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, read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 11 of the Special Provisions Act No. 19 of 1990.

CA Case NO: HCC-132-133-24

HC of Tangalle Case No: THC-16-07

Democratic Socialist Republic of Sri Lanka

Complainant

1. Galla Arachchige Piyathilaka
2. Galla Arachchige Ruwan Tharanga

Accused

And Now Between

1. Galla Arachchige Piyathilaka

Ehalahawatta, No. 126,

Isurupura

Getamanna South

Presently

Welikada Prison

Borella, Colombo 08

1st Accused Appellant

2. Galla Arachchige Ruwan Tharanga
No. 03
Bogahawaththa, Kaduboda
Gatamanna South

Presently
Welikada Prison
Borella, Colombo 08

2nd Accused- Appellant

Vs

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**

Amal Ranaraja, J

Counsel : Neranjan Jayasinghe with Randunu Heellage and Imangsi Senarath for the 1st Accused- Appellant

Nalin Laduwahetty, PC with Vajira Ranasinghe, Kavithri Ubeyesekera, Ranjith Samarasekeda and Rajitha Abeysekere for the 2nd Accused-Appellant

Yuhan Abeywickrama, DSG for the State

Written Submissions On : 19.12.2024 (by the 1st Accused Appellant)
02.04.2025 (by the 2nd Accused-Appellant)
21.01.2025 (by the Respondent)

Argued On : 09.10.2025

Judgment On: 17.11.2025

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellants (hereinafter referred to as "the 1st Accused and the 2nd Accused"), who are brothers, were charged on indictment with the murder of Wijesekara Pathiranage Sarath on 31st October 2004 at Gatamanne.

At the trial, the prosecution led evidence through 10 witnesses and marked productions P1-P2, and thereafter closed its case. In defence, the first accused testified from the witness box, while the second accused made a dock statement and called three witnesses. Upon conclusion of the trial, the Learned High Court Judge acquitted both Accused on the first and second counts, but found them guilty on the third count of the indictment and imposed the death sentence on 07.03.2024. It should be noted that the 1st and 2nd count deals with the unlawful assembly with a common object, and the 3rd count involves the common intention.

Aggrieved by the aforementioned conviction and sentence, both Accused preferred this appeal before this Court. The grounds of appeal advanced by the Accused are as follows:

1. The learned trial judge failed to analyse the defence evidence in accordance with the criteria established by the apex courts and failed to provide reasons for rejecting the defence evidence.
2. The learned trial judge failed to consider the alleged doubt regarding the identification of the 1st Appellant by the deceased.
3. The learned trial judge failed to properly evaluate the circumstantial evidence in accordance with established legal principles.

4. The learned trial judge failed to adequately assess the existence of a common intention between the Appellants.
5. The learned trial judge failed to consider the possibility of a third party committing the offence, as alleged by the Appellants.
6. The judgment and sentence are inconsistent with the evidence presented at trial, and the prosecution failed to prove the charges beyond reasonable doubt.

The facts and circumstances of this case are as follows,

PW1, Samantha Deepika Gamage, the wife of the deceased, passed away on 01.02.2013 prior to the commencement of the trial before the High Court. Her testimony recorded during the non-summary inquiry was admitted in evidence pursuant to Section 33 of the Evidence Ordinance.

According to her testimony on 31st October 2004, the deceased returned home around 7:45 PM and then went to a nearby boutique. At that time, PW1, her children, and PW2, her mother, were watching the television, and the witness heard a sound resembling firecrackers coming from outside. PW1 stepped out and saw the deceased collapse to the ground and uttering, "බුදු සමන්ති තිලක් මට වෙඩි තිබ්බා" (dying declaration). In the non-summary inquiry, the witness stated that she was the cousin of Thilak, who is the son of the witness's mother's sister. The deceased then requested a vehicle, upon which PW2 left to arrange one. At approximately the same time, PW3, the deceased's uncle and a nearby resident, also arrived at the scene.

