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 Case No:
CA/HCC /0131-133/2022
High Court of Kalutara
Case No. HC/643/2006

1. Hettiarachchige Chandika Indrajith Jayaratna
2. Dena Bodage Wijeyananda
3. Mallikage Upali Ajith Kumara

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Kalinga Indatissa, PC, with Thinathi Korosgolla, Udari Wickramasinghe, Rashmini Indatissa and Nimansha for the 1st Appellant.**

Anil Silva, PC, with Arinda Silva for the 2nd Appellant.
Neranjan Jayasinghe with Randunu Heellage and Imansi Senarath for the 3rd Appellant.
Shanaka Wijesinghe, PC, ASG for the Respondent.

ARGUED ON : **02/06/2025**

DECIDED ON : **23/07/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted in the High Court of Kalutara under the following count;

> On or before 09.09.2003 at Delmulla North the Accused committed the murder of Nekethralalage Gamini Shantha punishable under Section 296 read together with Section 32 of the Penal Code.

The Appellants had opted for a non-jury trial. The prosecution had called PW1, PW2, PW3, PW9, PW10, and PW14 and marked several productions in support of their case. When the defence was called, the 1st Appellant gave

evidence under oath while the 2nd and the 3rd Appellants made dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them to death on 27.05.2022.

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

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

The background of the Case albeit briefly is as follows:

PW1, who was an employee of the deceased at the time of the incident, had accompanied the deceased and three others to a coming-of-age ceremony held at the house of one Wimalaratne. They had arrived at the ceremony and stayed under a canopy tent erected outside the house. After some time, the deceased had gone into the house where the main function was in progress to deliver a speech. At that time music was playing through a cassette player for the guests, including the Appellants to dance. Both the canopy tent and the house were properly lit within using electric bulbs. The deceased had switched off the cassette player to deliver his speech. While delivering his speech, the 1st Appellant had switched on the cassette player to continue dancing. Again, the deceased had stopped the music to deliver his speech. As the 1st Appellant once again switched on the cassette player and disturbed the deceased, an argument ensued between the deceased and the 1st Appellant. This had led to an exchange of swear words by the duo and it had quickly escalated to a physical fight outside the house. Then PW1 had witnessed the 1st Appellant stabbing the deceased several times using a knife which he took from his waist. PW1 had further witnessed that after the 1st

Appellant stabbing the deceased, the 2nd and the 3rd Appellants had held the deceased from his arms to facilitate the 1st Appellant to stab the deceased further. Although he had run towards the 1st Appellant to apprehend him, he had failed. Thereafter, he had taken the deceased to the Horana Base Hospital where he was pronounced dead upon admission.

PW2, Nimalawathie, a relation of the deceased had corroborated the evidence given by PW1 up to the quarrel which erupted between the 1st Appellant and the deceased. However, she had not witnessed the stabbing, she had only witnessed the deceased falling down on to the ground.

PW14, Uthpala Atigala, the JMO had given evidence on the postmortem examination report prepared by Dr. H. P. Bandara (deceased). The JMO had noted three injuries on the deceased's body. First one is a deep cut injury on the chest. Second and third are cut injuries on the skin. According to the JMO, the first injury had caused the death of the deceased.

All three Appellants had been identified at the identification parade by PW1.

The grounds of appeal advanced by the 1st Appellant are as follows.

1. The learned Trial Judge has not considered the failure on the part of the prosecution to establish the case beyond a reasonable doubt.
2. The learned Trial Judge has not considered the failure on the part of the prosecution to prove individual liability under Section 32 of the Penal Code, in that the legal requirement of common murderous intention was not considered by the Trial Judge.
3. The learned Trial Judge failed to consider the *inter se* and *per se* inconsistencies in the evidence of PW1 and PW2.
4. That the learned Trial Judge failed to consider and analyze the dock statements of the 2nd and the 3rd Appellants.
5. Does the judgment conform to the requirements of Section 283 of the Code of Criminal Procedure Act No.15 of 1979.

The grounds of appeal advanced by the 2nd Appellant are as follows.

1. Has the prosecution proved the case against the 2nd Appellant beyond a reasonable doubt?
2. Has the learned High Court Judge considered the question of common intention in his judgment?

The grounds of appeal advanced by the 3rd Appellant are as follows.

1. Has the prosecution witnesses passed the test of credibility?
2. The Dock statement of the 3rd Appellant is not considered at all in the judgment.
3. The question of common intention is not considered in the judgment.

Considering the grounds of appeal raised by the Counsel, this Court has decided to consolidate them as follows:

1. Has the prosecution proved the case against the Appellants beyond a reasonable doubt?
2. Has the learned High Court Judge considered the legal requirement of common intention in the judgment?
3. Has the learned High Court Judge considered the *inter se* and *per se* contradictions in his judgment?
4. The learned High Court Judge has not considered the defense evidence in its correct perspective.
5. Does the judgment conform to the requirements of Section 283 of the Code of Criminal Procedure Act No.15 of 1979.

As the 1st and 3rd grounds mentioned under consolidated grounds are interconnected, they will be considered jointly hereinafter.

Under the first and third grounds it is commonly argued by both the learned President's Counsel appearing for 1st and 2nd Appellants and the Counsel appearing for the 3rd Appellant that the prosecution has failed its duty by not proving the case against the Appellants beyond a reasonable doubt. Further, the evidence given by PW1 and PW2 contain *inter se* and *per se* contradictions.

Eyewitness testimony stands as one of the paramount types of criminal evidence, posing a challenging yet pivotal task for judges in evaluating criminal cases. This often entails scrutinizing whether the witness's narrative aligns with established facts of the case. However, direct verification or falsification of such accounts may not always be feasible. Consequently, judges must assess the reliability of the source.

Moreover, while an eyewitness's testimony holds significant sway in court proceedings, its accuracy in numerous cases remain questionable. Evidence suggests that erroneous eyewitness accounts can result in wrongful convictions, leading individuals to serve extended prison sentences, and in severe cases, to face capital punishment for crimes they did not commit.

When deliberating on eyewitness evidence, the court should consider various factors, including the demeanour of the witness, the inherent plausibility of the account, internal consistencies, consistency with prior statements, potential biases, the compatibility of the account with crime scene evidence, and corroboration from other witnesses. These considerations hold great significance, especially considering that the burden of proof lies with the prosecution in all criminal cases.

In **Sumanasena V Attorney General** [1999] 3 Sri L.R. at 137 Jayasuriya, J. observed that;

> *"In our law of evidence, the salutary principle is enunciated that evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a court*

of law. Section 134 of the Evidence Ordinance sets out that no particular number of witnesses shall, in any case, be required for the proof of any fact".

Witnesses are evaluated based on their credibility and reliability. Credibility pertains to whether a witness is sincere and making genuine efforts to tell the truth, or if they are trying to deceive or mislead the court. Reliability, on the other hand, concerns whether the witness's memory or perception is trustworthy and accurate.

PW1 in his evidence admitted that he was an employee working under the deceased. But he had not provided any further information as to what sort of work he did for the deceased. According to PW1, he had seen the 1st Appellant stabbing the deceased about five times, but the medical evidence does not support his version. Although PW1 and PW2 can be categorized as 'Eyewitnesses' there are glaring discrepancies and inconsistencies which have been highlighted during the argument between the statements provided by the two.

Although, PW1 took up the position that he, along with the others who came with the deceased did not consume alcohol, according to the postmortem report the JMO had detected the presence of alcohol in the deceased's stomach contents. Further, PW2 in her evidence admitted that the deceased had consumed liquor. Hence, PW1's position contradicts the position taken by PW2.

PW2 in her evidence did not mention that she witnessed the stabbing by the 1st Appellant. Further, in her evidence, she had categorically stated that she saw nothing that the 2nd and the 3rd did to the deceased. She also said that after the deceased collapsed, the people who accompanied the deceased including PW1 were carrying knives in their hands. Further, PW1 had stated that the people who accompanied the deceased were heavily intoxicated. Due to the sudden fight situation, PW2 could not exactly tell the people who had

attacked the deceased and the people who were trying to rescue the deceased.

Under these circumstances, in my view, the learned High Court Judge should have considered these factors very carefully before arriving at his conclusion. Neglecting this evidence had caused great prejudice to the Appellants.

Next, I consider whether the learned High Court Judge had considered the legal requirement of common intention in the judgment:

Section 32 of the Evidence Ordinance States:

> "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 it were done by him alone".

In this case the Appellants were charged and convicted for murder, under a common intention charge. Hence, it is the duty of the prosecution to adduce evidence that two or more accused got together with the same intention and actively participated in committing the offence. Hence it is the duty of the trial judge to consider and analyze in his judgment the active participation of each one of those Appellants separately in the commission of the offence as the mere presence of the accused person is not sufficient to establish common intention.

In **King v Assappu** 48 NLR 324 the court held that:

> *"Where the question of common intention arises, the jury must be directed in the following manner;*
>
> 1. *the case of each accused must be considered separately,*
> 2. *the accused must have been created by a common intention with doer of the act at the time the offence was committed,*

3. *common intention must not be confused with same or similar intentions entertained independently of each other,*
4. *there must be evidence, either direct or circumstantial of prearrangement of some other evidence of common intention,*
5. *the mere fact of the presence if the accused at the time of the offence is not necessarily evidence of common intention."*

In **Banda and others v Attorney General** [1999] 3 SLR 168 the court held that:

> *"The learned trial Judge has used the term common intention only in one solitary passage in his judgment. He has culpably failed to consider the acts of participation on the part of each one of those accused separately to analyse those acts and relate them to the principles of law relating to common intention and having regard to their respective acts to determine whether they were actuated by a common intention."*

Hence, assumptions as to the reason of the Appellants' presence at the party on the day of the fatal incident is insufficient to prove the charge of murder with common intention and the prosecution must provide cogent evidence in order to prove the charge.

In this case, nowhere in his judgment has the learned Trial Judge explained what common intention is and whether the Appellants had a common murderous intention to commit the offence they were charged for. In his judgment the learned High Court Judge had merely mentioned that the evidence led at the trial supports the participation of all three Appellants. (Page 409 of the brief). Therefore, the learned High Court Judge had failed to consider and discover whether the ingredients of the charge against the Appellants have been established beyond a reasonable doubt.

As per the 4th common ground of appeal, the learned Trial Judge has failed to narrate the dock statements of the 2nd and the 3rd Appellants thereby causing serious prejudice to them occasioning a deprivation of a fair trial for the Appellants.

The Appellants have the right to a fair trial to determine whether they are innocent or guilty which is an internationally recognised fundamental human right. Fair trials help establish justice and are vital for everyone involved in a case. They are a cornerstone of democracy, helping to ensure the development of fair and just societies, and for the limiting of abuse perpetrated by state authorities.
The profound duty of the trial court is to consider the evidence placed by the prosecution and the defence on equal footings to arrive at its finding.

In **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".*

Upon perusal of the judgment delivered by the trial Judge in the case at hand, it is manifestly clear that the learned High Court Judge had failed to analyze the dock statements of the 2nd and the 3rd Appellants in a fair manner and thereby had failed to provide a fair trial for them. The importance of considering the dock statement had been discussed in several judgments by the Superior Courts. However, its evidentiary value is less than the evidence given from the witness box by an accused.

In **Queen v. Buddharakkitha Thero** 63 NLR 433 the court held that:

> *"The right of an accused person to make an unsworn statement from the dock is recognised in our law (King v. Vellayan[10 (1918) 20 N. L. R. 251-at 266.].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused*

subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination'.

In **Queen v. Kularatne** 71 NLR 529 the court held that:

"We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that;

a) If they believe the unsworn statement, it must be acted upon.

b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed,

c) That it should not be used against another accused".

Upon the perusal of the judgment, it becomes evident that the learned trial Judge had only narrated the evidence given by the prosecution witnesses. The learned High Court Judge had failed to adequately analyze and evaluate the dock statements of the 2nd and 3rd Appellants and its legal principles in his judgment. Therefore, the judgment cannot be considered as a proper judgment.

In our law the guidance pertaining to Judgement Writing is provided under Section 283 of the Code of Criminal Procedure Act No.15 of 1979 The Section states:

The following provisions shall apply to the judgments of courts other than the Supreme Court or Court of Appeal: -

(1) The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.

(2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.

(3) If it be a Judgment of acquittal, it shall state the offence of which the accused is acquitted.

(4) When a judgment has been so signed it cannot be altered or reviewed by the court which gives such judgment:

Provided that a clerical error may be rectified at any time and that any other error may be rectified at any time before the court rises for the day.

(5) The judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

(6) The original shall be filed with the record of proceedings.

It is important for the judge who continues the case and pronounces the judgment finally to adhere to this section in relation to Sub Section 283 (1) CPC. Non-compliance with this Section provides a ground of appeal to the Appellant who may then apply to an appropriate court for the delivered judgment to be varied or even set aside.

Further, the mere outline of the case with re-production of the evidence of both parties is not sufficient. Discussion of evidence is quite important as it covers a major part of the judgment. This paves the way to come to a correct conclusion on the question of facts.

In **Thuranya v Pathaimany** 15 CLW 119 the Court held that:

"That a mere outline of the case for the prosecution and defence embellished by such phrases as "I accept the evidence for the prosecution" "I disbelieve the defence" is by itself an insufficient

discharge of the duty cast upon a magistrate by Section 306(1) of the Criminal Procedure code".

In **Jansz v Gregoris** 04 NLR 359 the Court held that:

"That a judgment drawn up under section 306 of the Criminal Procedure Code should specify the offence, the section of the law under which the conviction was had, the name of the accused, and the date of the conviction."

