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

In the matter of an appeal in terms of the Section 331 of the code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 0161-167/2010
HC: Panadura: HC 1476/2001

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

Complainant

Vs.

01. Halanetti Saman Wijithasiri Perera
02. Halanetti Deepal Sri Lakshman Perera
03. Amila Nissanka Weerasinghe
04. Tikiriyadura Ajith Suranga Silva
05. Jayasinghe Samantha Chandramal Silva
06. Halanetti Priyantha Rathnasiri
07. Halanetti Dilupa Duminda Anura Kumara

Accused

And now between

01. Halanetti Saman Wijithasiri Perera
02. Halanetti Deepal Sri Lakshman Perera
03. Amila Nissanka Weerasinghe
04. Tikiriyadura Ajith Suranga Silva
05. Jayasinghe Samantha Chandramal Silva
06. Halanetti Priyantha Rathnasiri
07. Halanetti Dilupa Duminda Anura Kumara

Accused- Appellants

Vs.

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

Complainant-Respondent

Before: N. Bandula Karunarathna J.

&

R. Gurusinghe J.

Counsel: Saliya Pieris, PC with Rukshan Nanayakkara AAL and Amila Egodamahawatta AAL for the 1st Accused-Appellant

Anoopa de Silva DSG for the Complainant-Respondent

Written Submissions: By the 01st, 2nd, 6th and 7th Accused-Appellant on 28.03.2017 and 15.10.2020

By the Complainant-Respondent 04.01.2021

Argued on : 12.10.2022

Decided on : **30.11.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Trial Judge of the High Court of Panadura, dated 05.05.2010, by which, the 1st accused-appellant was convicted and sentenced to 5 years' rigorous imprisonment a fine Rs. 7,500/- in default, 6 months' simple imprisonment. The 2nd to 7th accused-appellants were convicted and sentenced to 3 years' rigorous imprisonment and a fine of Rs. 5,000/- in default, 6 months' simple imprisonment. All accused-appellants were on bail.

When this matter was taken up for argument the learned President's Counsel for the 1st accused-appellant informed court that he is arguing only against the appeal of the 1st accused-appellant. The reasons being that the 02nd to 7th accused-appellants were sentenced to 2 years' rigorous imprisonment suspended for 5 years on 04.04.2019.

The 1st, 2nd, 6th, and 7th accused-appellants and three others were indicted in the High Court of Panadura on the following counts;

(i) That on or about the 15.04.1998, being members of an unlawful assembly with the common object of causing hurt to one Olupathage Somasiri Silva and thereby committing an offence punishable under section 140 of the Penal Code.

(ii) That at the same time and place and in the course of the same transaction one or more members of the said unlawful assembly did commit the murder of the said Olupathage Somasiri Silva, in prosecution of the said common object of the said unlawful assembly, or such as the members of the said assembly knew to be likely to be committed in prosecution of the said common object, and thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(iii) That at the same time and place and in the course of the same transaction you committed the murder of the said Olupathage Somasiri Silva with common intention which is an offence punishable under section 296 read with section 32 of the Penal Code.

The Learned Trial Judge after conclusion of the trial convicted all accused-appellants on count 1 of the indictment. The Learned Trial Judge further found all the accused-appellants guilty for culpable homicide not amounting to murder with regard to the 2nd count on the basis that there was a grave and sudden provocation. The Learned Trial Judge acquitted all the accused-appellants in respect of the 3rd charge and proceeded to sentence them as follows in respect of count 1 and count 2.

Count 01: Section 140 of the Penal Code: 6 months' rigorous imprisonment and a fine of Rs. 2,500/-, in default 6 months' simple imprisonment

Count 02: Section 296 read with section 146 of the Penal Code in respect of the 1st accused appellant: 5 years' rigorous imprisonment and a fine of Rs 5000/=, in default 6 months' simple imprisonment.

2nd to 7th accused-appellants 3 years' rigorous imprisonment and a fine of Rs 5000/=, in default 6 months' simple imprisonment.

This appeal is preferred against the said conviction and sentence.

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

(i) Did the Learned Trial Judge err in law holding that the contradictions and omissions marked by the defence which go to the root of the case were not properly marked?

(ii) Has the Learned Trial Judge failed to consider the contradictions and omissions marked by the defence which go in to the root of the case?

(iii) Has the Learned Trial Judge failed to apply the test of probability and improbability in respect of the evidence of the Prosecution Witness No. 01 namely Olupathage Nalini de Silva whose evidence was unworthy of credit?

(iv) Has the Learned Trial Judge failed to consider the contradictory positions taken up by PW 1 and PW 2 with regard to the identification of the appellants?

(v) Has the Learned Trial Judge failed to consider the dock statement made by the 1st, 2nd and the 6th accused-appellants and the evidence given by the 7th accused-appellant?

At the trial, Olupathage Hasantha (PW 2), Olupathage Nalini de Silva (PW 1), Wasala Mudiyanselage Thilak Kumara Budhdhadasa (PW 5) the JMO who conducted the post mortem examination of the deceased Olupathage Somasiri de Silva , (PW 12) Madduma Patabandige Ananda Bandula Abeysinghe the JMO who examined the 6th accused-appellant, (PW 9) ASP Hewagamage Sirisena of the Agruwathota police, (PW 8) CI Rangage Gnanendra Pradeep Perera, (PW 6) P.S. 22427 Sisira Kumara Kannangara , (PW 10) PS 3017 Aluthgedera Meththananda and (PW 11) PS 21392 who conducted the investigations gave evidence for the prosecution.

Upon the conclusion of the prosecution case, subsequent to the Learned High Court Judge having explained the rights of the accused-appellants the 1st accused-appellant, the 2nd accused-

appellant and the 6th accused-appellant made dock statements whilst the 5th accused-appellant gave evidence from the witness box. The 5th accused-appellant in addition called 2 defence witnesses namely Sunil Lakshman Perera and Halnetti Dilupa Duminda Anura Kumara.

The prosecution witness number 2 namely Olupathage Hasantha De Silva testified before the learned Trial Judge. In his testimony he stated that the deceased is the brother of his father and the incident happened at Narthupana and the date was 15.04.1998. On 15.04.1998 at around 4.45 pm he had come to Nartupana Junction to find a three-wheeler for hire and he had come to the place by his motorbike. The deceased was sitting on a short wall near the junction. When he was riding the bike towards Anguruwathota area the bike was stopped by the 6th accused who was a driver and 10 others were at the scene. Among them were Priyantha's brother and Ajith, Amila, Suranga and Lal. Thereafter, the said Priyantha questioned him about the deceased. Samantha the 1st accused had stated that they had come to kill the deceased. Thereafter the said group assaulted the deceased.

According to what he had seen, the 1st appellant had stabbed the deceased using a knife and the 2nd appellant assaulted the deceased using a pole, the 3rd appellant assaulted the deceased using his hands and the 4th accused assaulted the deceased using a helmet and 5th appellant assaulted the deceased using stones and the 7th appellant assaulted the deceased using a pole. He attempted to rescue the deceased at the incident and a sister of the deceased had also seen the incident and she had come to the scene to rescue the deceased. After stabbing the deceased, the said group went away from the scene.

It was revealed that one of his relatives namely Milton Silva (brother of the deceased) was serving in the Police Department at the time of the incident and he had no knowledge that the said Milton Silva had worked as a Personal Security Officer of Mr. Tudor Dayarathne the then Member of Parliament. After 15 minutes of the incident, he and another two persons brought the deceased to the Horana Hospital in a van. He did not make a complaint to the Anguruwathota Police Station or the hospital's police post while the deceased was brought to the Hospital.

It was suggested to the witness during the cross-examination that, he had failed to state in his statement to the police that the deceased was sitting on a wall. In his statement to the police, he had stated that, while the deceased was coming from the house of his aunty (PW 1), he was assaulted by the accused. However, in his evidence he had stated that while the deceased was sitting on the wall, he was assaulted and the said contradiction was marked as V 2. In the non-summary inquiry, he had taken the same position.

It was suggested to the witness that he had taken up contradictory positions with regard to the number of people who came to the scene. He was aware that the deceased had assaulted the brother of Priyantha prior to the said incident. In his statement to the Police, the witness had stated that there were other several people who had assaulted the deceased. However, in his evidence he had stated that only one accused had assaulted the deceased and the said contradiction was marked as V 7.

