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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/0377-381/2019
High Court of Matale
Case No: HC/296/2006

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

COMPLAINANT

Vs.

1. Duraisamy Chamil Selvam
2. Selliah Balakrishnan
3. Irulan Adi Ganeshan
4. Duraisamy Chandran
5. Duraisamy Manoharan
6. Selvaraj Sivashakthi

ACCUSED

AND NOW

1.Duraisamy Chamil Selvam
2. Selliah Balakrishnan
3. Irulan Adi Ganeshan
4. Duraisamy Manoharan
5. Selvaraj Sivashakthi

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Indica Mallawaratchy for the 1st and 4th Appellants.**
Saliya Peiris, PC with Pasindu Thilakarathene for the 2nd and 3rd Accused-Appellants.
Shanaka Ranasinghe, PC with Niroshan Mihindukulasuriya and Anushika Ranasinghe for the 5th Appellant.
Azard Navavi, ASG for the Respondent.

ARGUED ON : **29/07/2025, 10/09/2025 and 16/10/2025**

DECIDED ON : **08/12/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) along with the 4th accused were indicted jointly in the High Court of Matale as follows:

1. That on or about the 20.06.2004 the accused named in the indictment were members of an unlawful assembly with the common objective of causing hurt to Karunakaran Suresh Kumar thereby committing an offence punishable under Section 140 of the Penal Code.
2. At the same time, same place and in the course of the same transaction the accused committed the murder of Karunakaran Suresh Kumar thereby committing an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. Under Section 296 read with Section 32 of the Penal Code. (Alternative common intention charge to count 02).

4. At the same time, same place and in the course of the same transaction the accused committed simple hurt to Karunakaran Ashokan thereby committing an offence punishable under Section 314 read with Section 146 of the Penal Code.

5. Under Section 314 read with Section 32 of the Penal Code. (Alternative common intention charge to count 04).

As the 4th accused had passed away during the pendency of the trial, the indictment was amended accordingly.
The trial commenced before the High Court Judge of Kandy as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the Appellants had made dock statements and closed their case.

After the conclusion of the final submissions of the defence, the case was transferred to the High Court of Matale as the place of incident falls under the jurisdiction of the newly established High Court in Matale.

After considering the evidence presented by both parties, the learned High Court Judge who heard the case at the High Court of Kandy delivered the Judgement in the High Court of Matale and had convicted the Appellants as charged under Counts 1,2 and 4 and sentenced them as follows:

- Under the First Count - 06 months rigorous imprisonment with a fine of Rs.10,000/- on each Appellant. The fine is subject to 02 months simple imprisonment.
- Under the Second Count - death sentence on each Appellant.
- Under the Fourth Count - 01-year imprisonment with a fine of Rs.10,000/- on each Appellants. The fine is subject to 02 months simple imprisonment. Further, each Appellant is

directed to pay a compensation of Rs.10,000/- with a default sentence of 06 months simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court.

As the learned High Court Judge who passed the sentence had failed to record the *allocutus* in terms of Section 280 of the Code of Criminal Procedure Act No.15 of 1979, on 11/01/2023 this Court has directed the then presiding High Court Judge of Matale to record the *allocutus* and send the case record back to this Court. As per the direction, on 25.01.2023 the learned High Court Judge of Matale had recorded the *allocutus* of the Appellants and remitted the original case record back to this Court.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence. Also, at the time of argument the Appellants were connected via the Zoom platform from prison.

Background of the Case.

The prosecution's case rests on the testimony of an eye witness and circumstantial evidence.

PW1, Karunakaran Ashokan is the eye witness in this case. The incident had happened around 7.pm on 20.06.2004. The eye witness is the brother of the deceased. The deceased was a three-wheeler driver at the time of his demise.

On the day of the incident, the eye witness also accompanied the deceased who had gone on a hire at 6.30pm from Kandenuwara to Hunugala, as a dispute relating to running hires had taken place between the deceased and the 2nd Appellant. On their return, at about 7.pm, both the deceased and the witness had noticed that their way was blocked by some stones that were

placed across the road. At that time, the deceased was driving the three-wheeler.

When the deceased alighted from the three-wheeler to clear the road, a group of people consisting of the 1st 2nd,3rd 5th and 6th (Now 1st ,2nd ,3rd 4th and 5th) Appellants and the 4th Accused, had assaulted his brother and himself using knife and stumps. The witness had run to the nearby jungle and had hidden himself until he was discovered by the police. According to him, he had identified the Appellants and the 4th Accused clearly with the aid of the head light of the three-wheeler and a torch he had with him. He too sustained injuries due to this unexpected attack.

PW2, Karunakaran Ravindran, is the elder brother of the deceased and the owner of the three-wheeler which had been given to the deceased to hire. On the day of the incident as the deceased was late to come home, he had gone in search of him. At the place of the incident, he had found the three-wheeler with blood stains. As he could not find his brothers, he had directly gone to the Raththota Police Station and had lodged a complaint. When he returned to the place of the incident with the police, he had found the deceased lying fallen with bleeding injuries some distance away from the three-wheeler. According to him the deceased had revealed the names of all the Appellants and the 4th Accused.

According to PW07, the main investigating officer SI/Rasika Sampath who visited the scene of crime, the deceased had told him that 'Chandran's brother' had assaulted him.

PW04, JMO Kodikara who held the post mortem of the deceased, had noted 08 cut injuries on the deceased's body. According to him the cause of death is due to hemorrhagic shock due to multiple cut injuries to the head, both upper limbs and the right lower limb.

The 1st and 4th Appellants had filed the following grounds of appeal:

1. Total failure on the part of the Court to evaluate the evidence of the chief investigation officer relating to the dying declaration, in its correct judicial perspective, results in a serious prejudice being caused to the Appellants.
2. Following closely on the heels of ground No.1, the conflict of evidence between the chief investigation officer (PW7, namely Rasika Sampath) and the sole eye witness (PW1, namely Karunakaran Ashokan) creates a serious doubt in the prosecution's case.
3. Evidence of the sole eye witness is contradicted by the medical evidence (PW5, Dr. Tennakoon Banda) thereby creating a serious doubt regarding the veracity of the version as testified by the eye witness.
4. Evidence of the sole eye witness is further in conflict with the medical evidence, thereby creating a serious doubt regarding the veracity of the version of the eye witness.
5. The conviction, which hinges on the evidence of the sole eye witness, is factually and legally untenable and flawed for the reasons enumerated below, to wit;

    A. The conflict of evidence between the chief investigating officer and the sole eye witness **c**reating a serious doubt in the prosecution's case.
    B. The evidence of the said eye witness is contradicted by the medical evidence thereby creating a serious doubt regarding the veracity of the version as testified by the eye witness.
    C. The Police statement is involuntary.

D. This fails the test of promptness and test of consistency in terms of Section 157 of the Evidence Ordinance.
E. The version of the sole eye witness fails the test of probability.
F. The contradictions and omissions marked/highlighted render his evidence unworthy of credence.

6. The judgment of the trial court is deficient and flawed and in violation of Section 283 of the Code of Criminal Procedure Act.
    A. The learned trial judge had failed to apply his judicial mind to the conflict of evidence between the prosecution witnesses.
    B. The trial judge had factually misdirected himself by concluding that the evidence of prosecution witnesses is corroborative, a factual finding which is totally fallacious and wholly contrary to the evidence led at the trial.
    C. Total failure on the part of the learned trial judge to apply his judicial mind to the serious infirmities in the evidence of the sole eye witness.
    D. The Learned Trial Judge has erred in law by shifting the burden of proof to the Appellants.
    E. Although the convictions are based on a common objective, the judgement is depleted of the legal principles relating to the imputation of vicarious liability.

The 2nd and 3rd Appellants had filed the following grounds of appeal:

1. Burden of proof.
2. The rejection of the defence under Section 126A of the CPC is a misdirection.
3. Identification of the 3rd Appellant at the scene of crime is doubtful.

The 5th Appellant had filed the following grounds of appeal:

1. Burden of proof.

2. Identification of the 5th Appellant at the scene of crime is doubtful.

Considering the grounds of appeal raised by the Appellants, it will be considered on the following common grounds;

1. The prosecution has not proved the case beyond reasonable doubt.
2. The failure of the learned High Court judge to evaluate the dying declaration of the deceased in its correct perspective.
3. The conviction which hinges on the evidence of the sole eye witness is factually and legally untenable and flawed.
4. The rejection of the defence under Section 126A of the CPC is a misdirection.
5. The judgment of the trial court is deficient and flawed and in violation of Section 283 of the Code of Criminal Procedure Act.
6. Identification of the Appellants at the scene of crime is doubtful.

As the 1st, 2nd, and 3rd common grounds are interconnected, all three will be considered together hereinafter. The learned Counsel strenuously argued that the infirmities in the evidence of the main eye witness have not been given due consideration.

The learned Counsel for the Appellants mainly argued that the Learned Trial Judge had failed to consider all the circumstances whether PW1, Karunakaran Ashokan had witnessed the incident as claimed by him in his testimony.

In **CA/HCC/417/2018** decided on 14/03/2024 this court has held that:

> *Eyewitness testimony is one of the most important kinds of criminal evidence. In criminal cases, the judges regularly face the difficult but crucial task of evaluating eyewitness testimony. This sometimes means checking whether the witness's story fits with other established facts of*

the case. However, the veracity of such a story cannot always be verified or falsified directly. In such cases judges will have to look at whether the statement comes from a reliable source.

Further, an eyewitness's testimony is probably the most persuasive form of evidence presented in court, but in many cases, its accuracy is dubious. There is also evidence that mistaken eyewitness evidence can lead to wrongful conviction—sending people to prison for years or decades, even to death row, for crimes they did not commit.

In considering the evidence of an eye witness, the Court should look at the demeanour of the witness, the inherent probability of the account, any internal inconsistencies in the account, whether the account is consistent with previous statements by the witness, whether the witness has any bias against the accused or any family or group to which the accused belongs, whether the evidence at the crime scene supports the account, and whether the witness's testimony is supported by the testimony of other witnesses. These factors are very important as the burden of proof is on the prosecution in all criminal cases.

As stated above, PW1, who is an eye witness had vividly explained how this gruesome incident had happened. He had clearly seen the attack on the deceased before he could escape from the crime scene with injuries.

The Learned High Court Judge in his judgment had considered the evidence given by PW1 extensively and properly analyzed his evidence in its correct perspective. Further, the learned High Court Judge had reasonably considered all direct and circumstantial evidence to come to his decision.

In criminal trials, contradictions and omissions are serious discrepancies in relation to witness testimony or evidence, which can affect the credibility of such evidence. A contradiction refers to when a witness makes a statement which is contradictory, in other words, opposite to what they previously

stated. An omission, refers to the failure to include or mention a crucial detail from a prior statement by a witness. Such discrepancies are used to challenge the trustworthiness and veracity of a witness, which could assist in finding reasonable doubt, as evidence in multiple cases.

In a practical sense, cases are generally not completely free from omissions or contradictions. The presence of such omissions or contradictions would not always result in acquittal, neither will the absence of such omissions or contradictions surely result in convictions. This is due to the fact that the opposite may, in fact, take place; where the presence of such discrepancies would lead to convictions and their absence would lead to acquittals.

As such, omissions and contradictions must be considered with a sole focus on the assessment of a witness's credibility, with an objective to extract the truth from false statements. Furthermore, the importance of omissions or contradictions may be lost with the passage of time, as memories of witnesses' fade, along with changes in circumstances. Accordingly, each omission or contradiction must be considered with respect to the context of each case, respectively.

In **The Attorney General v Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are true material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.*

Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter".

In the case of **R v. Hepworth** 1928 (AD) 265, at 277, Curlewis JA stated:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".

