‍ර: පොතක් බලලා කාටද කිව්වේ?

ප්‍ර: ඉස්සෙල්ලාම අපේ ලේලිට, මිණිපිරීට කිව්වා. ඊට පස්සේ මට කිව්වා.

ප්‍ර: මොකක්ද ඒ කිව්වේ?

උ: විස්තරේ කිව්වේ, අපි ඉස්සර කට උත්තර දීපු ඒවා අරවා මේවා තමයි කිව්වේ. .....

(Page 203 and 204 of the appeal brief)

The learned High Court Judge did not take into account the aforementioned contradictions, per-se, inter-se, improbabilities, and unethical manner of presenting evidence. He has also failed to consider the principles governing the proof of a charge based on circumstantial evidence. For the reasons stated above, I hold that the learned High Court Judge's decision to convict the first accused-appellant on counts 1, 3, 4, and 5 is bad in law.

Accordingly, I allow the appeal and set aside the convictions and sentences dated 13.09.2021 for the offences described in counts 1, 3, 4, and 5. The appellant is acquitted of all four charges against him.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL