

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

In the matter of an Appeal in terms of section 331(1) of the Code of Criminal Procedure Act. No. 15 of 1979.

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

C.A. Case No: **CA 140-141/2012**

Complainant

H.C. Colombo Case No: **3174/2006**

Vs.

1. Harison Jayaweera
2. Karawum Wijesooriya Arachchige Sunil Shantha *alias* Ruwan

Accused

AND NOW BETWEEN

1. Harison Jayaweera
2. Karawum Wijesooriya Arachchige Sunil Shantha *alias* Ruwan

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : K. K. Wickremasinghe, J.
M.M.A. Gaffoor, J.

COUNSEL : Rienzie Arsecularatne, PC with AAL Prem Kumar, AAL Thilina Punchihewa, AAL Udara Muhandiramge and AAL Chamindri Arsecularatne for the 1st Accused-Appellant
Anil Silva, PC with AAL E. Udawaththa for the 2nd Accused-Appellant
Thusith Mudalige, DSG for the Complainant-Respondent

ARGUED ON : 06.06.2016, 12.07.2016, 21.06.2017,
20.07.2017, 25.07.2017 & 19.09.2018

WRITTEN SUBMISSIONS : The 1st Accused-Appellant – On 07.03.2019
The 2nd Accused-Appellant – Did not file
The Complainant-Respondent – On 22.02.2019

DECIDED ON : 04.04.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellants have filed two appeals seeking to set aside the judgment of the Learned High Court Judge of Colombo dated 10.01.2012 in case No. HC 3174/2006. Written submissions on behalf of the 2nd appellant were not filed even though the opportunity was given.

Facts of the case:

The two accused appellants namely Harison Jayaweera and Sunil Shantha *alias* Ruwan (hereinafter referred to as the 1st appellant and 2nd appellant respectively) were indicted in the High Court of Colombo on following counts;

1. On or about 07.05.2003 at Dehiwala with Kadiravel Mahendran committed the murder of Franklin Harmer, an offence punishable under section 296 read with section 32 of the Penal Code.
2. In the course of the same transaction, with kadiravel Mahendran committed the murder of Deter Harmer an offence punishable under section 296 read with section 32 of Penal Code.
3. In the course of the same transaction, with kadiravel Mahendran committed the murder of Daisy Ann Harmer an offence punishable under section 296 read with section 32 of Penal Code.
4. In the course of the same transaction committed robbery of items specified in the charge worth Rs. 31,000/-, an offence punishable under section 380 read with section 32 of Penal Code
5. In the course of the same transaction committed robbery of items specified in the charge worth 151,000/-, an offence punishable under section 380 read with section 32 of Penal Code.

The prosecution led the evidence of an accomplice, Kadiravel Mahendran as a prosecution witness who was granted pardon by the Hon. Attorney General. After leading evidence for both the prosecution and the defence, the Learned High Court Judge convicted the appellants for all five counts. Accordingly both of them were sentenced to death.

Being aggrieved by the said judgment, the appellants preferred an appeal to this Court. The Learned President's Counsel for the 1st appellant submitted following grounds of appeal;

1. The Learned Trial Judge failed to consider the material favourable to the 1st appellant such as;

- a) The testimony of the PW 01 in Court has been contradicted 86 times vis-a-vis to the statement he made to the Police
 - b) The PW 01 stands contradicted to medical evidence
 - c) The weapon used for the murders was recovered upon the directions of the PW 01
 - d) The contradictions marked 1V3 to 1V8 demonstrate that the PW 01 has planned to commit robbery of the Harmer household/or murder
2. The story of the Kadiravel Mahendran (hereinafter referred to as the 'PW 01') was extremely artificial and fanciful
 3. The Learned Trial Judge failed to appreciate that the prosecution suppressed evidence pertaining to the recoveries and investigations carried out by the Police, Dehiwala.
 4. A Judgment was not available on the day it was purportedly delivered i.e. on 10.01.2012 because a copy of the judgment was issued to the 1st appellant on 25.01.2012 even though he requested a copy on 12.01.2012.
 5. The Learned Trial Judge failed to appreciate that the indictment was misconceived in law because Kadiravel Mahendran, the main witness, has been made a co-accused who committed the three murders with the 1st and 2nd appellants.
 6. The Learned Trial Judge failed to appreciate that the evidence given by one accused cannot be used to convict another co-accused
 7. The Learned Trial Judge failed to appreciate that the name of a person who has been pardoned by the Hon. Attorney General cannot appear in the charge and thereby got himself misdirected in law

8. The Learned Trial Judge failed to deal with Kadiravel Mahendran either as a co-accused or as an accomplice but treated him merely as a prosecution witness
9. Although the Hon. Attorney General treated Kadiravel Mahendran as a co-accused for murder and robbery, at the page 250 of the judgment the Learned Trial Judge has come to conclusion that Kadiravel cannot be connected to the robbery.
10. The Learned Trial Judge has unreasonably faulted the 1st appellant for not going to see what has happened in the adjoining house separated by a common wall
11. The Learned Trial Judge failed to apply the law pertaining to common intention
12. The Learned Trial Judge failed to consider the failure on the part of the Attorney General to produce and mark the conditional pardon papers of Kadiravel Mahendran
13. The Learned Trial Judge, at page 251 of the judgment, has considered the content of a confession made by Kadiravel Mahendran to the Learned Magistrate without such confession being led in Court through the Magistrate
14. The Learned Trial Judge faulted the 1st appellant, for selling the property occupied by the deceased family, without considering deeds

Followings grounds of appeal were submitted on behalf of the 2nd appellant;

1. The Learned Trial Judge erred in law by convicting the appellant on the uncorroborated evidence of an accomplice in the absence of any additional evidence

2. The Learned Trial Judge further erred in law by failing to be alive to the principle that any ‘corroboration’ must proceed from an independent source and must be weighed as to its probative value
3. The Learned Trial Judge erred in law by failing to strictly apply section 114(a) of the Evidence Ordinance.

The incident related to the instant appeal, as narrated by the PW 01, is summarized as follows;

The deceased Franklin Harmer who was around 78 years had been engaging in various business enterprises at the time of incident. His son Deter Harmer was around 33 years and was employed as an executive at Sampath Bank. The daughter of Franklin Harmer was Daisy Ann Harmer who was around 29 years at the time of the incident. She was employed as a Banquet Manager at Mount Lavinia Hotel.

There was a Chinese Restaurant right next to the house of the deceased family. This restaurant and the house of the deceased were separated from a single wall. There was a pending litigation over this property between the deceased Franklin Harmer and the 1st appellant that was running the restaurant.

According to the evidence of Kadiravel Mahendran (hereinafter referred to as the ‘PW 01’) he was employed in the 1st appellant’s Hotel for a period of three years in various capacities such as cook, waiter since 1998. Thereafter he had left the job and however came to meet his former employer the 1st appellant to get a job on 05.05.2003. The 1st appellant had scolded him and told him to come on 7th. Accordingly PW 01 came on 07.05.2003 and he was asked to accompany Ruwan (the 2nd appellant), and he did the same. The 2nd appellant went to the House of Franklin Harmer with the PW 01 around 5.30pm and called out for ‘Harmer

Mahaththaya'. Thereafter the deceased Franklin arrived and 2nd appellant asked him for the deeds to which the deceased replied that they are in Courts.

The 2nd appellant then grabbed the cross bar which was in the hands of the deceased and attacked Franklin Harmer on the side of his head and Franklin Harmer fell on the cabinet 2 ½ feet in height which was 12 feet away. Thereafter the PW 01 tried to run away as he did not expect Harmer to be attacked. The 1st appellant had arrived and taken the PW 01 inside the house and hit him twice threatening that he too would be killed if he tried to escape. Thereafter the PW 01 and the 2nd appellant had dragged Franklin Harmer and put him under a bed.

Testifying further the PW 01 had stated that they searched almirah for deeds and while they were searching Deter Harmer came looking for his father Franklin Harmer. Then 1st appellant asked the PW 01 and the 2nd appellant to hold Deter Harmer and they did as instructed. The 2nd appellant then threatened Deter Harmer with three weapons i.e. a pointed knife, a razor knife, a pistol and asked for deeds from him. Deter harmer replied that they are with his father and thereafter he was tied to a chair with a rope. Thereafter the wrist watch of Deter Harmer was removed and he was put under the bed. Later Deter had untied himself and was hiding in the bathroom. Thereafter he was taken out of the bathroom and the 2nd appellant had stabbed him twice on the neck. After about 20 minutes, Deter asked for water signing from his fingers and the PW 01 gave him water which came out of the neck. Thereafter hands of Deter were tied and the 2nd appellant had cut Deter's stomach with a knife.

Thereafter they ransacked the almirah with the light of a torch since the lights were switched off at that time. Then they heard sound of a vehicle and saw through the window that the daughter of Franklin Harmer had arrived. One Subasinghe who

was a three-wheeler driver near the Chinese hotel brought the daughter, Daisy Ann, inside the house and handed her over to the 1st appellant. Thereafter Subasinghe got some arrack from room of Franklin Harmer and Subasinghe drank arrack and the others drank beer. The 1st appellant directed the 2nd appellant to remove clothes of Daisy Ann by threatening her. Accordingly all her clothes were removed except for her underwear (lingerie).

The 1st appellant had asked for the deeds from Daisy Ann and she replied that they were in the almirah and gave them to the 1st appellant. Thereafter the 1st appellant obtained Daisy Ann's signature on some documents and lights were switched on at that time. Daisy Ann was given food since she had said that she is hungry and she ate the given food including pork, bread and sausages.

Thereafter Daisy Ann was brought to her room and the 1st appellant asked the PW 01 to tie her hands with a rope to the bed and he did accordingly. Thereafter the PW 01 had seen that the 1st appellant was on the body of Daisy Anne for 15 minutes. Even though the 1st appellant had asked the 2nd appellant and the PW 01 to go and be with her only the 2nd appellant had gone to the room.

Thereafter the appellants had asked Daisy Ann to wear a blue short and a brown colour T-shirt. The PW 01 was asked to tie Daisy Ann's mouth and he tied her mouth with a bed sheet. The 1st appellant had asked the PW 01 to bring the razor knife and she was stabbed with the said razor knife. Thereafter the 1st appellant asked the PW 01 to cover Daisy Ann's body and he covered it with a bed sheet.

We will consider appeal grounds of 05 to 09 at this stage. The Learned President's Counsel for the 1st appellant contended that the indictment was misconceived in law. We observe that the names of both appellants appear on the very first page of the indictment. At the next page, charges read thus "on or about 07.05.2003 at

Dehiwala with Kadiravel Mahendran committed the murder of...". Kadiravel Mahendran was not listed as a co-accused since his name does not appear in the indictment. We are of the view that including his name only in the charge would make him an accomplice and that is in fact legal. Since he was made a witness for the prosecution after granting pardon, the general principles related to the evidence of a co-accused would not be applicable here. Therefore we are of the view that the Learned High Court Judge was not misdirected in this regard. It was further contended that the Learned Trial Judge failed to deal with Kadiravel Mahendran either as a co-accused or as an accomplice but treated him merely as a prosecution witness. However we observe that the Learned High Court Judge referred to the PW 01 in the following manner;

“මෙම නඩුවේ කදිරවේලු මහේන්ද්‍රන් රජයේ සාක්ෂිකරුවෙකු වී ඇත. ඔහු මෙම වරදවල් සිදුවෙන ස්ථානයේ එම ක්‍රියාවන්ට 1,2 විත්තිකරුවන්ට සහාය වූ අපරාධ සහායෙකු වන අතර, ඔහු දැනට රජයේ සාක්ෂිකරුවෙක් වී ඇත...” (Page 173 of the Vol. IX of the brief)

“...ඔහු 1 වන 2 වන වූදිතයන් සමඟ 1 සිට 5 දක්වා ඇති වෝද්‍යාවන්ට සහාය වූ අපරාධ සහායකයෙකි...” (Page 253 of the Vol. IX of the brief)

These amply demonstrate that the Learned High Court Judge had treated the PW 01 as an accomplice.

The Learned President's Counsel for the 1st appellant contended that Kadirawel Mahendran who is an accused named in the charge cannot be called as a witness to testify for the prosecution without there being evidence led of the conditional pardon granted to him. It was further submitted that the prosecution led no evidence pertaining to the granting of a conditional pardon or the conditional pardon papers were not submitted in evidence. Section 256 and 257 of the Code of

Criminal Procedure Act No. 15 of 1979 empower the Attorney General to grant pardon to an accomplice. However there is no requirement that such pardon papers need to be led as evidence in a trial. We observe that the PW 01 was questioned whether he was aware of the pardon granted to him to which he has answered that he was aware of such pardon. Further he testified that he signed the pardon papers before the Learned Magistrate. (Page 231 of the Vol. I of the brief)

In the case of **Monika Fernando & Others V. The Attorney General [CA 03-06/2005 – Decided on 17.02.2016]** it was held that,

“In the absence of any specific requirement for the pardon papers to be marked before the trial, this court is of the view that the Learned Trial Judge has sufficiently cautioned the Jury with regard to the admissibility of the evidence of the 3rd witness Sunil Shantha on whom the Attorney General has granted a pardon.”

Therefore it is not a mandatory requirement for the prosecution to mark pardon papers in the trial.

The Learned DSG for the respondent drew the attention of this Court to the fact that the PW 01 was brought to the household of the 1st appellant when the former was about eight years old. The PW 01 was brought from Welimada to the residence of a sister of the 1st appellant.

Now we will consider several contradictions pointed out by the Learned President's Counsel for the 1st appellant. Accordingly the Learned President's Counsel contended that the PW 01 stands contradicted to the medical evidence.

It was submitted that PW 01's testimony was contradicted by the Post Mortem Report (PMR) of Franklin Harmer, since it did not explain 6 stab injuries. We

observe that the as per the Post Mortem Report of Franklin Harmer marked as X45, he had sustained 6 stab injuries i.e. on the root of the neck, on the right costal margin, left side of the abdomen, on the back of the scalp, at the back of the neck and on the back of the upper chest. The cause of death was identified as combined effects of smothering, multiple stab injuries and blunt trauma to head. We observe that the PW 01 has testified about the blow given to the head of the deceased Franklin Harmer. Further the PW 01 has testified that he was shocked due to the sudden attack on Franklin Harmer and the PW 01 wanted to escape the scene of crime. Therefore there could have been confusion about the very first incidents that happened unexpectedly.

It was further submitted that the first Senior Police Officer who investigated the scene of crime on 08.05.2003 found the body of Franklin Harmer was wearing a green and brown sarong even though the PW 01 testified that Franklin Harmer was bare bodied and wearing a pair of shorts. However we observe that the said Police officer (PW 09) did not mention that the deceased was wearing a sarong but the body was covered with a green color sarong. (Page 154 of the Vol. V of the brief)

The Learned President's Counsel for the 1st appellant contended that the injury on Deter Harmer's stomach was a stab injury and not a cut injury as described by the PW 01. We observe that the Post Mortem Report of Deter Harmer marked as X46 revealed that there was a 9.5 x 3.5 cm horizontal stab in the stomach. We observe that the PW 01 has testified as follows;

“உ: டி.ஐ. பிலீயன் ஆட்டே மோகாட்டு?

உ: கூடும் ஆட்டே?

உ: கொஹாம் ஆட்டே?

எ: இனின் அதை பெரலா எடு பிதியேங் ஆட்டே” (Page 122 of Volume I of the brief)

Therefore it is evident that the PW 01 has testified that an injury was inflicted on the stomach of Deter Harmer. We cannot expect a witness who is not an expert to describe an injury very specifically as to a cut injury or a stab injury. What is more important in this regard is that the PW 01 testified that there was an injury inflicted on the stomach of Deter Harmer.

The Learned President's Counsel for the 1st appellant contended that although the PW 01 stated that Deter Harmer was stabbed on his neck twice the PMR (X46) reveals seven injuries on the neck. Further there had been two stab injuries on the back of the head close to the posterior occipital protuberance on the midline and a stab injury on the back of the right chest which the PW 01 did not explain. However it is pertinent to note that after being stabbed on his neck, Deter Harmer, requested for water making a sign from his fingers. As per the evidence of the PW 01, he was the one who went to kitchen to bring water while both the appellants remained with Deter Harmer. Was not there enough opportunity/time for the appellants to inflict further injuries on Deter Harmer while the PW 01 was in kitchen? If some of the injuries were inflicted while the PW 01 was away then we cannot expect him to explain the said injuries.

The Learned President's Counsel for the 1st appellant submitted that although the PW 01 said that he saw the 1st appellant on top of the body of Daisy Ann, the Doctor who did the Post Mortem has not found any injury in her genitals and according to the Post Mortem examination Report her sexual organs appeared normal. According to the evidence of the Doctor he did not find any semen in her genitals either. However we observe that as per the evidence of PW 01, they

removed clothes of Daisy Ann except for her lingerie (brief). Therefore the 1st appellant being on the body of the deceased does not suggest that there was in fact a penetration. We observe that the PW 13 (JMO) has answered on this position as follows;

“පු: මේ තැනැත්තියගේ යම් ආකාරයක අතපය ගැට ගැසීමක් කරලා ලිංගික සංසර්ගයට ප්‍රවේශ වෙන්න පූලුවන්ද තුවාලයක් වෙන්නේ නැතුව?

උ: පරණ තුවාලයක් තිබෙනවා. එම තුවාලය මේ කළින් ලිංගික ප්‍රවේශයක් තිබිලා තිබෙනවා. ගැම ලිංගික එක්වීමකදීම කනායා පටලයේ එවැනි තුවාල අපිට දකින්න ලැබෙන්නේ තැහැ. ඒ නිසා මෙහිදී ලිංගික සංසර්ගයට හාජනය වුනාද, නැද්ද කියන එක තුවාලවලින් කියන්න අමාරුයි” (page 142 of Vol. V of the brief)

Further we are of the view that if the deceased was sexually assaulted without a penetration, it is possible that there would not be any semen or any injury in her genitals.

It was argued that the PW 01 does not speak about any compression being applied to the neck of Daisy Ann although the PMR revealed that her neck was compressed by tight ligature made of piece of cloth. Further it was submitted that according to the PW 01, Daisy Ann has had a meal of bread, sausages and pork but according to the Post Mortem Report (X47) the doctor has found only a yellow colour semi solid substance (250 cc). Accordingly it was contended that food like bread, pork and sausages would not digest within 30-45 minutes. However it is noteworthy that the defense made no effort to get this point of issue clarified from the Doctor who performed the postmortem of Daisy Ann. The PW 13, Dr. Wedasinghe was cross-examined by the Learned Counsel in the High Court only with regard to the injuries in her genital area (Page 138 – 142 of the Vol. V of the brief). Further we are of the view that the time it takes to digest food under normal

circumstances cannot be applied in the instant matter since the intestines of the deceased were cut (page 111 of Vol. V of the brief).

We observe that as per the evidence of the PW 01, he tried to call the 1st appellant's brother, Dickson Jayaweera's house and one Nishantha (a friend of the PW 01) using Deter Harmer's phone. However he could not make the call since the 1st appellant prevented him from making the said call. We think this is a very important piece of evidence. Further IP Ranaweera, defence witness, confirmed that an attempt had been made to originate a call from the mobile phones of deceased Deter Harmer to one Nishantha. [Page 88 of vol. VII of the brief]. Would a person, who plans a heinous crime, try to make a call from a phone in the scene of crime? We think it is highly unlikely. Therefore if the PW 01 planned the whole murder/robbery he would not make such a call which would inevitably connect him to the crime. The PW 01 testified that he thought of informing the 1st appellant's brother about the incident as he was in fear that he would be killed inside the house. At the beginning it was observed that the PW 01 was brought to the house of 1st appellant's sister when he was a small kid. He had worked in houses of 1st appellant's siblings. Further the Learned DSG for the respondent pointed out that the PW 01 knew these numbers by heart even after four years in remand and the witness did not refer to any document when he testified regarding the numbers. We observe the same and the PW 01 as a person who grew up without the care of his parents, it was the 1st appellant's family with whom he had maintained a close relationship. Therefore it is not wrong to conclude that the PW 01 was not the mastermind of the crime as suggested by the appellants and the PW 01 was merely a tool of the 1st appellant.

Another argument raised by the Learned President's Counsel for the 1st appellant was that the PW 01 did not escape from the 1st appellant even though he had

enough opportunity to do so. As per the evidence of the PW 01 he was instructed by the 1st appellant to put the T.V. that was in the house into a box. Further on the instructions of the 1st appellant, the PW 01 put 4 arrack bottles, a camera, a pair of white shoes, 3 pairs of trousers, and 3 shirts into a black colour bag and took Deter Harmer's wrist watch and Daisy Ann Harmer's bracelet. Thereafter the goods were loaded at about 12.10. a.m. to the 1st appellants's car and the 2nd appellant was dropped near the Dehiwala Town hall. Both the 1st appellant and the PW 01 proceeded to the house of the 1st appellant at Pitakotte. The Learned President's Counsel for the 1st appellant contended that how could a person, who cannot read and write, exactly mention the correct address of the house of the 1st appellant since he went to said house for the very first time.

The PW 01, in the cross-examination, had stated that the 1st appellant was observing his movements through a window in the house. We further observe that the PW 01 was threatened to death by the 1st appellant in several instances. It is imperative to note that the PW 01 was a very loyal servant to the 1st appellant's family. Therefore it is not surprising that the PW 01 made no effort escape or to lodge a complaint in the Police.

The Learned President's Counsel for the 1st appellant submitted that the prosecution did not lead the evidence of the main Investigating officer, IP Ranaweera, who handled the investigations related to instant appeal. IP Ranaweera was the OIC, Crime Branch of the Police station, Dehiwala. The Learned DSG for the respondent answered this contention that there was sufficient proof to show that said IP Ranaweera had mishandled the investigation and therefore the prosecution decided not to call him as a witness even though he was listed in the witnesses list. The Learned DSG further submitted that the prosecution has elicited

adequate reasons in the cross examination of IP Ranaweera justifying its decision not to call him as a witness for the prosecution.

We observe that the said IP Ranaweera was later called as a defence witness and he has admitted that he mishandled the investigation.

“ප්‍ර: වාසිය විත්තියට කියා තමන් දන්නවාද?

උ: එහෙමයි

ප්‍ර: විමර්ශනය නිසි ආකාරයට කළේ නැහැ කියා තමන් පිළිගන්නවාද?

උ: එහෙමයි” (Page 174 of Vol. VII of the brief).

Further it is observed that the said IP Ranaweera had recorded statements from the staff of the Chinese Restaurant in the adjoining land but not from the 1st appellant who was the owner of the said Restaurant. (Page 155 of the Vol. VII of the brief)

The attention of this Court was drawn to the fact that there were about 92 contradictions marked by the defence at the trial with the PW 01's statement made to the Dehiwala Police. IP Ranaweera stated that the PW 01 was formally arrested on 15th June 2003 but was kept in the police station from 14th May 2003. Accordingly the police officer had to admit that the PW 01 was kept in illegal custody for about a month. We observe that The PW 01 had testified that he was forced to make the statement. It was found at the page 49 of vol. II as follows;

“ගුවිකන්න බැර නිසා අත්සන් කලා...”

As per the contradiction marked as 1 V 73 (page 94) the PW 01 had allegedly stated that he used public transport to leave the place with all the goods robbed, after committing the crime. The Learned DSG contended that using public transport after a crime of this nature is illogical. We agree with the said contention

and it is quite possible that the police have deliberately attempted to cover up culpability of the 1st appellant. Upon perusal of the evidence of said IP Ranaweera, we find it really doubtful the way in which the statement of the PW 01 was recorded.

As per the appeal ground 13 of the 1st appellant, it was contended that the Learned Trial Judge, at page 251 of the judgment, has considered the content of a confession made by Kadiravel Mahendran to the Learned Magistrate without such confession being led in Court through the Magistrate. However we observe that the Learned High Court Judge had not considered any content of a confession but simply made a comment as to the statement made by the PW 01 to the Learned Magistrate was not challenged by the defence. The Learned High Court Judge was not prevented from making such an observation while considering the trustworthiness of the statement made to the Police by the PW 01.

Accordingly we are of the view that it is unsafe to attach undue importance to the contradictions marked in the statement made to the Police by the PW 01, given the fact that the said statement could have been a forced one and there was a possibility of the investigation being mishandled at some stages. Therefore the Learned High Court Judge was correct in refusing to consider the said contradictions since it was apparent that the statement was fabricated by the Police in order to implicate the PW 01 in the instant case.

The 1st appellant testified that he was at the restaurant at the time the murders were committed. The Learned DSG for the respondent submitted that given the brutal nature of the attack and where the whole family was killed, the normal human conduct of the occupant in the adjoining premises would be to make basic inquiries which the 1st appellant failed to do. It was further submitted that the 1st appellant

did not even attend the funeral of the deceased family which again cannot be explained any innocent hypothesis. However much importance cannot be given to this argument since it was elicited from the evidence that both parties were not in good terms with each other due to the aforesaid land matter. It is possible that the 1st appellant did not take any step to inquire about his neighbour due to the animosity between each other. Therefore we are of the view that this position can be argued in favour of both parties.

The Learned DSG for the respondent pointed out that there was a strong motive behind this triple murder as the 1st appellant was in a need of acquiring the title of the disputed land.

The PW 14, Himali Chandrika, was the registrar of the District Court of Mount Laninia and she produced two case records marked as X53 and X54 that was relevant to the litigation between the 1st appellant and the deceased Franklin Harmer. The witness No. 17, Ali Akbar, testified that he purchased the land consist of the restaurant and the house of the deceased family from the 1st appellant by deed of transfer marked as X49.

A deed of declaration signed by the 1st appellant was marked as X50 and an affidavit signed by the 1st appellant was marked as X55. Both documents stated that the 1st appellant had long and undisputed title to the house of the deceased family (including possession). However upon being cross-examined, the 1st appellant admitted that he signed these documents without reading (Page 131 of vol. VI of the brief). These evidence taken together amply demonstrate that the 1st appellant was in a dire need of acquiring the property and had sold the whole property including the deceased's house (after three members of the family died) even without a proper title.

The general principle is that motive is not an element of an offence. In **Criminal Law by Smith and Hogan**¹, it is explained that,

"As evidence, motive is always relevant (Williams (1986) 84 CR App Rep 299, CA, not following Berry (1986) 83 Cr App Rep 7). This means simply that, if the prosecution can prove that D had a motive for committing the crime, they may do so since the existence of a motive makes it more likely that D in fact did commit it. Men do not usually act without a motive."

Accordingly the evidence led by the prosecution proves that there was a strong motive. We are of the view that a complete outsider would not want to murder the whole family as the ultimate beneficiary of the crime is the 1st appellant.

We observe that the appellants took up the position that the PW 01 planned to rob the deceased's house. As per the evidence of the PW 01 the entry to the scene of crime was around 5.30pm and the exit was past midnight on 07.05.2003. If he wanted to rob the house why would he spend around seven hours at the house and waited till son and daughter arrive too? That is very unlikely.

As per the ground of appeal 04 for the 1st appellant it was contended that a judgment was not available on the day it was purportedly delivered i.e. on 10.01.2012. It was submitted that a copy of the judgment was issued to the 1st appellant on 25.01.2012 even though he requested a copy on 12.01.2012. We find that the judgment consists of around 95 pages including the order of sentence. We are well aware that the staff in the High Court is struggling to issue certified copies of judgments since there is a huge amount of case files and judgments. Therefore such delay has to be excused in some instances. Further we are of the view that such delay does not necessarily suggest that a valid judgment was not available.

¹ (8th Edition, Butterworths, 1996, pg. 83)

The Learned President's Counsel for the 1st appellant submitted that the PW 01 stands contradicted to the evidence of defence witnesses, Subasinghe and Pradeep Suranga. Pradeep Suranga was a waiter who was working for the Chinese restaurant of the 1st appellant and he testified that the 1st appellant was sipping a drink of alcohol until about 12.00 midnight in his hotel on 07.05.2003. We do not see any merit in this argument since a prosecution witness need not be corroborated by a defence witness. A defence witness should be corroborated with other defence witnesses in order to create a reasonable doubt in the case for the prosecution.

Both Learned President's Counsel for the 1st appellant and the 2nd appellant submitted about the necessity of corroboration in the evidence of the PW 01.

We are mindful that Section 133 of the Evidence Ordinance states that "*an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice*" while Section 114(b) states that "*an accomplice is unworthy of credit, unless he is corroborated in material particular.*"

In the case of **Galagamage Indrawansa Kumarasiri and 3 others V. The Attorney General and another [S.C. TAB Appeal No. 02/2012 – decided on 02.04.2014]**, it was held that,

“...These statutory provisions, read together, create a conundrum of sorts leading to the conclusion that the creditworthiness of an accomplice is dependent upon whether his evidence, in material particulars, is corroborated by another source, whereas a conviction based solely on the uncorroborated evidence of an accomplice is not illegal. Yet, such a conviction would undoubtedly be a dangerous and unsafe one. Thus, it is

within the purview of the Courts to consider the creditworthiness of each accomplice, apply their mind and search for cogent and conclusive factors that satisfy them that the accomplice is in fact, reliable, if they are to convict solely on his evidence. This sentiment was encapsulated succinctly in *The Queen v. Liyanage and Others* (1962) (67 NLR 193) which stated the following with regard to corroborative evidence:

'In the case of fellow conspirators or accomplices the established practice, virtually equivalent to a rule of law, requires independent corroboration of their evidence, in material particulars. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice's story is true and reasonably safe to act upon, and connecting or tending to connect the particular defendant with the offence. The degree of suspicion attaching to an accomplice's evidence varies according to the extent and nature of his complicity.'

*However, such independent corroboration need not confirm each detail of the account presented by the accomplice, for if such a standard were required, as stated in *Rex v Noakes* (5 C&P 326) 'his evidence would not be essential to the case; it would be merely confirmatory of the other and independent testimony'."* (Emphasis added)

In '**The Law of Evidence by E.R.S.R. Coomaraswamy**',² the rule regarding the evidence of an accomplice was emphasized as follows;

"(4) But the rule regarding the need for corroboration of the evidence of an accomplice is not absolute, and in an exceptional case, if, while heading the

² Vol. II (Book 2), Stamford Lake publishers, 2013, page. 652

warning regarding such evidence, the court is satisfied that the witness is truthful and reliable, and that his evidence does not suffer from any infirmity, the court can base a conviction on his sole uncorroborated testimony.

(5) *Whenever corroboration is required, the other evidence must be*

(A) from an independent source; and

(B) such as to support the direct testimony in material particulars and to connect the accused with the crime.

*The corroborative evidence need not be direct evidence of the commission of the offence by the accused... The corroboration must proceed from an independent source and must be weighed as to its probative value. It must confirm in some material particular the commission of the crime and that the accused committed it. It need not extend to the whole story of the accomplice (*Ilangatilaka Vs. Republic, n 246 supra see also P. Saravanamuttu Vs. R.A. de Mel (1948) 49 NLR 529 at 560...*)” (Emphasis added)*

In the case of **Piara Singha V. State of Punjab [1969] AIR 961**, it was held that,

“...There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious taint in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent, evidence. It would not, however, be right to expect that such independent corroboration should cover the whole of the prosecution case

or even all the material particulars of the prosecution case. If such a view is adopted it will render the evidence of the accomplice wholly superfluous... ”

In the case of **Lachchi Ram V. State of Punjab [AIR (1967) SC 792]**, it was observed that,

“... What the Court did was to act on the principle of valuing the evidence of an approver with caution and of not accepting it unless it is corroborated at least material particulars. The fact that the Court thus did not accept the evidence of the approver for this part of the story does not mean that the Court held that the approver was an unreliable or untruthful witness... ”

In the said case of **Lachchi Ram, Justice Bhargava** cited the case of **Sarwan Singh V. The State of Punjab [(1957) S.C.R. 953]** in which it was held that,

“The approver’s evidence to be accepted must satisfy two tests. The first test to be applied is that his evidence must show that he is a reliable witness, and that is a test which is common to all witnesses. The test obviously means that the Court should find that there is nothing inherent or improbable in the evidence given by the approver, and that there is no finding that the approver has given false evidence. The second test which thereafter still remains to be applied in the case of an approver, and which is not always necessary when judging the evidence of other witnesses, is that his evidence must receive sufficient corroboration... ”

In light of above, it is understood that the corroboration required from an accomplice mainly focuses on material particulars. A Judge can act on such evidence if it is corroborated on material particulars by independent evidence. He does not become unworthy of credit merely because there are minor discrepancies.

As evaluated above, we are of the view that the PW 01 had corroborated sufficiently with medical evidence and he was a reliable witness. The evidence of the PW 01 creates a ring of truth which proves that it was a well-executed crime by the 1st appellant and the 2nd appellant where the PW 01 was merely a tool. We observe that the Learned High Court Judge has thoroughly evaluated all the evidence in his judgment which consist about 90 pages. The Learned High Court Judge came to the right conclusion by convicting both appellants after analyzing the evidence placed before him. Therefore we see no reason to interfere with the judgment of the Learned High Court Judge of Colombo dated 10.01.2012 and we affirm the convictions and the sentences imposed on both accused-appellants.

Accordingly both appeals filed by the both appellants are hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I agree,

JUDGE OF THE COURT OF APPEAL