In this case, the learned High Court Judge at pages 401-495 and 500-503 of the brief, had very extensively considered the contradictions marked and the omissions highlighted and had given very plausible reasons as to why he disregarded those contradictions and omissions. Hence, it is incorrect to say that the learned High Court Judge had failed to evaluate the contradictions and omissions adequately in the judgement.

Further, the eye witness PW1 had given evidence in the High Court nearly 05 years after the incident. A photographic memory cannot be expected from him as PW1 is also an ordinary human being. I consider his evidence to be clear and cogent and therefore has not shaken his credibility or testimonial trustworthiness.

The learned Counsel for the 1st and 4th Appellant further argued that the evidence of PW1 is contradicted by medical evidence. The learned High Court Judge had very correctly analyzed the medical evidence in his judgment.

In the case of **Menoka Malik and others v. The State of West Bengal and others** (2018) 2 SCeJ 1390 held that:

> *"It is by now well settled that the medical evidence cannot override the evidence of ocular testimony of the witnesses-If there is a conflict between the ocular testimony and the medical evidence, naturally the ocular testimony prevails. In other words, where the eye witnesses account is found to be trustworthy and credible, medical opinion pointing to alternative possibilities is not accepted as conclusive".*

In the judgment of **Darbara Singh v. State of Punjab,** (2012) 10 SCC 476, it was held that:

> "*So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved…"*

The doctor had noted about 08 injuries on the deceased. According to him the cause of death is due to hemorrhagic shock due to multiple cut injuries to the head, both upper limbs and the right lower limb. Considering the evidence given by PW1, the medical evidence is not contradictory when

comparing with the evidence given by PW1. Hence, the learned High Court Judge had not acted upon contradictory medical evidence.

Although it is not necessary to prove motive in a criminal trial, existence of a motive would strengthen the prosecution's case. In this case, the evidence revealed that an enmity existed between the 2nd Appellant and the deceased regarding the hiring of the deceased's three-wheeler at a low cost. This dispute had gone up to the police before this incident. The last incident had happened at 11.00 am on the previous day of the incident. (Pages 475-476 of the brief).

Next the learned Counsel for the 1st and 4th Appellant contended that, had the learned High Court Judge considered the dying declaration of the deceased properly, he would not have convicted her clients in this case.

According to PW2 and PW7, when the deceased was discovered, he had uttered that 'Chandran Thambi' had assaulted him. According to PW2, 'Chandran Thambi' is the 3rd Appellant in this case. Considering the evidence given by PW7, the investigation officer, the learned High Court had disregarded PW2's evidence at pages 504-505 of his judgment. As the learned High Court Judge mainly relied on the evidence given by PW1, the eye witness, I am of the view that not considering the dying declaration of the deceased had not caused any prejudice to the Appellants.

As per the 4th ground of appeal, the learned President's Counsel for the 2nd,3rd and 4th Appellants contended that the learned High Court Judge had wrongly rejected the *alibi* of the 2nd, 3rd, and 4th Appellants.

It is trite law that no burden is cast upon the accused to prove his *alibi*, as the *alibi* is not a defence. It is the duty of the Learned High Court Judge to consider the *alibi* and if any doubt arises in the mind of the Learned Trial Judge, the benefit of the doubt must be awarded to the accused.

Learned High Court Judge in his judgment at pages 508-509 of the brief very correctly considered the law pertaining to *alibi* under Section 126A of the Code of Criminal Procedure Act No.15 of 1979 and rejected the same after giving plausible reasons. Hence, it is incorrect to say that the learned High Court Judge had not considered the *alibi* in his judgment.

In this case, even though the learned High Court Judge had not had the benefit to observe the demeanor and the deportment of all the witnesses during the trial, he had properly evaluated the evidence given by both sides to arrive at his finding. Considering the entirety of the judgment, it is incorrect to say that the learned High Court Judge had totally disregarded Section 283 of the Code of Criminal Procedure Act No.15 of 1979. The Learned High Court Judge has very correctly and accurately considered and analyzed the prosecution and defence case and arrived at a correct finding that the prosecution has proved the case beyond reasonable doubt.

In **The Queen v. K.A. Santin Singho** 65 NLR 447 the court held that:

> *"It is fundamental that the burden of proof is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances".*

In **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

> *"…the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the*

sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".

In **The King Vs. W. P. Buckley** 43 NLR 474, it was stated by Howard, C.J.:

"*In arriving at a verdict of guilty, the majority of the jury must have viewed the evidence in sections accepted and convicted the appellant on those parts that were satisfactory and disregard those facts that pointed to the improbability of the story put forward by the Crown. The jury should have viewed the evidence as a whole. If they had done so, we are of opinion that they must have had a reasonable doubt as to the guilt of the appellant. The verdict is in our opinion, unreasonable, in as much as taken as a whole the evidence does not support the conviction."*

In the final ground of appeal, the learned President's Counsel for the 2nd,3rd and 5th Appellants contended that the identification of the 2nd ,3rd and 5th Appellants at the scene of crime is doubtful.

In the judgment of **Regina Vs. Turnbull and Another** (1977) QB 224, it was held:

"Whenever the case against an accused depends wholly on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification by the witness." The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.

• Caution is required to avoid the risk of injustice.

•A witness who is honest may be wrong even if they are convinced, they are right.

• A witness who is convincing may still be wrong.

• More than one witness may be wrong.

• A witness who recognizes the defendant, even when the witness knows the defendant well, may be wrong.

Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;

• The length of time the accused was observed by the witness;

• The distance the witness from the accused;

• The state of the light;

•The length of time elapsed between the original observation and the subsequent identification to the police.

E.R.S.R. Coomaraswamy in his book 'The Law of Evidence' Volume 1 at page 663 discusses the mistaken identity in the following manner.

> "A fundamental requisite in a criminal case is to establish the identity of the accused as the guilty party. The text-books abound with instances of what were supposed to be clear identifications which proved to be fallacious and defective. These include the case where an honest witness was deceived by the broad glare of sunlight, (R. Vs. Wood and Brown [Ann-Reg. 1784]) … …Much of the value of direct evidence of identification will depend on the personal appearance of the subject of identification. Many persons cannot be easily distinguished from others. The liability mistake is greater where the questionable identity is a matter of deduction and inference and the expression of an opinion than where it is the subject of direct evidence. (Wills, op. cit., 7th edition., pp 197-200)"

In this case PW1 had clearly seen all the Appellants at the time of committing the offence. He had ample opportunity to see the assailants at the crime

scene. Further, the Appellants are persons known by PW1. He had correctly identified each of them at the trial.

In this case the learned High Court Judge had considered and analyzed the evidence accurately even though he did not have the advantage of seeing the demeanour and deportment of some of the witnesses who had given evidence before his predecessor.

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner which ensures their procedural equality during the course of the trial.

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at his decision. He has properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the learned High Court Judge in this case cannot be faulted.

In State of **Uttar Pradesh v. M. K. Anthony [AIR 1985 SC 48]** the court 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 scrutinise 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. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole.....Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

In **Sarkar on Evidence,** 15th Edition at page 112, it is stated as follows:

"Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence. [Sidhan v. State of Kerela [1986] Cri LJ 470, 473 (Kerala)]. But discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony (Brij Lal v. Kunwar, 36A 187: 18 CWN 649: A 1914 PC 38). The main thing to be seen in whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it. (Krishna Pillai Sree Kumar v. State of Kerala A [1981] SC 1237,1239)."

As discussed under the appeal grounds advanced by the Appellants, the prosecution has adduced strong and incriminating evidence against the Appellants. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and arrived at a correct finding that the Appellants were guilty of committing the murder of the deceased in this case.

Therefore, I affirm the conviction and dismiss the Appeal of the Appellants.

The Registrar of this Court is directed to send this judgement to the High Court of Matale along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL