

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

The Petition of Appeal under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Section 14 of the Judicature Act, read with Section 331 of the Code of Criminal Procedure Act. No.15 of 1979.

**CA No: CA/HCC/ 287/2017**  
**HC: Matara: HC 100/2015**

The Hon. Attorney General

**Complainant**

**Vs.**

Meegasdeniya Kankanamlage Jayadasa

**Accused**

**And now between**

Meegasdeniya Kankanamlage Jayadasa

**Accused- Appellant**

**Vs.**

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

**Complainant-Respondent**

**Before:** **N. Bandula Karunarathna J. (P/CA)**

**&**

**R. Gurusinghe J.**

**Counsel:** Yalith Wijesundara AAL for the accused-appellant  
Dileepa Peiris, SDSG for the complainant-respondent

**Written Submissions:** By the accused-appellant on 04.06.2018  
By the complainant-respondent 05.07.2018

**Argued on :** 28.11.2022

**Decided on :** 15.11.2023.

**N. Bandula Karunarathna J. (P/CA)**

The 2<sup>nd</sup> Accused Appellant along with the now deceased 1<sup>st</sup> accused M.K. Pradeep Nishantha was indicted before the High Court of Matara for committing the murder of Thalpavila Vidana Kankanamge Sujith, an offence punishable under Section 296 of the Penal Code read along with Section 32. The 1<sup>st</sup> Accused was reported dead before the trial commenced. The judgment in this matter was delivered on 31. 05. 2017, convicting the 2<sup>nd</sup> accused appellant (herein after referred as the appellant). Accordingly, the death sentence was imposed.

The prosecution led the following witness at the trial -

PW 01 - T.W.K. Cyril (Page 57) father of the Deceased,

PW 02 - T.W.K.C. Lakmal (Page 102) brother of the Deceased,

PW 04 - G.A. Chandrasiri (Page 134) employee of the Deceased's family,

PW 05 - Dr. K. I. Padmathilaka (Page 157) JMO,

PW 06 - K.M.A. Gunerathne (Page 171) Sub Inspector,

PW 07 - A.G.U. Chandrasiri (Page 179) SP Investigating Officer.

The grounds of appeal are as follows;

1. The Learned Trial Judge at Matara has failed to consider the vital inter-se and per-se contradictions in the testimony of the two eye witnesses' evidence, in which he relied upon to convict the accused.
2. The Learned High Court Judge has failed to consider the unreliable nature of the evidence of the 1<sup>st</sup> witness, when the test of probability is applied.
3. The Learned High Court Judge has failed to identify that the accused appellant cannot be held guilty for the common murderous intention, under the circumstances, even though the court decides to believe in the testimony of the eye witnesses.

T.W.K. Cyril (PW 01) father of the Deceased giving evidence informed that the deceased was the eldest in the family of 4 children. The witness is a landowner in Urugamuwa area. On 29. 11. 2000 he recruited several men to pluck coconuts in the estate. In the evening after dinner, a group stayed at his house engaged in a conversation. Thereafter, the deceased and his sister had gone towards the newly built house. The witness went in a different direction to light a fire. He had proceeded about 40 meters passing the new house when he suddenly heard the sound of a gunshot.

Thereafter, he had come back towards the new house. He also heard footsteps of people running. Having aimed his torch light towards the direction of the footsteps, he identified the accused person along with the now deceased accused, running away from the house. He clearly identified the deceased accused armed with a firearm. The accused was seen running closer to the deceased accused person. Thereafter, he had arrived at the newly built house. There he saw his elder son seated on a chair with gunshot injuries. The deceased was rushed

to the Batheegama Hospital and was pronounced dead. He claims that the two accused are cousin brothers.

The defence in cross-examination had pointed out several omissions in his testimony. It was further suggested to him that he only arrived at the scene after the incident occurred and villagers having admitted his son to the hospital.

T.W.K.C. Lakmal (PW 02) brother of the deceased giving evidence admits that he was present with the deceased on the day in question. The witness proceeded to close the gate at the same time when the deceased, his sister and an 8-year-old child left for the new house. Whilst closing the gate he heard a loud noise similar to a gunshot or a firecracker. Then he observed two men running towards him from the direction of the new house. At this moment he was in possession of a torch light. Having aimed the torchlight towards the persons, he recognized both accused persons. He claims that the deceased accused was armed with a firearm. Later he saw his deceased brother with gunshot injuries.

The defence in cross-examination has not challenged pertinent issues raised by him in giving evidence. It should be noted that the above mentioned two witnesses had testified in court cogently and consistently. The two witnesses had not attempted to fabricate evidence against the accused. If they wish to adduce false evidence it could have been easily said that they saw the deceased accused or the accused shooting at the deceased. But both witnesses had said that they saw the two accused only running away from the crime scene. Therefore, the trustworthiness and credibility of the two witnesses could be heavily relied upon.

Witness Dr. Padmathilaka (PW 05) has conducted the post-mortem inquiry. He had observed 6 injuries on the body of the deceased. All 6 injuries were caused by a firearm. Injury No. 1 on the head region was remarked as the fatal injury.

Police witnesses PW 06, SI Gunarathne and PW 07, SP Chandrasiri had carried out the police investigation. SP Chandrasiri had made observation at the crime scene. He says that the deceased had been shot while being seated in the verandah. He noted that the shooter would have shot the deceased from a distance of 30 meters. He further states that the accused was arrested 3 months after the incident.

The accused gave evidence from the witness box and vehemently denied any involvement to the shooting. The accused says that he absconded, fearing that some harm would befall on him. This was due to the fact that the deceased accused person Pradeep Nishantha had disappeared after being arrested by the police. Ironically the prosecution's stance was that the deceased accused Pradeep Nishantha was never arrested. He was presumed dead in view of the prevailing circumstances. But the accused-appellant claims that his cousin brother, the deceased accused Pradeep Nishantha was arrested by police and had subsequently disappeared. It was not disclosed from the accused how he came to know that the deceased accused was involved in a crime. The learned trial Judge had correctly determined the 3<sup>rd</sup> witness for the accused is a bias witness who was called to testify and to tarnish the credibility of PW 01.

The learned counsel for the appellant states that there were vital contradictions and omissions that will raise serious doubt in the prosecution case. The learned trial Judge in his well-considered judgment had clearly analysed and evaluated the omissions and

contradictions marked before him. He had disregarded them as he believed that they would not have a considerable bearing on the trustworthiness of prosecution witnesses.

The learned counsel for the appellant invites court to apply the test of probability in respect of the prosecution witnesses. It should be noted that both PW 01 and PW 02 promptly implicated the culpability of the accused in their statements to the police. There was no undue delay in implicating the names of the accused to the police. The accused were known men in the village. The house of the deceased accused was situated in close proximity to the new house of PW 01. The witnesses said in his evidence, both accused were seen running towards the said house of the deceased accused. When the accused was arrested, police recovered a hand grenade from his possession.

The accused testifying in the High Court and denied possessing of an offensive weapon such as a hand grenade. He gives an impression to court that the police planted the hand grenade to vindicate him. But subsequently he admitted that he pleaded guilty to a charge of possession of an illegal offensive weapon in court. It raises the question as to why he opted to plead guilty to a charge that was fabricated by Police. On behalf of the respondent the said prosecution witnesses had testified in court without any exaggeration. As pointed out earlier, the prosecution witnesses could have easily added more compelling narrative into their testimonies. But they professed the truth at all given times. The test of probability should be applied in favour of the prosecution witnesses.

It is important to note that drawing attention to the 2<sup>nd</sup> alternative situation as highlighted by the learned counsel for the appellant, at the commencement of the trial in High Court, the accused-appellant pleaded a defence of Alibi. However, as provided for in the said alternative situation, it makes mention of the fact that the deceased accused and the accused entered the jungle for the purpose of hunting. Based on the above fact, it is not possible for the accused-appellant to take up the said defence and still suggest that the accused-appellant was in the company of the deceased accused at the scene of the crime. On behalf of the respondent, it was suggested that the accused appellant is not telling the truth in this situation.

Further, with regards to the ground of appeal took forward by the learned counsel for the appellant, it is evident that the said ground of appeal appears to be misleading and quite confusing. Thus, the prosecution is of the view that the learned counsel is attempt in to mislead this court. He claims that even if this court tries to believe in the testimony of the two eye witnesses that it only proves that the accused appellant ran behind a man who was holding a long-barrelled gun.

The prosecution brought to the light the following important and pertinent facts that were elicited during the trial;

- A. On 29.11.2000 between 7.30 p.m. and 8.00 p.m., both accused were seen inside the property on PW1.
- B. It was never denied that there was and enmity between the accused and the deceased families.

- C. What tempted the accused person to continue running with the deceased accused who was armed with a long-barrelled gun.
- D. Isn't it strange for the accused to commence running behind the deceased accused, soon after a gunshot was heard?
- E. If in fact the accused was chasing behind the real culprit, when PW1 and PW2 both aimed their torch light at him, he could have responded to them in respect of his intention.
- F. What was the subsequent conduct of the inherently running accused appellant? Did he disappear from the village for no apparent reason and finally apprehended whilst begging armed with a hand grenade?
- G. When a neighbouring 27-year-old young person was brutally gunned down for no justifiable reason, what was the assistance given by him to the deceased's family? If he was in fact at the scene of the crime, as an innocent bystander, it is his obligation to assist law enforcement officers to carry out their duties.
- H. It is further pointed out that learned counsel for the accused-appellant has indirectly admitted the presence of the accused with the deceased accused at the scene of the crime. He further attempts to logically justify his client's. Presence and conduct as of a prudent person's response in such a situation.

Three persons have mainly testified as eye witnesses for the prosecution in this case. One of them claims that he saw the actual incident of shooting.

- 1. Thal pawila Widana Kankanamlage Cyril: PW 01 (The father of the deceased) who claims that though he didn't see the incident of shooting, claims that he saw the perpetrators of the crime running away, and that he identified them.
- 2. Thal pawila Widana Kankanamlage Chaminda Lakmal: PW 02 (The brother of the deceased) who too claims that though he didn't see the incident of shooting, claims that he saw the perpetrators of the crime running away, and that he identified them.
- 3. Geeganage Ajith Chandrasiri PW 04 (A worker who worked as a coconut plucker in the estate, under the father of the deceased) who claims that he saw the actual incident of shooting.

In the judgment at the end of the High Court Trial the learned High court Judge at Matara has evaluated the evidence of these three eye witnesses one by one. He has decided not to rely on the evidence of Geeganage Ajith Chandrasiri PW 04, since his testimony is full of contradictions and infirmities. He has decided to rule out his evidence.

The Prosecution Witness No.1, Thal pawila Vidana Kankanamlage Siril states that he and his children were residing in an old house which was built at the midst of that land. There is a major round route with a gate which leads to his house. Through that route there are about 200m to his old house. He states that there is another trail which is a direct close route to the

main road and they frequently use that trail. At the end of the trail, a new house which is built by him is situated. The distance between the two houses is about 100m.

There is a fence with a gate which separates the new house from the main road. There was a distance of 5-10 meters from the gate of the fence to the new house. He states that through the trail they reach the yard of the new house, then comes out of the fence through the gate, crosses the road and reach another route which leads to another coconut cultivated area, which is high in land. Through that route there are about 150 yards to that cultivated area. (1 yard = 0.9144 meters / 150 yards = 137.16 meters)

There is a distance of 250-300 meters from the gate of the main route, to the fence of the newly built house along the main road. On this fatal day the father of the deceased met two workers called Chandrasiri and Matara ayya, engaged in picking coconuts and in the evening, they were resting. Around 7.30 p.m. they had dinner and by 8 p.m. it was over and those who were in the house were chatting with each other. There were six home members, namely Cyril who was the father of the deceased, his wife Leelawathi, his four children: Sujith (Deceased), Chaminda Lakshan (PW02), Sarath Kumara, Dhammikaa (Daughter), Premaratna (a child of 8 years who was a relation of this family), and three others who are Chandrasiri (PW 04), Matara Ayya and another person called Ananda.

After this the deceased, his sister and Premaratne the child left the old house and started walking towards new house through the trail. After about 5-10 minutes he (father of the deceased) took a torch and a match box and started walking in the trail too. His intention was to reach the fence of the new house, get out of the gate, cross the road and take the route, which starts at the front of the new house to his plantation to kindle a fire to chase away the wild boars, which arrive and destroys the new coconut plantation.