He did not see the person who assaulted his aunty at the scene and he did not remember whether he had mentioned in his statement to the police about the intervention of his aunty. After the evidence of the prosecution witness number 2, the prosecution witness number 1 namely Olupathage Nalini De Silva testified before the learned Trial Judge and in her testimony, she stated as follows;

(i) The deceased is the younger brother of the witness;

(ii) The incident had happened on 15.04.1998 at around 4.45 - 5.00pm;

(iii) That the deceased was residing one kilometre away from the house of the witness;

(iv) On the date of the incident at around 2.30, 3.00 pm the deceased had come to her residence and thereafter he went to the boutique situated near the Karthupana bridge to buy a cigarette obtaining Rs. 5/- from her husband;

(v) She had seen that the deceased was near the Newchattelwatta Board which is 150-200 feet away from her house;

(vi) Thereafter a group of people consists of 20 or 25 people had come towards the deceased and assaulted him and at the time of the assault she attempted to rescue and when she reached the scene, she saw that the deceased was assaulted and she was also assaulted by a stone;

(vii) The deceased was assaulted using their hands, legs, poles, helmets and finally she had seen that he was stabbed using a knife by one Champa (the 1st accused) who was a driver;

(viii) She was also injured as a result of the said incident and she was admitted to the hospital;

(ix) She had made a complaint to the police about the said incident after she was discharged from the hospital;

(x) She had given evidence in the inquest and the non-summary inquiry;

(xi) She had no knowledge about the dispute between the deceased and the 1st accused;

(xii) The witness No: 02 is the son of her elder brother and she had seen him at the time of the incident.

In the cross-examination PW 1 stated as follows;

(i) She had no knowledge that the deceased had consumed liquor prior to the incident. However, in the inquest she had stated that the deceased had consumed liquor prior to the incident and the said contradiction was marked as V 8.

(ii) At the inquest she had stated that she identified the 6th accused at the time of the incident. However, in the evidence in chief she stated that she identified only the 1st accused by his name and the said contradiction was marked as V 9.

(iii) The deceased was assaulted while he was sitting on the wall. However, in her statement to the police she did not mention about that.

(iv) At the 1st instance a single person came to the scene and assaulted the deceased. However, in her statement to the police she did not mention about that.

(v) At the inquest she did not mention that the prosecution witness number 2 Hasantha De Silva is an eye witness to the incident.

(vi) She was getting death threats by one accused showing a knife and at the non-summary inquiry she had taken same position. However, she did not mention about that in her statement to the police contradiction marked V 11.

(vii) Only act done by the 1st accused was to stab the deceased. However, at the inquest she had stated that the 1st accused assaulted the deceased using stones and the said contradiction was marked as V 12, V 13, and V 14.

(viii) That the deceased was sitting on the wall at the time of the incident. However, at the inquest she had stated that the deceased was sitting on the floor at the time of the assault and the said contradiction was marked as V 16.

On 26.03.2008, the defence was called and the 1st, 2nd, 6th appellants made dock statements and the 7th appellant and others gave evidence.

Dock statement of the 1st appellant was that he denied the allegations levelled against him and on 14.04.1998 his grandmother passed away and when he came back to his home after attending the funeral her sister informed him that someone is assaulting his elder brother. At that time, he proceeded towards the said place and he noticed that the 6th appellant was also proceeding to the said place.

When he reached there his elder brother was not in the said place and the deceased was at the scene and the deceased assaulted the 6th appellant by stones and the head of the 6th appellant was injured as a result of the said assault. Thereafter the 6th appellant was brought to the hospital by the 1st appellant and the 5th appellant. He said that he never stabbed the deceased using a knife,

On behalf of the 1st accused-appellant it was argued that the learned Trial Judge erred in law holding that the contradictions and omissions marked by the defence which go to the root of the case were not properly proved. In her judgment the learned Trial Judge continuously held that the contradictions marked by the defence through PW 1 and PW 2 (eye witnesses to the incident) were not properly marked on the basis that the witnesses cannot be expected to possess a photographic memory.

It was further argued that the contradictions marked as V 2, V 3, V 5, V 7 by the evidence of the prosecution witness No: 02 Hasantha De Silva and the contradictions marked V 8, V 9, V 11, V 12, V 13, V 14 and V 15 go to the root of the case. The learned Trial Judge has rejected the said contradictions and omissions on the basis that the contradictions and omission cannot be considered or marked only if the witness could not remember the incident. In the instant case the learned Trial Judge has failed to consider the said contradictions and omissions which go to the root of the case on a substantial basis.

The learned President's Counsel for the 1st accused-appellant submits that the learned Trial Judge has failed to apply the test of probability and improbability in respect of the evidence of the prosecution witness number 1 namely, Olupathage Nalini De Silva and prosecution witness number 2 Olupathage Hasantha De Silva, whose evidence were unworthy of credit.

The evidence of the PW 1, who is the sister of the deceased is contradicted with her own statements made to the police and evidence given at the Magistrate's Court at the inquest. The said contradictions were marked as V 8 to V 16 which go to the root of the case and the said facts

are not consistent with the guilt of the appellant. Further, several omissions were brought to the notice of the learned Trial Judge. The said contradictions and omissions were as follows;

(i) That she had no knowledge that the deceased had consumed liquor prior to the incident. However, in the inquest she had stated that the deceased had consumed liquor prior to the incident and the said contradiction was marked as V 8.

(ii) That at the inquest she had stated that she identified the 6th accused at the time of the incident. However, in the evidence in chief she stated that she identified only the 1st accused by his name and the said contradiction was marked as V 9.

(iii) That the deceased was assaulted while he was sitting on the wall. However, in her statement to the police she did not mention about that;

(iv) That at the 1st instance a single person came to the scene and assaulted the deceased. However, in her statement to the police she did not mention about that;

(v) That at the inquest she did not mention that the prosecution witness number 2 Hasantha De Silva is an eye witness to the incident;

(vi) That she received death threat by one accused showing a knife and at the non-summary inquiry she had taken the same position. However, she did not mention about that in her statement to the police: this contradiction was marked as V 11;

(vii) That the only act done by the 1st accused was to stab the deceased. However, at the inquest she had stated that the 1st accused assaulted the deceased using stones and the said contradiction was marked as V 12, V 13, V 14;

(viii) That the deceased was sitting on the wall at the time of the incident. However, at the inquest she had stated that the deceased was sitting on the floor at the time of the assault and the said contradiction was marked as V 16;

The learned President's Counsel for the 1st accused-appellant says that the prosecution witness number 2 who is an eye witness to the incident had taken up contradictory position in respect of the incident and his evidence is contradicted with the statement given to the police and the said contradictions were marked as V 2 to V 8. Several omissions were brought to the notice of the learned Trial Judge. Those contradictions and omissions were as follows;

(i) That in the Magistrate's Court of Horana, Lal had stated that at the time of the incident Lal had seen only 5 persons. However, in the trial Lal had stated that he had identified that all the accused were at the scene.

(ii) That it was suggested to the witness that he had failed to state in his statement to the police that the deceased was sitting, on a wall.

(iii) That in his statement to the police he had stated that while the deceased was coming from the house of his aunty (the witness number 01), he was assaulted by the accused. However, in his evidence he had stated that while the deceased was sitting on the wall, he was assaulted and the said contradiction was marked as V 2. Further in the non-summary inquiry he had taken the same position.

(iv) That it was suggested to the witness that he had taken up contradictory positions with regard to the number of people who came to the scene.

(v) That in his statement to the police the witness had stated that there was other several people who had assaulted the deceased. However, in his evidence he had stated that only the accused had assaulted the deceased and the said contradiction was marked as V 7;

(vi) That he did not see the person who assaulted his aunty at the scene and he did not remember whether he had mentioned in his statement to the police about the intervention of his aunty;

Learned President's Counsel for the 1st accused-appellant further argued that in terms of the aforesaid contradictions and omissions which go to the root of the case, a reasonable doubt has arisen about the credibility and the trustworthiness of the eye witness to the incident and therefore it is unsafe to believe the evidence of the PW 1 and PW 2.

These are material contradictions, and as such as held in the case of H.K.K. Habakala vs. The Attorney General 2010 (BLR) 210, if a contradiction is material, such is sufficient to create a reasonable doubt in the evidence of the witness concerned.

In the case of Banda & others vs Attorney General 1999 (3) SLR 168, it was held that "proving omissions is an accepted method of "assailing the testimonial trustworthiness of a witness".

The case of Wiiepala vs The Attorney General 2001 (1) SLR 46, it was held that where the evidence of the sole eye witness was open to suspicion, it raised a strong doubt as to the guilt of the appellant the court should have given the benefit of that doubt to the accused.

It was further argued by the learned counsel for the appellant that the learned Trial Judge has failed to consider the contradictory positions taken up by the PW 1 and PW 2 with regard to the identification of the appellant. In the Magistrates Court of Horana, PW 2 had stated that at the time of the incident he had seen only 5 persons. However, in the trial he had stated that he had identified all the accused who were at the scene. It was suggested to the witness that he had taken up contradictory positions with regard to the number of people who came to the scene (V 5). In his statement to the police, the witness had stated that there were several other people who had assaulted the deceased. However, in his evidence he had stated that only one accused had assaulted the deceased and the said contradiction was marked as V 7.

In the evidence of the PW 1 she stated that at the inquest, that she identified the 6th accused at the time of the incident. However, in the evidence in chief she stated that she identified only the 1st accused by his name and the said contradiction was marked as V 9. The deceased was assaulted while he was sitting on the wall. However, in her statement to the police she did not mention about that. At the 1st instance a single person came to the scene and assaulted the deceased. However, in her statement to the police she did not mention about that. She was threatened to be killed by one accused showing a knife and at the non-summary inquiry she had taken the same position. However, she did not mention about that in her statement to the police, contradiction marked V 11.

Only the act done by the 1st accused was to stab the deceased. However, at the inquest she had stated that the 1st accused assaulted the deceased using stones and the said contradiction was

marked as V 12, V 13, and V 14. PW 1 and PW 2 had taken up contradictory positions in respect of the identification of the appellants and the acts done by the appellants. Therefore, a reasonable doubt has arisen as to whether they are eye witnesses to the incident as well as the presence of the appellants to the incident.

The learned Trial Judge has failed to consider the dock statement made by the 1st accused-appellant.

In their dock statement the 1st, 2nd and the 6th appellants denied their presence of the incident and while giving evidence in the witness box the 7th appellant has also denied his presence of the incident. A reasonable doubt has arisen about the presence of the appellants according to the evidence of PW 1 and PW 2 and the learned Trial Judge has failed and neglected to take into consideration the dock statements of the 1st, 2nd and the 6th appellants and the evidence given by the 7th appellant.

In James Silva vs Republic of Sri Lanka 1980 (2) SLR 167, the Court held as follows;

> "a satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the court by the prosecution and by the defence in its totality without compartmentalizing and asking the question whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

The Judicial Medical Officer (JMO) (PW12) who had examined the 6th accused-appellant testified to the effect that the address of the 6th accused-appellant is Welamitiyagoda, Thebuwana. The 6th accused-appellant had been 30 years of age. He had examined the 6th accused-appellant whilst he was warded in the National Hospital under the BHT number 452012 on the 23.04.1998 at 10.15 am. As per the short history given by the 6th accused-appellant, he had taken up the position that on the 15.04.1998 around 5.30 pm he had been attacked with a rock stone. The 6th accused appellant however had failed to reveal the name of the assailant.

The JMO had observed a single external injury on the body of the deceased. He had observed a fracture of the skull on the right side. There had been a blood clot in the dura which the JMO had removed by an operation.

The 1st accused-appellant took up the position in his dock statement that he categorically denies the allegations levelled against him, at the time of the incident. It was the position of the 1st accused-appellant that the prosecution witnesses were lying. The 1st accused-appellant categorically denied the allegation of having stabbed the deceased.

The learned Trial Judge in her judgment continuously held that the contradictions marked by the defence through PW 1 and PW 2 were not properly marked on the basis that the contradictions and omissions cannot be marked only if the witness cannot remember the particular portion of the evidence or statement put to him or her. The learned Trial Judge was quite correct in holding same.

As in the case of Rev. Maharagama Suneetha vs AG 2006 (3) SLR 266, it was held that before proof can be given of a former inconsistent statement and if the statement is in writing although it need not be shown to the witness or be proved in the first instance, if it is intended to

contradict him by it, his attention must be drawn to those parts of it to be used for contradicting him and he should also be afforded with an opportunity to explain such contradictions.

This is exactly what the learned Trial Judge observed and held in her judgment.

Page 887 of the appeal brief is as follows;

> **සිද්ධිය සිදු වූ අවස්ථාවේදී 01 වන චූදිත ඇතුළු අනෙකුත් චූදිතයන් කණ්ඩියක් උඩ වාඩි වී සිටි බාප්පා පෙන්වා, ඔහුව තමයි ඕන කියා කියූ බවත්, ඔහු මරන්නට පැමිණි බව 01 වන චූදිත එම අවස්ථාවේදී පැවසූ බවත් සාක්ෂි කරුගේ සාක්ෂියයි. බාප්පා කණ්ඩිය උඩ වාඩි වී සිටි බව පොලීසියට ප්‍රකාශයක් කරන අවස්ථාවේදී සඳහන් කළාද යනුවෙන් සාක්ෂිකරුගෙන් විමසූ විට ඔහු පවසා ඇත්තේ "පොලීසියට දුන්නු කටඋත්තරය මට හරියට මතක නෑ." යනුවෙන්ය. එසේ මතක නැති බව ප්‍රකාශ කල විට, එය ඌණතාවයක් වශයෙන් අධිකරණයේ අවධානය යොමු කර ඇති නමුත්, එය ඌණතාවයක් ලෙස සැලකිය නොහැක්කේ, එම කරුණ පිළිබඳ සාක්ෂිකරුගේ ස්ථාවරය කුමක්ද යන්න දැන ගැනීමකින් තොරව, එම ඌනතාවය පිළිබඳව අවධානය යොමු කර ඇති බැවින්ය. එසේම පහරදීම ආරම්භයේ දී මියගිය අය කණ්ඩිය උඩ වාඩි වී සිටි බව පොලීසියට ප්‍රකාශකර නොතිබීම ද ඌණතාවයක් වශයෙන් අධිකරණයේ අවධානය යොමුකර ඇත. නමුත් ඒ බව පොලීසියට ප්‍රකාශ කලාද යනුවෙන් සාක්ෂිකරුගෙන් විමසූ විට ඔහු පිළිතුරක් දී නොමැත. එසේනම් එය ඌණතාවයක් ලෙස සැලකිය නොහැකි බව අධිකරණයේ නිගමනයයි.**

In <u>Rev. Maharagama Suneetha vs AG 2006 (3) SLR 266,</u> it was further held this procedure has not been followed in this case and also that this court cannot take into cognizance the contradiction or omission at the stage of the appeal.

In the instant case this procedure was not followed. The moment the witness responded by saying I cannot remember the counsel for the defence proceeded to mark the contradictions and omissions. No explanation was called from the witness. This accordingly quite correctly resulted in the Trial Judge not to take into consideration the contradictions and omissions marked by the defence counsel.

Page 888 of the appeal brief is as follows;

> **මියගිය අය කණ්ඩියක් උඩ වාඩි වී සිටින විට චූදිතයන් පහරදුන් බව සාක්ෂිකරුගේ සාක්ෂිය වන නමුත් "එවිට මම දැක්කා සෝමසිරි බාප්පා ලොකු නැන්දලාගේ ගෙදර සිට පහළට එනවා. පහළට එන සෝමසිරි බාප්පාට මේ කට්ටිය පෙරලාගෙන ගැහ්වා." යනුවෙන් පොලීසියට කිව්වා ද කියා විමසූ විට එටහිදී ඔහු පවසා ඇත්තේ මට මතක නෑ යනුවෙන්ය. නමුත් එයද වි. 2 ලෙස පරස්පර විරෝධතාවයක් වශයෙන් ලකුණු කර ඇත. සාක්ෂිකරු මතක නෑ කියූ පමණින්ම එම සාක්ෂි කොටස පරස්පර විරෝධතාවයක් ලෙස ලකුණු කල නොහැකි බැවින් සහ ඒ අනුව එය විධිමත් ලෙස ලකුණු කරන ලද පරස්පර විරෝධතාවයක් නොවන බැවින්, ඒ පිළිබද අවධානය යොමු කිරීමක් අනවශ්‍ය බව අධිකරයේ නිගමනයයි. එසේම ලසු නොවන පරීක්ෂණයේදී මිය ගිය අය ලොකු නැන්දාගේ ගෙදර සිට පහලට එනවා දුටු බව සාක්ෂි දී ඇති අතර, එසේ කිව්වාද යනුවෙන් ප්‍රශ්න කල විට සාක්ෂිකරු පවසා ඇත්තේ, මතක නැහැ යනුවෙනි. එයද පරස්පර විරෝධතාවයක් ලෙස ලකුණු කර ඇත. ප්‍රථමයෙන් සඳහන් කළ පරිදි මතක නැහැ යැයි පැවසූ පමණින් එය පරස්පර විරෝධතාවයක් ලෙස ලකුණු කළ නොහැකි බව අධිකරණයේ නිගමනයයි.**

The learned Trial Judge was quite correct in rejecting the contradictions and omissions marked by the defence.

The view expressed in <u>Rev. Maharagama Suneetha vs AG 2006 (3) SLR 266,</u> has been reiterated in many a judgement and many a jurisdiction.

In Best Footwear (Pvt) Ltd and two others vs Aboosally 1997 (2) SLR 138, F.N.D Jayasuriya J held as follows:

> "In evaluating the evidence of a witness, a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy, does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance. Before arriving at an adverse finding in regard to testimonial trustworthiness the Judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter...."

In Shaik Subhai Vs State of AP., 321 (326) (AP), it was held that;

> "by putting suggestions to the witness and the witness denying the same will not amount putting contradiction to the witness. The contradiction has to be put to the witness as contemplated under section 45 of the evidence Act. If a contradiction is put to the witness and it is denied by him, then his attention had to be drawn to the statement made by such witness before the police or any other previous statement and he must be given a reasonable opportunity to explain as to why such contradiction appears and he may give any answer if to statement made by him is shown to him and if he is confronted with such a statement and thereafter the said contradiction must be proved."

In Brown vs Dunn 6 R 67, at page 76 Lord Halsbury observed that;

> "to my mind nothing would be more absolutely unjust than not to cross examine witness upon evidence which they have given, so as to give them notice and to give them an opportunity of explanation and an opportunity very often to defend their own character".

In Bombay C M Co Vs. Motilal 42 AIR 110, it was held that giving a witness an opportunity to explain the discrediting facts is important to show that the evidence for and against the relevant issue is trustworthy or untrustworthy in order to believe or disbelieve in the witnesses' story given in oral evidence.

Has the learned Trial Judge failed to consider the contradictions and omissions marked by the defence which go in to the root of the case?

As per the dicta in Rev. Maharagama Suneetha vs AG 2006 (3) SLR 266, the proper procedure to be followed when marking contradictions was not followed by the defence. The Trial Judge was quite correct in disregarding the contradictions marked by the defence, similarly as seen in Rev. Maharagama Suneetha vs AG 2006 (3) SLR 266, this procedure has not been followed in this case and therefore that this court cannot take into cognizance the so-called contradiction or omission at the stage of the appeal.

Has the learned Trial Judge failed to apply the test of probability and improbability in respect of the evidence of the prosecution witness No. 01 namely Olupathage Nalini de Silva whose evidence was unworthy of credit?

There is absolutely no merit in this ground of appeal as the learned Trial Judge had taken into consideration the test of probability and improbability.

Has the learned Trial Judge failed to consider the contradictory positions taken up by PW 1 and PW 2 with regard to the identification of the appellants? There is absolutely no merit in this ground of appeal as there were no proper contradictions in existence with regard to same.

Has the learned Trial Judge failed to consider the dock statement made by the 1st, 2nd and the 6th accused-appellants and the evidence given by the 7th accused? There is absolutely no merit in this ground of appeal.

In the above circumstances it is evident that there is strong and cogent evidence which establishes the fact that the prosecution has proved its case beyond reasonable doubt.

It is my view that the failure to take into account the afore-cited extenuating circumstances amounts to a non- direction resulting in a miscarriage of justice.

In this case the defences of grave and sudden provocation and sudden fights were proved. Even though the 1st accused had acted excessively when inflicting the said injury using a knife, the matters already discussed above indicate a sudden fight without premeditation and without taking any undue advantage in the heat of passion.

For the reasons set out above, I conclude that the learned Trial Judge had misdirected himself by failing to evaluate the said material in favour of the accused-appellant. I therefore decide to set aside the sentence and replace it with a fresh sentence.

The conviction for culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of provocation and sudden fight is affirmed and I impose a sentence of 2 years' rigorous imprisonment suspended for 7 years from today.

Appeal is dismissed.

Sentence altered.

Judge of the Court of Appeal

<u>R. Gurusinghe J.</u>

I agree.

Judge of the Court of Appeal