Composing Judgments is seen as an essential part of a Judge's duty and a fundamental aspect of a Judiciary's function. A well-written judgment ensures that justice is delivered fairly, transparently and provides clarity about the rationale behind the verdict. A good judgment needs to be correct on the facts as well as the law and as such, style and flair becomes merely a secondary aspect. However, on the assumption that the judgment is correct on the facts and the law, the presentation of the judgment is of considerable importance. Therefore, the Judge must be mindful to take effort to do justice in preparing and delivering such an impactful determination.

In **Alexander Machinery (Dudley) Ltd. v. Crabtree** (1974) LCR 120.it was observed:

"Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court."

In **Chandrasena and Others v. Munaweera** 1998 (3) SLR 94 the court held that:

> *'The mere outline of the prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a judge by the provisions of S.306(1)".*

In **Karunadasa v. OIC Police Station, Nittambuwa** (1987) 1 SLR 155 the court held that:

> *"Merely reciting the facts and giving no reasons for the judgment is insufficient. The Magistrate must give reasons for his conclusions and scrutinize the evidence led on behalf of the accused. Failure to give reasons can occasion a failure of justice. An outline of the facts embellished with phrases like "I accept the evidence of the prosecution", 'I disbelieve the defence" is insufficient to discharge the duty cast on the prosecution. Section 283 (1) of the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. The Magistrate has said "the evidence of the witness called by the accused does not in any manner help the defence. Therefore, I accept the evidence adduced on behalf of the prosecution'. This shows that the Magistrate has given his decision very largely on the weakness of the defence rather than on the strength of the prosecution. It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt".*

In **CA 34-35/2005** decided on 03/04/2007 Sisira De Abrew, J., held that:

> *"In this case the Learned Trial Judge has merely narrated the evidence of the prosecution witnesses without giving adequate reasons for the*

> *conclusion and for the acceptance of the evidence of the prosecution witnesses. In our view, a judgment devoid of adequate reasons for the conclusion reached and a mere reproduction of evidence of witnesses is not a judgment in the eyes of the law. We find that the judgment of the Learned trial judge in this case is no judgment and would amount to nullity".*

According to the evidence presented by the prosecution, the exact root cause which instigated the initial foul verbal exchange was due to the cassette recorder being turned off, which was providing music to people who were dancing and then the cassette recorder being turning back on when the deceased was trying to deliver his speech. This argument between the deceased and the 1st Appellant continued as the deceased had stopped the cassette recorder for a second time. The argument had then turned in to a sudden physical fight between the 1st Appellant and the deceased. Firstly, according to PW2, the 1st Appellant had been beaten up by the deceased. Thereafter, the fight had continued and ended with the deceased collapsing on the ground. Evidence shows that all the Appellants took part in the sudden fight.

Although the common grounds of appeal discussed above have merit, it is prudent and reasonable that this matter should be considered under the exception 4 to Section 294 of the Penal Code.

The exception 4 to Section 294 (Murder) of the Penal Code states as follows:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner".

Explanation: - It is immaterial in such cases which party offers the provocation or commits the first assault.

Section 297 of the Penal Code states as follows:

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

In this case, the prosecution has brought sufficient evidence to prove that the incident happened. But the evidence led at the trial was not sufficient to support a murder charge. Under these circumstances, the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provide provisions to rectify any error, omission, or irregularity in a judgment where such error, omission or irregularity which has not prejudiced the substantial right of the parties or occasioned a failure of justice.

Section 436 of the Code of Criminal Procedure Act No: 15 of 1979 states as follows:

> "Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-
>
> (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or

(b) of the want of any sanction required by section 135,

Unless such error, omission, irregularity, or want has occasioned a failure of justice." [Emphasis added]

Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice".** [Emphasis added]

Considering the Section 436 of the Code of Criminal Procedure Act and the Article 138 of the Constitution, I consider it is appropriate and reasonable that the learned High Court Judge should have decided the charge under Section 297 (second limb) of the Penal Code. It is noteworthy to mention that on 03.11.2008, proposal was made to consider this case under diminish responsibility, but was not considered.

Therefore, the Appellants are acquitted from the murder charge but are convicted under Section 297 of the Penal Code (Second Limb) and sentenced as follows:

- Each Appellant is sentenced to 03 years of rigorous imprisonment.
- Each Appellant is imposed a fine of Rs.10,000/- with a default sentence of 06 months simple imprisonment.
- Each Appellant is ordered to pay a compensation of Rs.100,000/- to the deceased's family. In default 01-year simple imprisonment.
- Finally, the sentence is back dated from date of sentence, i.e. 27.05.2022.

The appeal is allowed subject to the above variation in the sentence.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree

JUDGE OF THE COURT OF APPEAL