He arrived to the new house, passed it and crossed the road and took the route towards his coconut plantation. There are 150 yards/ 137.16 meters from the main road to his coconut plantation. He goes about 41.5 meters when he hears a gun shot. Within seconds he hears his daughter screaming "Father, someone has shot ayya". He stopped his walk and returned to the main road towards the new house.

When he was coming closer to the new house, and was at the edge of the main road he heard somebody running. He flashed the torch light in that direction and he saw Pradeep Nishantha the 1<sup>st</sup> accused-appellant (who suddenly disappeared and was considered dead) running towards the main road, with a long barrel gun in his hand. Jayadasa the accused-appellant too was running behind him. There was about six and half meter's distance between them. They ran in front of him. They were wearing sarongs which they wore shortened. They were running to the Radampola - Dickwela direction.

He saw them running after about five minutes, the moment he heard the gun shot. The father of the deceased declares that these two (Pradeep Nishantha and Jayadasa) are cousins, and known to them as fellow villagers. He admits that he didn't see the actual incident of shooting. When he reached the new house, he saw his deceased son sitting on a chair in the verandah with a wound in his head, soaked in blood. The neighbours too then gathered and they took steps to take him to the Batheegama hospital. The doctor checked him and declared that he has succumbed to his injuries.

Thalpawila Widana Kankanamlage Chaminda Lakmal: P.W 02 (The brother of the deceased) states that his deceased brother stayed at the house in which he was born. On this fatal day they had dinner around 7.30pm-8.00pm and his father left with his deceased brother Sujith, his sister and a child called Premaratne who was a relative of them.

Then he went down in the main route to the estate to close the gate. When he closed a one half of the gate and was about to close the other half of the gate, he heard a gunshot, from the side in which his new house was situated. Then he heard someone shouting, "Father" and he started running towards the new house in the main road. When he went about 30 meters in 3-4 minutes, he heard somebody running fast towards him on the main road. He was in a junction.

At that point there was another adjoining route to the right side upwards which was leading towards the house of Pradeep Nishantha (the 1<sup>st</sup> accused). From that sub route there was about 500m to his house. He was afraid and he flashed the torch light on towards them to the ground, so that the torch light would fall on the bodies of the people that were running towards him. Then he saw them at the moment they turned to the sub route to the right side which was leading towards the house of Pradeep Nishantha (the 1<sup>st</sup> accused)

He saw Pradeep Nishantha running with a gun in his hand. Jayadasa too ran behind him. There was about a distance of a meter between them. They were wearing sarongs shortened. When he reached the new house, he found out that his brother has been shot dead.

In order to arrive at a conclusion in a criminal trial the court must evaluate the admissible evidence which is led by the prosecution. The following are the tests which the courts use in order to evaluate evidence.

- 1) Test of promptness
- 2) Test of consistency
- 3) Test of probability
- 4) Credibility of the witnesses.

The test of probability needs to be applied and recognized to grapple with normal human behaviour and problems and pave the way for likelihood of occurrence. This court must evaluate the evidence of the witnesses, whether those satisfy the probable perspective of a reasonable man.

The father of the deceased (PW 1) after about 5-10 minutes, he saw the deceased, his sister and Premaratne the child left the old house started walking towards the new house through the same trail. He took a torch and a box of matches. He reached the main road, crossed it and went to his plantation to kindle a fire to chase away the wild boars. There are 150 yards/ 137.16 meters from the main road to his coconut plantation. He went about 41.5 meters when he heard the gunshot (50 yards). He states that it took him about 5 minutes to return to the edge of the main road to see the accused persons running.

The fact that the trail starts from the right opposite side of the main road from the gate of the new house is clearly stated in his evidence.

Page 62 of the appeal brief is as follows;

ප්‍ර: තමා ගිය ඉඩම තිබෙන්නේ ඔය තමා අලුතෙන් හදපු ගෙදරට මොන පැත්තට වෙන්නද?

උ: අලුත් ගෙදර මිදුලෙන් තමා උඩට යන්න තියෙන්නේ.

Page 94 of the appeal brief is as follows;

උ: ඔව්. තාර පාරට ගොඩවෙලා තමයි පොල් පැල තිබෙන ඉඩමට ඇතුළු වෙන්න ඕන. තාර පාර ඉදිරියෙන්

Page 95 of the appeal brief is as follows;

උ: තාර පාරෙන් එගොඩවෙලා, මේ තාර පාර නම් මේකෙන් මේ පැත්තට යන්න පුළුවන්.  
(සාක්ෂිකරු සාක්ෂි කුඩුවේ සිට ඉදිරියේ තිබෙන මේසය පෙන්වා සිටී.) මේකෙන් මේ පැත්තට වැටුනාම මගේ ඉඩමට යන්න පුළුවන්.

It is evident that he took the same route back.

Page 67 of the appeal brief is as follows;

උ: මම උඩට යාම නවත්තලා පාර පැත්තට ආවා.

Page 97 of the appeal brief is as follows;

ප්‍ර: ඒ ගියපු පාරෙමද තමුන් ආවේ.

උ: ඔව්.

It is common sense that a man who shot another person in a likewise incident will immediately run, in order to disappear from the scene as soon as possible. It's highly improbable for another person who has travelled 50 yards through the trail which starts from the right opposite of the main road from the gate of the new house, to return, hear the sound of running, putting torch light on and seeing the supposed perpetrators of the crime running in front of him, as he describes at the bottom in page 64.

Page 64 of the appeal brief is as follows;

"පුතා, ඉන්න ගේ සහ මම හිටපු තැනිතුවක් ඉදිරියට ගියේ"

He states in pg. 71 he was at the edge of the road when he saw them running.

Page 71 of the appeal brief is as follows;

"මම ඒ පාරේ ගැට්ටේමයි හිටියේ. පාර අයිනෙමයි හිටියේ. "

Test of consistency and the credibility of the witnesses is also very important to consider in a case where limited eye witnesses are available. It is axiomatic in the criminal law parlance, that the most effective means of impeaching the credibility of a witness is marking contradictions and spotlighting omissions. On the other hand, the inconsistency of the versions testified to by the witnesses can be relied on in order to attack the credibility of the witnesses.

Contradictions and omissions upon the evidence of PW 01 should be considered seriously in this case.



In page 60/61 of the appeal brief is as follows;

The father of the deceased (PW 01) states that his daughter and elderly son went to the new house.

"පාරේ ගෙදරට යන්න ගියා දුව සහ පුතා"

In pg. 78, he states that another boy whose was about 8 years old, who was a relative and who stayed with them too went with them. But according to his statement to the police, his son and a relative boy called Premaratna has gone to the new house.

When he was questioned regarding this in pg. 80, he tries to correct it by stating that his daughter went to the new house prior to them. An omission is marked on that in pg. 80.

In pg. 61 he states that he went in the other long main route, and his son and daughter went in the trail which was heading towards the new house.

අර දෙන්නා කෙටි පාරෙන් ගියා. මම අනිත් පැත්තේ පාරෙන් ගියා.

Even in page 87 he states:

ඒ ගොල්ලො එතනට ගියා. මම පාරේ උඩ පැත්තෙන් ඉඩමට ගියා.

But in page 93, he changes that stance.

ප්‍ර: දැන් සාක්ෂිකරු ළමයි ගිහිල්ලා විනාඩි පහ-දහයකට පස්සේ යනවා ගිනි මැලයක් ගහන්න.

උ: ඔව්.

ප්‍ර: ඒ මොන පාරෙන්ද යන්නේ?

උ: ඒත් ඒ කෙටි පාරෙන් යන්නේ

In pg. 85 he has stated that he took the trail to the new house only after a lapse of about 5-10 minutes (page 85), after his deceased son, daughter and Premaratne the child has gone.

In pg. 87 he was questioned regarding a statement by him at the autopsy that he went just after them. He states in pg. 88 that he accepts it as true.

ප්‍ර: එහෙම නම් මමත් ඒ කට්ටියත් එක්කම පස්සෙන් ගියා කියල කියනවා නම් ඒක හරිද? වැරදිද?

උ: කොතනක හරි එහෙම ලියවිලා තියෙනවා නම් ඒක පිළි ගන්නවා.

These are contradictory statements. In pg. 68-69 he (P.W 01) states that he was in his plantation when he heard the gun shot.

ප්‍ර: දැන් තමුන් කිව්වා තමුන් ගියා කියල පොල්, පැල කරල තියෙන වත්තකට?

උ: ඔව්.

ප්‍ර: ඒ වත්ත අයිති කාටද?

උ: ඒ මට අයිති.

ප්‍ර: ඒ වත්තේ ඉන්නකොටද වෙඩි සද්දය ඇහුනේ?

උ: ඔව්.

These words by him in pg. 97 suggest that he was working in the plantation, when he heard the gun shot.

“මම ගබ්දය ඇහිල මගේ වැඩ නවත්වලා අනිත් පැත්තට එන කොට...”

But as it was described above, he states in pg. 62/ 72/ 94, he was on the way to the plantation, when he heard the gun shot in other places.

Due to the above factors, the testimony of Thal pawila Widana Kankanamlage Cyril: PW 01. (The father of the deceased) is full of contradictions and omissions and thus is not credible at all. There is a high degree of possibility that he is lying and narrating a fabricated tale.

Contradictions and omissions in the evidence of PW 02 is also important in regard to the incident which was highlighted by the prosecution. In contradiction to his father's statement that his deceased brother was employed in the army, Thal pawila Widana Kankanamlage Chaminda Lakmal: PW 02 (The brother of the deceased) states that his deceased brother was not engaged in any job and was staying at home.

On this fatal day they had dinner around 7.30 pm-8.00pm and his father left with his deceased brother Sujith, his sister and a child called Premaratne who was a relative of them. (pg. 107/ 110) This statement is contradictory to his father's (PW 01) statement that he started walking towards the plantation, after a lapse of 5-10 minutes. In pg. 128-129, an omission is marked upon his statement. He has not stated to the police that his sister went with them.

In pg. 111 he states that when he closed a one half of the gate and was about to close the other half of the gate, he heard a gunshot, from the side in which his new house was situated. Then he heard someone shouting, "Father." (pg. 111) Then he started running towards the new house (pg. 127) in the main road. There was a distance of 200m from the gate to the new house in the main road.

In pg. 124 he states that on this specific date he had the idea of closing the gate and going to their new house. (මම අලුත් ගෙදරට යන්න හිතාගෙන හිටියෙ)

But when he was cross-examined upon a contradictory statement to the police in pg. 126, he admits that it is true.

ප්‍ර: තමුන් මෙහෙම කියල තිබෙනවානම්.. “ මම ගේට්ටුව වහල පාර තාර පාර දිගේ ගේ පැත්තට යන්න ගියා. ඒ එක්කම අපේ අලුත් ගේ පැත්තෙන් වෙඩි සද්දයක් වගේ ඇහුනා.” එහෙම කියල තියෙනවා නම්?

උ: මට ඒක හරියට මතක නෑ.

ප්‍ර: එය සටහන් වෙලා තියෙනවානම් ඒක පිළි ගන්නවාද?

උ: ඔව්.

When he went about 30 meters in 3-4 minutes (pg. 117), he heard somebody running fast towards him on the main road. He was in a junction. At that point there was another adjoining route to the right side upwards which was leading towards the house of Pradeep Nishantha (the 1<sup>st</sup> accused). From that sub route there was about 500m to the house of Pradeep Nishantha (pg. 116)

He put the torch light on towards them to the ground, so the torch light would fall on the bodies of the people that were running towards them. Then he saw them. They were turning to the sub route to the right side which was leading towards the house of Pradeep Nishantha (the 1<sup>st</sup> accused) (pg. 113).

උ: මම ටෝච් එක ඇල්ලුවා

ප්‍ර: කොහොටද ටෝච් එක ඇල්ලුවේ

උ: එයාලා එන දිශාවට. හැරෙනවත් එක්කම තමයි මම ටෝච් එක ඇල්ලුවේ.

ප්‍ර: කොහොටද ඇල්ලුවේ.

උ: බිමට වගේ ඇහට වදින්න.

He saw Pradeep Nishantha running with a gun in his hand. Jayadasa too ran behind him. There was about a distance of a meter between them. (pg. 113) They were wearing sarongs shortened. It is not safe to rely on this identification by the witness. There is a high degree of possibility that the witness may not identify the running people clearly, when he flashed the torch light in that direction.

It is important to consider the defense version. The accused-appellant has given evidence under oath and he has been subjected to cross-examination. Two witnesses have given evidence on behalf of him.

The defence version of the incident is as follows.

This incident of murder has been occurred on 29.11.2000, and the accused-appellant has been taken into Dickwella police custody on 07.03.2001. He has been granted bail only after one and a half years. The defence pleaded a defence of alibi at the beginning of the trial. (pg. 56) The accused-appellant has given evidence under oath and allowed him to be subjected to cross-examination. (pg. 197-215) Two witnesses have testified on court on behalf of the defence in court.

In this case the accused-appellant was convicted under section 296 of the Penal Code which should be read with the section 32 of the Penal Code for the common murderous intention.

Section 32 states thus:

32. Liability for act done by several persons in furtherance of common intention.

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

As it was held in R v Swindall and Osborne (1846) 2 Car. & K. 230, to constitute common intention, it is necessary that the intention of each one of them be known to the rest of them and shared by them.

In Ariyaratne V Attorney General (1993) BLR 1 SC it was held that:

- (1) The inference of a common intention must be not merely possible inference but a necessary inference.

- (2) It is a strict rule that the presence of an accused at the scene alone cannot suffice to establish a common intention.

In the King Vs Assappu (1948) 50 NLR 324 CCA it was held by the Court of Criminal Appeal that:

In a case where the question of common intention arises the Jury must be directed that;

- (i) the case of each accused must be considered separately.
- (ii) the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
- (iii) common intention must not be confused with same or similar Intention entertained independently of each other.
- (iv) there must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.
- (v) the mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

In this case, even this court decides to believe in the testimony of the two eye witnesses it only proves that the accused-appellant ran behind a man who is holding a gun with a long barrel, after an incident of shooting which resulted murder.

Such running behind may occur in various alternative situations.

1. In an incident in which both committed the murder with common murderous intention with a prearranged plan and acting in concert pursuant to the plan, and trying to escape the man with the gun is a faster runner than the other.
2. The two persons were travelling together in the road for some intention. (Ex: To enter into the jungle to do hunting). Suddenly the man with the gun sees an enemy of him sitting in the Verandah through the fence. He suddenly decides to shoot him and does so. (He might be under intoxication) Then he runs. The other person become surprised and shocked and decides to run after him too, in order to escape.
3. The man with the gun does the shooting and another man sees him doing so. He decides to chase that man in order to capture him. In this case the learned trial Judge at Matara High court has not considered these alternative probabilities and has decided to believe in the testimony of two eye witnesses and has jumped into the conclusion that the accused-appellant who was running behind the culprit (according to the testimony of the eye witnesses) participated in the crime with the common murderous intention.

This is not the only irresistible inference that can be drawn out of the facts; thus, the conclusion is logically fallacious and erroneous. The presumption of innocence in criminal trials is a right which is granted to all, by the constitution itself. The sole burden lies with the prosecution to prove beyond reasonable doubt that the accused committed the indicted

crime, beyond reasonable doubt. If there is any doubt, the benefit of the doubt should be given to the accused.

Under the circumstances, the learned counsel for the appellant requests to acquit accused-appellant, due to the infirmities and unreliable nature of the evidence. Due to the circumstances which are elaborated above, it is not at all safe to conclude that the accused appellant committed a murder with common murderous intention, beyond reasonable doubt, defeating the presumption of innocence.

The evidence does not support the existence of a murderous intention. It is then up to the prosecution to have established the requisite *mens rea* on the part of the accused, which has not been done. The 2<sup>nd</sup> accused-appellant could neither have been convicted under section 296 of the Penal Code nor any other section of the Penal Code.

The prosecution was unsuccessful in proving all the elements of the offence of murder, beyond any reasonable doubt. However, as per the judgments cited above, the only burden on the defence was to create a reasonable doubt on the existence of *mens rea* as opposed to proving beyond reasonable doubt the non-existence of necessary *mens rea*.

The infirmities in the judgment support the contention that the finding of the learned trial Judge's judgment is unsound in law. 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 2<sup>nd</sup> accused-appellant.

I, therefore, decide to set aside the conviction and the sentence dated 31.05.2017.

The accused-appellant is acquitted and discharged from the charges in the indictment.

The Appeal of the 2<sup>nd</sup> accused-appellant is allowed.

**President of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**