She further stated that after PW2 left the premises, two unidentified individuals arrived at the house, disconnected the electricity supply, and attempted to shoot the deceased again. Unable to recognize the assailants, she intervenes by grabbing the barrel of the gun. The deceased fled toward the front of the house, and she heard another gunshot, which struck the deceased in the leg. PW1 then brought the injured person inside and locked the door. Shortly afterwards, PW2 returned and informed her that both accused had obstructed her from bringing the vehicle. The police later arrived and transported the deceased to the hospital. She also

mentioned a rumour circulating in the village about an alleged extramarital affair between the deceased and the accused's sister.

During cross-examination, the witness testified that she was unable to identify the individual who shot the deceased due to the darkness at the time of the incident. She further disclosed that the deceased had been in remand for nearly a year in connection with a robbery, and that multiple cases had been filed against him in the Magistrate Courts.

When we peruse the evidence of the PW6, the police officer who conducted the investigation stated that this witness, PW1, had provided a statement during the investigation, in which she identified several individuals in connection with the incident. Notably, she named two women as the main suspects in the case. Therefore, it is pertinent to refer to the evidence given by PW6.

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ප්‍ර :තමුන් දන්නවා මෙම නඩුවට අදාලව මුලින්ම සැකකරුවන් හය දෙනෙක් ගරු මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කලා ?

උ :ඉදිරිපත් කලේ නැහැ මැතිනියනි, මුල් අවස්ථාවේ සැකකාරියන් දෙදෙනෙක් මා ඇත් අඩංගුවට ගෙන ඉදිරිපත් කළා. අනිත් අය අධිකරණයට භාර උනා

ප්‍ර :ඒ සම්පුර්ණ ඔක්කොම හය දෙනයි?

උ :මගේ මතකයේ හැටියට හය දෙනයි

ප්‍ර :තමුන් කිව්වා මේ පළමුව ඉදිරිපත් වූ සැකකරුවන් හය දෙනාගෙන් රේණුකා සහ චාන්දනී පළමුව ඇත් අඩංගුවට ගත්තා කියලා

උ :එහෙමයි

ප්‍ර :ඒ අත් අඩංගුවට ගත්තේ යම්කිසි සැකයක් නිසා නේද

උ :පැමිණිල්ලේ සඳහන්ව තිබු නිසා ඇත අඩංගුවට ගත්තා

ප්‍ර :කාගේ පැමිනිල්ලේද?

උ :මරණකරුගේ බිරිඳ වන සමන්ති දීපිකා ගමගේ නමැත්තියගේ ප්‍රකාශයේ ඔවුන් දෙදෙනාගේ නම් සඳහන්ව තිබුනා

He further stated that some other names also diverged by the PW 1.

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ප්‍ර :එතකොට ඒ කටඋත්තරය තිබෙනවා තමුන් ලග

උ :එහෙමයි

ප්‍ර :එහි නම් සඳහන්ව තිබෙනවා ප්‍රියතිලක, රන්ජිත්, උපසේන, රේනුකා, සුද්දී, සුගතදාස කියලා හය දෙනෙක්ගේ නම් ?

උ :එහෙමයි

However, PW1 has failed to offer any justification for implicating the individuals she named in connection with the crime. Her testimony raises serious doubts about its credibility and prompts concern over whether she is being truthful before the court or has named the accused and others under dubious circumstances. In my considered view, by listing multiple individuals as suspects, she appears to have sought to implicate the accused's family without any legitimate basis.

PW2, Mahanama Gunawardana Amarawati, the mother-in-law of the deceased, was at the deceased's residence on 31st October 2004. She stated that the deceased had left the house at approximately 6:30 p.m. Later, while watching the news around 8:10 p.m., they heard a sound resembling firecrackers. The deceased then approached from the direction of the boutique, saying, "සමන්ති මට තිලක් වෙඩි තිබ්බා" and collapsed near the doorway and asked to get a vehicle. PW2 then went to Bandarawatta in search of one. On her way, she noticed the first accused near the boutique with the crowd. Unable to find a vehicle, she returned home, where PW1 informed her that the deceased had died. PW1 also mentioned that during PW2's absence, the power had gone out, and the deceased had been shot again by two unknown people. Later, the police arrived and took the deceased to the hospital.

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ප්‍ර : දුව සමන්ති, ත්‍රිවිල් එකක් සොයන්න ගිහින් එන කාලය ඇතුලත මොනවා හරි උනා කියලා කිව්වද?

උ : ලයිට් නැති උනා කිව්වා.. කළුවරේ ආවා කියලා කිව්වා. තවත් වෙඩිල්ලක් තිබ්බා කිව්වා.

ප්‍ර : තමාගේ දුව සමන්ති කිව්වා ආපසු කළුවරේ ඇවිල්ලා වෙඩිල්ලක් තිව්ව කියලා?

උ : ඔව්.

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ප්‍ර : දැන් තමා කිව්වා තමා යම් අවස්තාවක වාහනයක් සොයන්න ගිය අවස්ථාවේ තිලක් ඉන්නවා දැක්ක කිව්වා. ඒ වෙලාවේ ඔහු සමඟ කතා කලාද?

උ ; ඔව්. මම කතා කළා. සරත් කිව්වා නේ තිලක් වෙඩි තිබ්බා කියලා. මම ඇහුවා ඇත්තද පුතේ වෙඩි තිබ්බද කියලා.

ප්‍ර : එවිට තිලක් මොනවද කිව්වේ?

උ : උත්තරයක් නැත.

ප්‍ර : තමාට කියන්න පුලුවන්ද තමාට දැනුවත් භාවයක් තියෙනවද, සරත් කියන අයව ඒ ආකාරයට මරන්න හේතු වුයේ මොකද්ද කියලා?

උ : හේතුව ගමේ කතාවක් තිබුනා සරත් එයැයිගේ නංගි එක්ක හොඳයි කියලා.

The witness also stated that the second accused, known as ‘Chandi’, was with the first accused near the boutique. While she was on her way to find a vehicle, the second accused told her they would not allow her to bring one. The witness then questioned the first accused, asking why he had shot the deceased. In response, he stated, 'ඔහේ දන්නවද මෙතැන් වෙච්ච සිද්ධිය’. She confirmed that the first accused was known as Thilak, and the second accused was his younger brother.

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ප්‍ර : තමා කිව්වා ත්‍රිරෝද රථයක් බලන්න යනවිට විත්තිකරුවන් දෙන්නා කඩේ ලඟ සිටියා කියලා කිව්වා?

උ : ඒ දෙන්න පමණක් නොවේ. ගොඩක් කට්ටිය හිටියා.

ප්‍ර : 02 වන විත්තිකරු වන්ඩි තමා යනවිට මොනවද කිවේ?

උ : එයැයි වීල් එකක් ගේන්න දෙන්නේ නැත කියන කතාවක් කිව්වා.

ප්‍ර : ඒ කොහොමද කිවේ?

උ : වීල් එකක් ගේන්න ගියාට වීල් එක ගේන්න දෙන්නේ නැහැ කිව්වා.

ප්‍ර : එහෙම ඒ කිව්වේ කව්ද?

උ : වන්ඩි තමයි කිව්වේ.

During cross-examination, the defence asserted that the deceased had been implicated in multiple criminal cases, including robbery and murder, and cited specific case numbers to support their claim. In response, the witness acknowledged that there were several cases filed against the deceased but stated she had no personal knowledge of the details of those cases. The defence argued that, due to the numerous cases filed against the deceased, he had many enemies—a point the witness conceded.

The defence also proposed that there was no lighting in the area where the shooting occurred. She admitted that the surroundings were dark and that she was unable to identify anyone. The witness admitted that PW 1 didn't mention the name of the person who came to shoot in the second instance. When asked by the defence counsel whether she was aware that there were 5 individuals named Thilak in the village, she responded that she was not from that area.

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ප්‍ර : මම යෝජනා කරනවා මේ පළාතේ තිලක් නමින් හඳුන්වන පුද්ගලයින් 5 දෙනෙකු ඉන්නවා කියලා තමුන්ගේ මියගිය බන සමග ආශ්‍රය කරපු අය?

උ : ඒක මම දන්නේ නැහැ.

PW3, Wijesekara Pathiranage Ariyasena, the uncle of the deceased, was residing in the neighbouring house and on 31st October 2004, around 8:00 PM, he heard the sound of a gunshot followed by screaming. He immediately went to the deceased's house and saw the deceased lying on the ground in front of the house. The witness then left to find a vehicle to take the deceased to the hospital. Upon locating a three-wheeler at Beliatta Park, which belonged to Nande, he was prevented from using it by the second accused. As a result, the witness attempted to find another vehicle but was unsuccessful. Then he contacted the police and, along with PW1 and PW2, transported the deceased to the hospital.

During cross-examination, the witness stated that the shot had happened near the boutique. Although Nande was reportedly driving the three-wheeler obstructed by the second accused, he was not called as a witness, and the witness affirmed that he was alive during the trial. The defence highlighted a contradiction in the witness's police statement, where he had claimed to have heard the deceased tell PW1 that Thilak shot him. The witness also admitted that the place where the shooting incident had taken place was dark and that there were several individuals named Thilak living in the village.

PW 04, Jayawardana Pathiranage Babyhami, testified that while she was closing her boutique at approximately 7:30 p.m., she heard the sound of a firecracker. She further stated that a bulb inside her boutique was lit, as well as the bulb on the nearby lamp post. During cross-examination, she stated that she heard the sound while she was asleep. She observed that the deceased's house was about 90 feet from her boutique, and the land on either side of the road leading to the house was in darkness. She also testified that several individuals in the village were known by the name Thilak.

PW6, Ciryl Ranaweera, Police Officer, stated that on 31st October 2004, he received information regarding a shooting incident. He then proceeded to the scene in a private three-wheeler, accompanied by three other officers. The witness then took steps to have the deceased admitted to the hospital. The witness admitted that there was no electricity at the time they arrived at the scene of the incident

during the night. He has inspected the crime scene and found 5 parts of a bullet in Tharunaseva Road and in the corridor of the house.

During cross-examination, the witness stated that he was unable to conduct a proper investigation at the scene due to poor lighting conditions. He also confirmed that, at the time, two suspects had been arrested and four others, including both accused, had surrendered to the Magistrate's Court. According to him, when he questioned the PW1, the wife of the deceased person had indicated in her statement with regard to the six individuals, along with both accused.

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> ප්‍ර :තමුන්ට කල් යනකොට මේ නඩුවේ හෙළිදරව් උනාද යම්කිසි සැකකරුවන් අතර මේ සැකකරුවන් දෙදෙනාත් ඉන්න බව
>
> උ :මේ අපරාධය සිදු වුන ස්ථානයේදී පැමිණිල්ලේ අපරාධය සිදු වන විට මේ විත්තිකරුවන් සියලු දෙනාම සාමුහිකව එක් එක් ක්‍රියාවන් කරමින් සිටි බව පැමිණිලිකාරිය කියනවා. ඒ අනුව තමයි මා විසින් ඒ අනුව තමයි මා විසින් ඒ දෙන්නා අත් අඩංගුවට ගත්තේ.
>
> ප්‍ර: නමුත් අධි චෝදනාවේ සඳහන් වන්නේ මේ විත්තිකරුවන් දෙදෙනායි ?
>
> උ :ඒ ගැන කියන්න දන්නේ නැහැ

PW05, Maximun Fernando, the doctor who conducted the post-mortem examination on 02.11.2004, identified a total of 16 injuries. Injury No. 01 was located in the abdominal region, while the remaining injuries were confined to the left arm and left leg. Based on the nature of the wounds, the doctor opined that they were caused by distant firing from a smoothbore firearm. PW05 further testified that Injury No. 01 was necessarily fatal, whereas the other injuries were not considered to be fatal.

The first accused denied committing the crime and later surrendered to the Magistrate's Court. It was noted that the deceased had multiple cases filed against him in the village. The accused also stated that the crime scene lacked lighting. During cross-examination, he revealed that the deceased was his brother-in-law and had been involved in an affair with the accused's sister. He further explained

that he had evaded the police out of fear. The second accused stated that, at the time the offence was taking place, he was in Ambalanthota and denied all the allegations against him.

In the present case, we note that there is no direct evidence implicating both accused. The prosecution's case rests entirely on circumstantial evidence. Therefore, it is essential to examine the legal principles governing the admissibility and evaluation of circumstantial evidence.

E.R.S.R. Coomaraswamy, The Law of Evidence, Page 25:

> *"In Sri Lanka, the rule that in order to justify the inference of guilt from purely circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt, has been repeatedly emphasized and applied by our courts. Thus, in a case based entirely on circumstantial evidence, the fact that the deceased was last seen alive in the company of the deceased would not of itself justify a conviction, where the exact time of death is not established, nor would the fact that the accused subsequently attempted to dispose of a weapon which might have caused the injuries on the deceased. Again, where the only evidence against two accused, indicted for murder, was that they had the opportunity of committing the offence either jointly or individually and that after the discovery of the body, they absconded and were not apprehended for three years, the verdict of guilty was held to be unreasonable."*

Emperor v. Browning, 1917 CLJ Volume 18, page 482 at page 483, DonaldJohnstone, KT, CJ held that;

> *"In a case like this, in which there is no direct evidence against the prisoner, but only the kind of evidence that is called circumstantial, you have a two-fold task: you must first make up your minds as to what portions of the circumstantial evidence have been established, and then when you have got that quite clear, you must ask yourselves: Is this sufficient proof? Do the*

facts proved exclude the possibility that the deed was done by some other person? It is not sufficient to say, "If accused is notthe murderer, I know of no one who is. There is some evidence against him, and none against any one else. Therefore, I will find him guilty." Such a line of reasoning as this is unsound, for experience shows that crimes are often committed by persons unknown who have succeeded in wholly covering their tracks. I repeat that you must be satisfied that it is impossible that the deceased's own servant did the deed, and that is impossible it could have been done by some unknow person, who has vanished and left no clue. This view is, I think, more in accordance with the authorities and more in accordance with the traditions of English Law, than that put forward by the learned Government Advocate which I took to be that you should convict if you think accused's guilt probable.'

In B.R.R.A. ***Jagath Pramawansha v. The Attorney General***, CA Appeal No. 173/2005, decided on 19.03.2009, His Lordship Justice Sisira de Abrew held that;

"The case for the prosecution depended on circumstantial evidence. Therefore it is necessary to consider the principles governing cases of circumstantial evidence. In King v. Abeywicrama, 44 NLR 254 , Soertsz J remarked thus: "In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of this innocence."

In King v. Appuhamy 46 NLR 128 Kueneman J held thus: "' in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable- hypothesis the that of his guilt."

In Podisingho v. King 53 NLR 49 Dias J remarked thus: "That in a case of circumstantial evidence it is the duty of the trial Judge to tell the Jury that

such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."

Having regard to the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence, if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapably conclusion that the accused committed the offence. When the evidence adduced at the trial is considered, the one and only irresistible and inescapable conclusion that can be arrived at is that the accused committed the murder of Prema Jayawardwene."

His Lordship Justice Aluwihare, PC, in ***Junaideen Mohamed Haaris v. Attorney General,*** SC Appeal 118/17, Decided on 09.11.2018, held that:

"Before I consider the facts of the case and the legal issues raised in this appeal, it should be borne in mind that the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused- Appellant. Thus, it was incumbent on the prosecution to establish that the 'circumstances' the prosecution relied on, are consistent only with the guilt of the accused appellant and not with any other hypothesis.

Regard should be had to a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts. The two basic principles are ,

i. The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

ii. The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Wa termeyer J. in R vs. Blom 1939 A.D. 188)"

In view of the aforementioned judicial pronouncements, it is clear that the evidence presented must be both credible and consistent. The circumstances established should form an unbroken chain of events leading to only one logical and compelling conclusion: the guilt of the accused. No alternative hypothesis should reasonably explain the facts. The Court must be satisfied that the cumulative circumstances are such that they eliminate any reasonable possibility of the accused's innocence.

In the present case, the prosecution primarily relied on the testimonies of PW1 and PW2. According to both witnesses, the deceased made a dying declaration stating Thilak as the person who shot him. Before analyzing the evidence presented before the trial court concerning dying declarations, it is essential to first examine how our courts have treated such declarations as admissible evidence.

We are mindful of the opinion expressed by His Lordship H.N.G. Fernando S.P.J. regarding dying declarations in ***Queen vs. Anthonypillai*** 69 NLR 34 on 38 (also reported in 68 CLW 57)

> *"Apart from the medical evidence, the second important factor was the statement made to the Police by the deceased woman. With regard to this statement the learned Judge gave the following directions:-*
>
> *" This statement is evidence. The law permits you to take into consideration this piece of evidence. Usually a witness's evidence is tested by cross-examination and in this case the deponent is dead. In spite of the fact that there is no cross- examination because she is dead, still the law permits you to examine that evidence. It is in the nature of a dying declaration. Examine that evidence and if you are satisfied beyond reasonable doubt, accept what has been stated there. Do not forget that there was no other witness to the incident and the deponent herself is not before you, the law regards her statement as evidence in regard to the cause of death, and the circumstances which led to her death."*

In our opinion this direction only instructed the Jury that they could act upon the deceased's statement. But there was no caution as to the risk of acting upon the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate."

This dictum was considered by His Lordship Sisira de Abrew J in ***Gamini Mahaarachchi vs. The Attorney General***, CA 106/2002, Decided On 22.08.2007, held that:

"When a dying declaration is sought to be produced as an item of evidence against an accused person in a criminal trial. the Trial Judge or the jury as a case may be, must bear in mind on the following weakness;

1. Statement of the deceased person was not made under oath.

2. Statement of the deceased person has not been tested by cross-examination.vide King vs. Asirivadan Nadar 51 NLR 322 and Justin Pala vs. Queen 66 NLR 409/

3. That the person who made the dying declaration is not a witness at the trial.

As there are inherent weaknesses in a dying declaration, which I have stated above, the trial Judge or the jury, as the case may be, must be satisfied beyond a reasonable doubt on the following matters;

A. *Whether the deceased in fact made such a statement*
B. *Whether the statement made by the deceased was true and accurate*
C. *Whether the statement made by the deceased person could be accepted beyond reasonable doubt.*
D. *Whether the evidence of the witness who testifies about the dying declaration can be accepted beyond reasonable doubt.*
E. ***Whether the witness is telling the truth.***

F. *Whether the deceased was able to speak at the time the alleged declaration was made.*

G. ***Whether the deceased was able to identify the assailant."***
(*Emphasis added)*

We note that it is not necessary to determine whether the deceased was able to identify the assailant or how he did so, as he cannot be questioned. The key point is that the deceased has stated that Thilak shot him in his dying declaration. However, this raises the question: Who is Thilak? Was the deceased referring to the first accused? If so, how can the Court be certain that the Thilak mentioned in the dying declaration is indeed the first accused? No evidence led with regard. Thus Thilak, the name referred to by the deceased, is referred to the 1st accused was not established by any other witnesses. Thus, the identification of the 1st accused has not been established beyond a reasonable doubt.

Soon after, the deceased stated that Thilak had shot him, and PW2 went to get a three-wheeler. At that location, she saw both the first accused, Thilak, and the second accused present. Upon returning, PW1 informed that two unknown individuals had come and shot the deceased again. This raises a critical question: who were these individuals? PW2 had seen both accused among the crowd at the time of the second shooting. Was it the first accused who returned and fired again, or were these entirely different individuals? This is a serious and unresolved issue, which the Learned High Court Judge failed to adequately consider. It is pertinent to refer to the judgment of the Learned High Court Judge.

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> "පැමිණිල්ලේ සාක්ෂි අනුව දෙවන වරටද මරණකරුට වෙඩි තැබීමෙන් අනතුරුව පළමු හා දෙවන චුදිතයන් අපරාධ ස්ථානය අසල රැඳී සිටි බව තහවුරු වී ඇති අතර...."

This piece of evidence was not led by any of the witnesses.

It is now pertinent to examine the credibility of the evidence given by PW1, who has stated that the deceased made a dying declaration. According to PW 1, the deceased stated that "Thilak shot me," and PW2 was present at that time. She

initially claimed that the deceased told her only that Thilak shot him, without providing further details. However, she later stated that two unknown individuals came and shot the deceased again.

The second incident reportedly took place inside her residence, where she initially asserted that she was unable to identify any of the individuals present. However, she subsequently named six people, including both of the accused. This contradiction raises significant concerns regarding the reliability of her testimony. If she truly could not identify anyone, why did she implicate so many individuals? Moreover, she claimed that despite the darkness, she managed to grasp the barrel of the firearm—yet she failed to recognize the person wielding it. These inconsistencies undermine the credibility of her account and merit a thorough judicial examination. Her decision to name multiple individuals as suspects, despite her stated inability to identify them, calls her credibility into question.

My understanding is that when the PW 2 went out to bring the vehicle, the 1st and second accused had stopped her. That would have created a suspicion over the two accused concerning the killing of the deceased. The learned High Court Judge erred in failing to recognize that PW1 did not identify any individual during the second incident, nor did the Court adequately consider the reasons behind PW1's implication of multiple persons. We note that the Learned High Court Judge has failed to adequately analyse the evidence of PW 1. In my considered view, the testimonial trustworthiness of this witness casts serious doubt on whether the deceased in fact made a dying declaration.

According to PW1, she was familiar with the first accused, who is her cousin. However, PW1 also stated that she was unable to identify the person involved. This raises a critical point: if she could not see clearly in the dark, how was she able to hold the barrel of the gun? This inconsistency warrants further scrutiny.

> 'වෙඩි තියන්න හැදුවේ කව්ද කියා දැක්කේ නැහැ. මම තුවක්කුවේ බටයේ එල්ලුනා.ඒ පොරබදුන අවස්ථාවේ මම කව්ද කියලා හඳුනා ගත්තේ නැහැ. ඒ පොර බදුන අවස්ථාවේ මහත්තයා ඉස්සරහට දුවලා තිබුණා. මම තුවක්කුවේ එල්ලිසිටින විට මම තල්ලු කලා.'

Furthermore, the Learned Judge observed that both accused were present near the location of the deceased, amidst the crowd, and had obstructed efforts to transport the deceased to the hospital. Based on this observation, the Judge concluded that the second accused was involved in the shooting incident.

It is noted that the Learned High Court Judge failed to consider the legal principle of common intention.

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> 'පැමිණිල්ලේ සාක්ෂි විශ්ලේෂණය කිරීමේදී පෙනී යන්නේ මරණකරුට වෙඩි තබා ඇත්තේ පළමු චුදිත විසින් බවයි. මෙම අධිකරණය විසින් මීලඟට සලකා බැලිය යුතු කරුණ වන්නේ වෙඩි තැබීම සිදුකල පළමු චුදීත දෙවන චුදිත සමග පොදු අදහසකින් යුතුව ක්‍රියා කලේද යන්නයි. මෙහිදී එක් එක් චුදිත ට එරෙහිව ඉදිරිපත් වී ඇති සාක්ෂි නැතහොත් එක් එක් චූදිතගේ නඩුව වෙන වෙනම සලකා බැලිය යුතුය. පැමිණිල්ලේ සාක්ෂි අනුව දෙවන වරටද මරණකරුට වෙඩි තැබීමෙන් අනතුරුව පළමු හා දෙවන චුදිතයන් අපරාධ ස්ථානය අසල රැඳී සිටි බව තහවුරු වී ඇති අතර දෙවන චුදිත විසින් ඉහතින් සඳහන් කර ඇති පරිදි මරණකරුට කඩිනමින් රෝහල්ගත කිරීම වලක්වා ඇත. මෙහිදී එක් එක් එක් චුදිතයින් අතර පුරවා සැලැස්මක් සහ එකගත්වයක් තිබු බව පැහැදිලි වන අතර දෙවන චුදිතද ක්‍රියාකාරී ලෙස අපරාධයට සම්බන්ධ වී ඇති බවත් එම කරුණු අනුව පළමු චුදිත අපරාධය සිදු කිරීමේදී දෙවන චුදිත සමග පොදු අදහසකින් යුතුව කර ඇති බවත් තීරණය කරමි.'

Section 32 of the Penal Code refers to the common intention reads as follows,

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

The applicable principles for common intention are clearly laid down in ***Raju and Others v Attorney General*** (2003) 3 Sri L.R. 116, where it is stated that;

> *"In the case of King v Assappu 50 N.L.R. 324 Dias, J. sitting with Nagalingam, J. and Gratiaen, J. held that in a case where the question of common intention arises the Jury must be directed that –*

1. *The case of each accused must be considered separately.*
2. *The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
3. *Common intention must not be confused with same or similar intention entertained independently of each other.*
4. *There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.*
5. *The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.*

Justice Sirimanne in the case of Punchi Banda v The Queen 74 N.L.R.494 refers to the legal principle laid down in King v Assappu (supra) that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32 of the Penal Code"

In the case of ***Somarathne v. The Attorney General***, 1986 (1) SLR 217 at page 221, Moonemalle, J held that;

'it is necessary for the prosecution to prove two essential ingredients, namely, a sharing of a common intention by the accused and participation of the accused in the commission of those offences. It was necessary for the trial Judge to apply the rule of common intention to the facts of the case. Where the evidence before the trial Judge was circumstantial, then it was his duty to pay heed to the principle that the inference of common intention should not be reached unless it is a necessary inference, an only inference, an inference from which there is no escape. The learned trial Judge has been silent on all these important factors relating to the rule of common intention. He should have considered them along with the evidence in the case which he should have carefully analysed before coming to any finding on the question whether the 2nd accused acted in furtherance of a common intention with the other accused to commit the offences of house breaking and theft'

This judgement is considered in ***Athige Don Preeman Melat Silva v The Attorney General*** CA/HCC/ 192/2018, decided on 20.06.2022.

The concept of common intention presupposes a premeditated plan, requiring active participation by all involved at the time of the incident. Mere presence at the scene does not suffice to establish culpability. In the present case of murder, the second accused is alleged to have shared the intent to kill alongside the principal offender. Evidence presented before the trial court indicates that the second accused obstructed PW2 from using a vehicle to transport the victim to the hospital. However, the Learned High Court Judge erroneously concluded that both accused were present at the victim's residence during the second shooting. This misapprehension has led to the inference that the second accused's involvement confirms his shared murderous intent. It is therefore essential to examine the relevant portion of the judgment in question.

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> 'මරණිය තුවාල ලබා සිටි මරණකරු රෝහල්ගතවීම වළක්වාලීමට දෙවන චුදිත විසින් කටයුතු කිරීම දෙවන චුදිතගේ මරණිය චේතනාව ඉතා හොඳින් ප්‍රකට කෙරෙන අවස්තාවක් බව නිගමනය කල හැක. මෙහිදී මනුෂ්‍ය ඝාතනයට අදාළ මානසික අංගය හා ක්‍රියාව දෙවන චුදිතට එරෙහිව සැකයකින් තොරව ඔප්පු වී ඇති බව නිගමනය කරමින් ඒ අනුව දෙවන චුදිතද නගා ඇති තුන්වන චෝදනාවට වරදකරු බවට තීරණය කරමි.'

The trial court was not presented with any evidence indicating that the deceased had named the second accused in connection with the shooting involving Thilak, nor was there any testimony placing the second accused at the victim's residence during the second shooting. Even assuming he attempted to restrain PW2, that act alone does not suffice to establish that he shared a common intention to murder the deceased

I hold that the evidence presented against the second accused, under Section 32 of the Penal Code for the offence of murder, has not been proven beyond a reasonable doubt by the prosecution.

There exists reasonable doubt concerning the name 'Thilak' mentioned by the deceased as referring to the 1st Accused. The prosecution has failed to substantiate this claim. Consequently, the identification of the 1st Accused has not been proven beyond reasonable doubt.

We are mindful that in a case of circumstances, evidence of an inference if guilt is to be drawn, such an inference must be the only irresistible and inescapable conclusion that the 1st accused committed the offence. In the instant case, we hold that the prosecution has failed to adduce evidence to establish that the one and only irresistible and inescapable conclusion that can be arrived at is that the 1st accused committed the murder of Wijesekara Pathiranage Sarath.

For the reasons stated above, the appeal is allowed, I set aside the conviction and sentence imposed on both accused Appellants and acquit them.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL