

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

In the matter of an Appeal under Section 154(p) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA 162-164/2012

Complainant

HC Embilipitiya Case No:
15/08

Vs.

1. Virithamulla Gamage
Priyantha

2. Athanayaka Kamkanange
Chandradasa Alias Kirimalli

3. Athanayaka Kamkanange
Indrani Alias Kusuma

4. Jayantha

Accused

AND NOW BETWEEN

1. Virithamulla Gamage
Priyantha

2. Athanayaka Kamkanange
Chandradasa Alias Kirimalli

3. Athanayaka Kamkanange
Indrani Alias Kusuma

Accused-Appellants

Vs.

The Attorney General

Respondent

BEFORE : K. K. Wickremasinghe, J.
K. Priyantha Fernando, J.

COUNSEL : Shanaka Ranasinghe, PC with Niroshan
Mihidu Kulasuriya, AAL and Nisith
Abesuriya, AAL for the 1st Accused-
Appellant

N.A.Chandana Sri Nissanka, AAL for the
2nd and 3rd Accused-Appellants

H.Peiris, DSG with D.Rahubadda, S.C.
for the Attorney General.

ARGUED ON	:	14.06.2019
		18.06.2019
		25.06.2019
WRITTEN SUBMISSIONS	:	The 1 st Accused-Appellant – On 30.07.2019
		The 2 nd and 3 rd Accused-Appellants – On
		19.02.2018
		The Respondent– On 20.12.2019
DECIDED ON	:	09.07.2020

K.K.WICKREMASINGHE, J.

The accused-appellants filed this appeal seeking to set aside the judgement delivered by the Learned High Court Judge of Embilipitiya dated 10.02.2012 in Case No. HCE 15/2008.

The 1st, 2nd,and 3rd accused-appellants (hereinafter referred to as the 1st, 2nd and 3rd appellants) together with the 4th accused, were indicted before the High Court of Ratnapura for having committed the murder of Sembakuttige Samarapala on or about 14.07.1993, an offence punishable under section 296 of the Penal Code.

The case has been transferred to the High Court of Embilipitiya on 27.02.2008.

At the trial, the prosecution called 6 witnesses including two eye witness - the son and the daughter of the deceased (PW 02 and PW 03), the brother of the deceased (PW 01), IP Upali Senerath Yapa (PW 04), Police Sergeant Gamage Kulasiri (PW 05) and the JMO who conducted the post mortem examination

(PW 06). The 1st and 3rd appellants had given evidence in Court while 2nd appellant and the 4th accused had made dock statements.

At the conclusion of the trial, the Learned High Court Judge convicted the appellants for the offence of murder and thereby sentenced to death. The 4th accused was acquitted by the judgment of the Learned High Court Judge of Embilipitiya dated 10.02.2012.

Being aggrieved by the said judgment, the appellants made this appeal to this Court.

Facts of the Case

This is a case of murder alleged to have committed by 4 accused, where the 1st and 2nd appellants are in-laws of the deceased and the 3rd appellant is the wife of the deceased. It is elicited that the deceased was said to have been (living together with another woman) in Welikanda where he used to visit his residence (where his family lives) on and off.

Sembukuttige Dulip Nishantha (son of the 3rd appellant and the deceased) is the principal witness (PW 02 – an eye-witness) in this case for the prosecution. According to him, he had seen the 1st accused armed with a club and the deceased was bleeding from his head. Thereafter the deceased was wrapped in a mat and was carried to the stream by the 2nd and 3rd appellants while the 3rd appellant was heading them with a torch. Then the 1st appellant was holding the deceased from his legs while dipping his head under water. Thereafter the neck of the deceased had been severed by the 1st and 2nd appellants and the 3rd appellant had buried the decapitated head of the deceased in a nearby banana mound in their compound. Then the 2nd appellant had washed out the blood from the body of the deceased and then the 1st appellant had separated the arms and legs from the body and had put them into a composte bag (සොහොර

බැඟයක්) where the 2nd appellant had taken it from the house and had tied it while the 3rd appellant was holding the torch. Then they had taken the bag away.

The 4th witness IP Senerath Yapa testified that the body of the deceased was not found but only the head was recovered about a month after the disappearance of the said deceased. The head was buried under a banana tree, in the premises of the 3rd appellant (where the deceased and the 3rd appellant were living).

Grounds of Appeal by the Appellants

The Learned Counsel for the 1st appellant submitted following grounds of appeal:

1. The Learned High Court Judge has failed to consider the doubts created on the doctor's evidence as to the identification of the skull.
2. The Learned High Court Judge has failed to consider the doubts created as to the age of the deceased.
3. The Learned High Court Judge has failed to consider the inconsistency and the inter se and per se contradictions of PW 02 who claims to be an eye witness.
4. The Learned High Court Judge has failed to consider the contradictions of evidence with regard to the alleged assault on the head of the deceased.
5. The Learned High Court Judge has failed to consider the contradictions of evidence with regard to the alleged blow dealt by an axe to separate the head from the body of the deceased.

6. The Learned High Court Judge has failed to consider the contradictions of evidence with regard to dipping the head of the deceased in the stream.
7. The Learned High Court Judge has failed to consider the underlying principles of the presumption of innocence.

The Learned Counsel for the 2nd and 3rd appellants submitted following grounds of appeal:

1. The Learned High Court Judge has failed to evaluate the totality of the evidence of the case.
2. The Learned High Court Judge has failed to consider the case of each accused separately.
3. The Learned High Court Judge has failed to consider that the prosecution had failed to establish the fact that the 2nd and 3rd accused were acquitted by a common murderous intention beyond reasonable doubt.
4. The Learned High Court Judge has failed to consider whether the prosecution witnesses are creditworthy to uphold a conviction of murder.
5. The Learned High Court Judge has failed to consider the matters raised by the defense and which are favourable to the defence.

6. The Learned High Court Judge has failed to consider whether the circumstantial evidence which were lead substantiate an irresistible inference of guilt of the 2nd and the 3rd accused for the offence of murder.

Legal Analysis.

- 1. I will consider the 1st appellant's 1st, 2nd, 4th, 5th and 6th grounds of appeal together, as those grounds basically question the identity of the head that was found. Further, these grounds raised a question as to whether the said Sembakuttige Samarapala had been killed by the appellants or not.**

The Learned High Court Judge has clearly analyzed this fact in his judgment with due diligence as follows;

"මෙම හිස තම පියාගේ බවට හඳුනා ගත් බව සාක්ෂිකාර දුලීප් නිඟාන්ත සහ දුලීකා නිඟාන්ති මෙම අධිකරණයේ සාක්ෂි දෙමින් පවසා ඇත. මෙම අපරාධය සම්බන්ධයෙන් විමර්ශන කටයුතු පවත්වා ඇති සුරියවැව පොලිස් සේලානයේ හිටපු සේලානාධිපති පොලිස් පරීක්ෂක සෙනරත් යාපා සිය සාක්ෂියෙදී පවසා ඇත්තේ හිස කොටස මහේස්ත්‍රාත් තුමා ඉදිරියේ පෙන්තු පසු ගොඩිට ගෙන ඒ සම්බන්ධයෙන් පරීක්ෂණයක් පැවත්වූ බවත් එම පරීක්ෂණය පවත්වන සේලානයේ මෙම සාක්ෂිකරදී සිටි බවත් මහේස්ත්‍රාත් තුමා ඉදිරියේ හිස කොටස හඳුනා ගැනීමක් සිදු වූ බවත් එසේ හඳුනා ගත්තේ ලමඳි සහ බිරිදි විසින් බවත් පවසා ඇත. ඒ අනුව සාක්ෂිකාර දුලීප් නිඟාන්ත සහ දුලීකා නිඟාන්ති වල දමා නිලි ගොඩිට ගෙන ඇති හිස තම පියාගේ බවට හඳුනා ගත් බවට ඔහු විසින් දෙන ලද සාක්ෂිය පොලිස් පරීක්ෂකවරයාගේ සාක්ෂිය මගින් තහවුරු වී ඇත . එමෙන්ම පොලිස් පරීක්ෂක යාපාගේ සාක්ෂියට අනුව මිය ගිය සමරපාලගේ බිරිදි වන 3 වන වින්තිකාරියද මෙම හිස තම පුරුෂයාගේ බවට මහේස්ත්‍රාත් තුමා ඉදිරියේ හඳුනා ගෙන ඇත. මෙම හඳුනා ගැනීම පිළිබඳ කරුණ මෙම නඩුවට ඉතාම වැදගත් වන කරණකි. මන්ද මූලික වගයෙන්ම සමරපාල මියගොස් ඇති බව

පැමිණිල්ල විසින් ඔප්පු කළ යුතු බැවිනි. ඒ අනුව සොයාගත් හිස මිය ගිය සමරපාලගේ බවට හඳුනා ගැනීම අතියයින්ම වැදගත් කරුණකි. පොලිස් පරීක්ෂක යාපා තම සාක්ෂියේදී මිය ගිය සමරපාලගේ ලමඹි සහ ඔහුගේ බිරිද හිස කොටස් හඳුනා ගත් බවට දෙන ලද සාක්ෂිය වින්තිය විසින් කිසිදු අභියෝගයකට ලක් කරන ලද්දේ නැතු. වින්තිය ඒ සම්බන්ධයෙන් මෙම සාක්ෂිකරුගෙන් කිසිදු හරස් ප්‍රශ්න ඇසීමක්ද සිදු කරන ලද්දේ නැතු. මිය ගිය සමරපාලගේ බිරිද වන 3 වන වින්තිකාරිය සාක්ෂි දෙන අවස්ථාවේදී හෝ ඇය එම හිස තම පුරුෂයාගේ බවට හඳුනා ගත් බවට පොලිස් පරීක්ෂකවරයා විසින් දෙන ලද සාක්ෂිය ප්‍රතික්ෂේප කිරීමක්ද කරන ලද්දේ නැතු." (Pg. 3 and 4 of the High Court Judgment)

Further, the Learned High Court Judge had referred to the judgment of **C.A. No. 135/2003**, where Justice Sisira de Abrew had referred to **Sarwan Singh Vs State of Punjab 2002 AIR S.C. (111) 3652 at 33655 and 3656** where Indian Supreme Court held:

"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in Cross examination it must follow that the evidence tendered on that issue ought to be accepted"

Furthermore, the Learned High Court Judge had referred to the judgment of **C.A. No. 135/2003**, where Justice Sisira de Abrew had referred to **Motilal Vs State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP**, where Indian Courts held:

"Absence of cross examination of prosecution witness of certain fact leads to inference of admission of that fact"

Further, in the case of **Mohomed Uvais alias Paraniam Suresh V. The Republic (2014 BASL LR 514)**, it was held that,

"In the light of the above judicial decisions, I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness..."

Thus, it was uncontradicted evidence that the head that was identified was in fact the head of the deceased by his children (2nd witness and 3rd witness). This identification had been done before the Magistrate during the investigation. (Pg.270 of the Appeal Brief. Proceedings dated 02.11.2006 of Case No. H.C.Ratnapura 72/96)

In addition, the wife of the deceased, who has been made an accused in the instant case, also had identified the head as the head of her husband. This identification had been done prior to making her as an accused in the same case. Even though this fact lacks any evidential value, it is pertinent to shed light on the fact that the 3rd appellant herself had identified the head as the head of the deceased and this fact has never been challenged by the defence at any stage of the trial. (Pg.270 of the Appeal Brief. Proceedings dated 02.11.2006 of Case No. H.C.Ratnapura 72/96)

In view of the above, it is evident that both the daughter and the son of the deceased identified and admitted that the head which was found belonged to the deceased.

The 1st, 2nd, 4th, 5th and 6th grounds of appeal on behalf of the 1st appellant thereby fails from the fact of non-identification of the deceased. Hence it is evident that the head of the deceased belonged to Sembakuttige Samarapala.

JMO L.B.L. De Alwis (PW 06) in his evidence mentioned that the cause of the death was due to a fracture of the head caused by a heavy blunt weapon. Further, the deceased had sustained the injury at a sleeping position. The above

evidence was corroborated by PW 02. Evidence given by PW 06 as regards to the blow dealt by an axe to separate the head from the body of the deceased (Pg.346, 347, 348 and 349 of the Appeal Brief), was also corroborated by PW 02.

The Learned High Court Judge has clearly analyzed in his judgement that the deceased had been mostly living in welikanda (Pg. 11 and 12 of the High Court Judgement). Therefore the fact whether the deceased was a habitual betel chewer would have been an unknown fact to his family members who never got an opportunity to live with him on a daily basis.

The Counsel for the 1st appellant has stated in his written submission that the deceased should be absolutely more than 30 years of age. The JMO has stated that the deceased is a person of around 35 years of age. The JMO further stated that the deceased could be at least 25 years of age and his age ranges from 25 to 40 years of age. (Pg.345 and 346 of the Appeal Brief)

“පූ : මෙම හිස් කබල අයත් පුද්ගලයාගේ වයස නිරීක්ෂණය කළේ නැද්ද?

උ : මෙම පුද්ගලයාගේ දන්ත සාදනය සහ අස්ථි සාදකයන් සැලකිල්ලට හාජනය කරලා මම ප්‍රථමයෙන් වයස සම්බන්ධයෙන් සීමාවක් පැනවා. වයස අවුරුදු 25-40 අතර පුද්ගලයෙක් කියලා. පසුව ඔහු තැවතත් පරීක්ෂා කිරීමේදී මම වයස සීමාව තවත් අඩු කළා, මෙම පුද්ගලයා වැඩිපූර අවුරුදු 25 ට කිටවු පුද්ගලයෙක් බවට.

පූ : මෙම පුද්ගලයා ගැන හඳුනා ගැනීම සම්බන්ධයෙන් මොකක්ද දරණ මතය?

උ : මෙම පුද්ගලයා පිරිමි පුද්ගලයෙක්. දළ වශයෙන් වයස අවුරුදු 25ත් 40ත් අතර පුද්ගලයෙක්. අඩුම වශයෙන් 25 ට කිටවු පුද්ගලයෙක්. හිස් කබලේ අස්ථි අනුව සහ දන්වල බුලත් කුම නිසා දල වශයෙන් වයස කියන්නේ. අස්ථි සීමන තුනක් තියෙනවා. ඒවායේ විෂමතා තියෙනවා. ඒ අනුව අවුරුදු 5ක් අතර වයස් සීමාවක් කියන්න පුළුවන්. මා කළින් මුළින්ම සඳහන් කළ වයස් සීමාව අඩු කර සිටියා. ඒ නිසා වයස අවුරුදු 35ක

පමණ පුද්ගලයෙක් කියන්න පුළුවන්. දන්ත පරීක්ෂා වල විෂමතා තියෙනවා. ඒ නිසා මට හරියට කියන්න බැහැ.” (Pg.345 and 346 of the Appeal Brief)

Therefore, the argument brought out by the Counsel for the 1st appellant that the Learned High Court Judge has failed to consider the doubts created as to the age of the deceased is hereby failed.

Moreover, in **Gratiaen Perera V. The Queen (61 NLR 522)**, it was held that,

“....the Judge must not accept the expert’s opinion without making an attempt himself to decide whether the grounds on which the expert’s opinion is formed are satisfactory. The opinion of the expert is relevant but the decision must, nevertheless, be the Judge’s.”

In the case of **The King V. Ebert Silva (50 NLR 457)**, where some bones of the deceased persons were the only evidence available as to the “*corpus delicti*” – body of the deceased personals, it has been held by Howard C.J. that,

“The caution that a man should never be convicted of murder or manslaughter on circumstantial evidence alone unless the body of the deceased person has been found need not, however, be followed when very strong circumstantial evidence of death can be given.”

In this present case there is an eye-witness supported by the above mentioned evidence. Therefore, there is cogent evidence to prove that the skull belongs to the deceased.

2. The 3rd ground of appeal raised on behalf of the 1st appellant as to the inconsistency and the inter se and per se contradictions of PW 02 who claims to be an eye witness.

There were only 4 contradictions marked as V1 to V4 from the evidence of PW 02 and JMO. IP Senarath Yapa had corroborated the evidence given by the 2nd witness, Sembukuttige Dulip Nishantha.

The Learned Trial Judge of the High Court of Embilipitiya gives a good explanation as to these contradictions made by the said PW 02.

“...ඉදිරිපත් වූ සාක්ෂි අනුව මෙම සිද්ධිය සිදුවන විට මෙම සාක්ෂිකරුගේ වයස අවුරුදු 10 ක් වන අතර ඔහු ලැබූ නොවන නඩු විභාගයේදී සාක්ෂි දී ඇත්තේ වයස අවුරුදු 11 දිය. මෙම අධිකරණයේදී ඔහු සාක්ෂි ලබා දී ඇත්තේ අවුරුදු 10 කට පමණ පසුවය. ඒ අනුව කුඩා කල දුටු සිද්ධියක් දීර්ශ කාලයක් ගත වීමත් සමග මෙම සාක්ෂිකරුගේ මතකයේ ඇත්තේම සාමාන්‍යයෙන් සිදු විය හැක්කකි. ඒය සාමාන්‍ය මිනිස් ස්වභාවයකි. සාක්ෂිකරුවෙකුට තමා දුටු සිද්ධින් දීර්ශ කාලයකට පසුව ජායාරූප ගත කරන ලද ආකාරයක මතකයකින් සාක්ෂි දීමට හැකියාවක් නැතු. ඒ අනුව දීර්ශ කාලයක් ගත වීම නිසා මෙම සාක්ෂි කරුට සිය පියාට පහර දුන් තැනැන්නා, ඔහුගේ බෙල්ල, අන් පා කැපුවේ කවරෙකුද යන්න මතකයෙන් දුරස් වීමට ඇති ඉඩ කඩ වැඩිය. ඒ අනුව ඔහු ඒ සම්බන්ධයෙන් දෙන ලද පැහැදිලි කිරීම මෙම අධිකරණයට පිළිගත හැකි එකකි. එකී පරස්පර විරෝධීනා නිසාම මෙම සාක්ෂිකරු විශ්වසනීය සාක්ෂිකරුවෙකුය නොවේය යන නිගමනයට එල්ලීමට හැකියාවක් නැතු.” (Pg 20 and 21 of the High Court Judgement)

In the case of **The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144**, it was observed that,

“When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions,

viewed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court... ”

Further, in the case of **State of Uttar Pradesh v. M.K. Anthony [AIR 1985 SC 48]**, it was held that,

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.”

A similar opinion had been borne in the case of **B. Bhoghinbhai Hirjibhai v State of Gujarat (AIR) 1983 SC 753**, where it was held that,

“Over much importance cannot be attached to minor discrepancies. The reasons are obvious: - (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) the powers of observation differ from person to person. What one may notice, another may not. An object or movement

might emboss its image on one person's mind, whereas it might go unnoticed on the part of another, (4) By and large people cannot accurately recall a conversation and reproduce them very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder; (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time-sense' of individuals which varies from person to person. (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up, when interrogated later on, (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him-perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment... Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses."

Further, the written submissions on behalf of the 1st appellant refers to the case of **Kalinga Padmatilaka alias Sergeant Elpitiya V. The Director General**

Commission to Investigate Allegations of Bribery or Corruption. (SC Appeal No: 99/2007) 2010 B.LR. 67, in order to prove the unreliable nature of the evidence given by PW 2 while drawing attention to “inconsistent statements” as highlighted in the said case.

In **Kalinga Padmatilaka alias Sergeant Elpitiya V. The Director General Commission to Investigate Allegations of Bribery or Corruption (Supra)**, decided by Chandra Ekanayake,J., the evidence given on behalf of the Prosecution had “*contradicted the evidence given even with regard to the date of the incident*” and in such a situation it has undoubtedly been an instance where the contradictions made by the prosecution goes to the root of the case. Further, in the same case, it has been held that,

“... one cannot be unmindful of the proposition that Court cannot mechanically reject the evidence of any witness.”

Thus, as it has been referred to Sir John Woodroffe & Amir Ali’s “Law of Evidence – 18th Edition – Vol.1 at pg. 471, in the same judgement, “*No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case.*”

Therefore, the above cited case laws and the Learned High Court Judge’s clear observations prove the fact that the position taken by the 1st appellant is not applicable under the circumstances of this case.

Hence, I agree with the view borne by the Learned High Court Judge of Embilipitiya.

3. The 7th ground of appeal as raised on behalf of the 1st appellant was that the Learned High Court Judge has failed to consider the underlying principles of the presumption of innocence.

The Learned High Court Judge of Embilipitiya had considered the underlying principles of the presumption of innocence at the very beginning of the judgment dated 10.02.2012 at page 2 of the said judgment. As it is clearly analyzed and decided, the conviction of the 1st, 2nd and 3rd accused and the acquittal of the 4th accused after satisfying that the prosecution has proved its case beyond reasonable doubt.

4. The 2nd, 3rd and 6th grounds of appeal raised on behalf of the 2nd and 3rd appellants questions the common intention that the 2nd and 3rd appellants had shared with the 1st appellant.

According to the evidence given by PW 02, subsequent conduct of the 3rd appellant and also considering the totality of evidence before Court is sufficient to show that all three accused shared a common intention. This fact has been further analyzed by the Learned High Court Judge of Embilipitiya as follows;

“...මෙම සිදුවීම සිදු වූ අවස්ථා දෙකේදීම එනම පොල්ලෙන් පහර දෙන අවස්ථාවේදී සහ ආර ලගදී හිස කදෙන් වෙන් කිරීම, අත් පා කදෙන් වෙන් කිරීම සිදු වූ අවස්ථා වලදී 1,2,3 විත්තිකරුවන් එම ස්ථානයේ සිටි බවට පැහැදිලි සාක්ෂි ඇත. ඒ අනුව අදාළ ක්‍රියාවන් කලේ 1 වන විත්තිකරුද 2 වන විත්තිකරුද යන්න වැදගත් නොවේ. 1,2,3 විත්තිකරුවන් තිදෙනාම මිය ගිය අයට පහර දීමේ ක්‍රියාවලිය සිදු වන අවස්ථාවේදී එම ස්ථානයේ සිටීමත් පසුව 1,2 විත්තිකරුවන් මිය ගිය අයගේ සිරුර ආර අසලට රැගෙන යාමන් ඔවුන් සමග 3 වන විත්තිකාරිය විදුලි පන්දමක් අතැතිව ගමන් කිරීමත් මිය ගිය අය වතුරේ ඔබන අවස්ථාවේදී සහ බෙල්ල, අත්, පා කදින්

වෙන් කරන අවස්ථාවේදී එම ස්ථානයේ එකට සිටීමෙන්ද, 3 වන විත්තිකාරිය කදෙන් වෙන් වූ හිස කොටස ආපසු රැගෙන විත් කෙසෙල් මන්ධියේ කෙසෙල් පැලයක් ගලවා වලක් කපා වල දැමීමේ ක්‍රියාව සිදු කිරීමෙන්ද ඉන් පසුව අත් පා සහ කද පෝර උරයක දමා වලවේ ගහ දෙසට ගෙන යාමේ කටයුතුවලට ක්‍රියාකාරීව සහභාගී වීම තුළින්ද විත්තිකරුවන් නිදෙනාම පොදු වේතනාවකින් යුත්තව ක්‍රියා කොට ඇති බව පැහැදිලිවම සනාථ වී ඇත...” (Pg 21 and 22 of the High Court Judgement)

The above mentioned acts clearly demarcate the participatory presence of all three appellants.

As it is stated in the written submissions on behalf of the 2nd and 3rd appellants, in **King V. Ranasinghe 47 NLR 373**, it was held that:

“Common intention ‘within the meaning of section 32 of the Penal Code is different from same or similar intention. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.”

Thus, it is evident that the common intention is clearly inferred from the circumstances in the present case as it has been illustrated clearly by the Learned Trial Judge of the High Court of Embilipitiya.

Participatory presence at the commencement of an incident in furtherance of a common intention is enough to establish vicarious liability as it has been enunciated by Sarath De Abrew, J. in **Iddagodage Sarath Kumara V. The Attorney General, (C.A. 205/2008)**.

Further, in their written submission, the 2nd and 3rd appellants has referred to the case **Queen V Vincent Fernando 65 NLR 265**, where it has been held that:

“... to be liable under section 32, a mental sharing of the common intention is not sufficient; the sharing must be evidenced by a criminal act or illegal omission manifesting the state of mind”.

In the instant case, the Learned High Court Judge had clearly analyzed the conduct of each accused in committing the offence of murder with common intention. The Learned High Court Judge has acquitted the 4th accused on careful consideration on the “*mental sharing of the common intention*” as well as the sharing of a “*criminal act*” which had taken place by each accused.

5. The 1st , 4th and 5th grounds of appeal raised on behalf of the 2nd and 3rd appellants addresses the credibility of evidence, credibility of witnesses and the due regard given to the defence case.

As it has been clearly analyzed by the Learned High Court Judge, (Pg.23 of his High Court Judgement), I see no reason for a child to tell lies before a court to make false allegations against his or her own mother who gave birth to him/her. It is highly unlike that a child would falsely implicate his own mother for the murder of his own father at the age of 10 years and reiterate the same position after ten years upon the instigation of anyone, when he is capable of distinguishing between good and bad. Therefore, all facts and context considered, there appears to be no lack of credibility on the part of the witness.

In the case of **Dharmasiri V. Republic of Sri Lanka [2010] 2 Sri LR 241**, it has been held by Sisira de Abrew, J. that,

“Credibility of a witness is mainly a matter for the trial Judge, Court of Appeal will not lightly disturb the findings of a trial Judge with regard to the credibility of a witness unless such findings of trial Judge are manifestly wrong.”

Further, in the case of **Ambika Prasad and another V. State (Delhi Administration)** (2000) SCC Cri. L 522 the Indian Supreme Court observed that,

‘a criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties...’

According to section 134 of the Evidence Ordinance,

“No particular number of witnesses shall in any case be required for the proof of any fact”.

In the case of **Vadivelu Thevar V. State of Madras** [1957 AIR 614], it was held that,

“On a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions may be safely stated as firmly established:

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character...”

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses... "

Considering above, I am of the view that the Learned High Court Judge has come to the correct conclusion after careful consideration of all the evidence placed at the trial. Therefore, I do not wish to interfere with the conviction and the sentence imposed on the appellants, by the Learned High Court Judge, I affirm the same.

This appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL