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/0267-268/2024
High Court of Ratnapura
Case No: HC/147/2006

Democratic Socialist Republic of
Sri Lanka

COMPLAINANT

Vs.

1. Suse Anthony Reji
2. Wadiwel Bettan Nimal
3. Subranaiyam Arumugan Raja *alias* Thattaya
4. Perumal Murugesu
5. Subramaniyam Selvaraja

ACCUSED

AND NOW BETWEEN

1. Suse Anthony Reji
2. Perumal Murugesu

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**P. Kumararatnam, J.** **R. P. Hettiarachchi, J.**
COUNSEL	:	**Asthika Devendra with Aruna Madushanka for the 1st Appellant.** **Gayal Kalatuwawa for the 2nd Appellant.** **Dishna Warnakula, DSG for the Respondent.**
ARGUED ON	:	**09/03/2026**
DECIDED ON	:	**19/06/2026**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) along with three other accused persons were indicted jointly in the High Court of Ratnapura as follows:

1. That on or about the 25.07.2002 the accused named in the indictment were members of an unlawful assembly with the common objective of causing hurt to Soosai Norman 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 had committed the murder of Soosai Norman thereby committing an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. At the same time, same place and in the course of the same transaction the accused had committed an attempted murder on Sappan Chandrakumar thereby committing an offence punishable under Section 300 read with Section 146 of the Penal Code.
4. Under Section 296 read with Section 32 of the Penal Code. (Alternative common intention charge to count 02).
5. Under Section 300 read with Section 32 of the Penal Code. (Alternative common intention charge to count 03).

The trial commenced before the High Court Judge of Ratnapura 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 considering the evidence presented by both parties, the Learned High Court Judge who heard the case at the High Court of Ratnapura delivered the Judgement and had convicted the Appellants who were the 1st and 4th Accused named in the indictment for the fourth and fifth charges and sentenced them as follows:

- Under the 4th Count - death sentence on the Appellants.
- Under the Fifth Count - 15-year rigorous imprisonment with a fine of Rs.10,000/- on the Appellants. The fine is subject to 03 months simple imprisonment.

The Appellants were acquitted from 1st ,2nd and 3rd counts and, the 2nd, 3rd and 5th Accused were acquitted from all the charges.

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 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, Sappan Chandra Kumar is the eye witness and injured in this case. Before he could give evidence before the High Court, he had passed away and his evidence was admitted to the proceedings under Section 33 of the Evidence Ordinance as he had testified before at the non-summary inquiry in the Magistrate Court of Ratnapura and his evidence was subjected to cross examination. His evidence was marked as P4 by the prosecution.

The incident had happened around 10.30.pm on 25.07.2002. The eye witness and the deceased are friends and had been engaged in watcher duty at a nearby mine. On the day of the incident, the deceased had called PW1 to go for watcher duty at the mine. Before they went to the mine, both had dinner at the deceased's sisters house and came out of the house, sat on a step of a nearby church and smoked a cigarette. The Appellants who were armed with swords had arrived at the scene and inquired from them why they do dirty works. When the both of them asked what the dirty works they had done to them were, the 1st Appellant had cut the deceased on his face and the deceased had fallen down. The 2nd Appellant had cut the witness which landed on his back. When PW1 ran for his life, he had seen the other Accused there with arms. They had chased him and when PW1 had fallen down, the 2nd Appellant had cut him again with the sword. But PW1 had somehow managed to escape from them.

According to PW13, CI/Palitha had given evidence upon the notes entered by IP/Basil Dias who was deceased at the time of the trial. According to PW13, when they went to the scene of crime, they had seen the deceased lying fallen with blood all over the body. The deceased's face was mutilated. Investigations revealed the names of the Appellants and the other Accused named in the indictment. The houses of the Appellants and the Accused had been attacked by unknown persons.

PW06, JMO Dissanayake 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. The JMO had also examined PW1 and had mentioned in the Medico Legal Report that injury number 4 is grievous and endangering the life.

The 1st Appellant has filed the following grounds of appeal:

1. The learned High Court Judge has erred in law in considering the evidence of PW1 of the non-summary under Section 33 of the Evidence Ordinance.
2. The prosecution had failed to prove the case (murder and attempted murder) beyond reasonable doubt in as much as:
    I. The Learned High Court failed to consider whether the version of the prosecution fails the test of probability,
    II. Failed to consider the previous conduct of the Appellant (even if the prosecution is believed) would not point premeditated murder,
    III. Failed to consider the conduct of the parties specially the words uttered. (even if the prosecution is believed).
3. The Learned High Court Judge has failed to appreciate that the prosecution has failed to establish common intention as required for the conviction.
4. The Learned High Court Judge has failed to consider a conviction of murder cannot be sustained on evidence before court in as much as evidence before court shows that there were mitigating circumstances.
5. Has the Learned High Court Judge shifted the burden to the Accused?
6. The Learned High Court Judge has failed to correctly evaluate the dock statement of the Appellant in as much as:
    I. Has failed to consider in the correct light which gives light to a sudden fight between two fragments.

II. The Learned High Court Judge has given very low value to the same which is bad in law.

The 2nd Appellant has filed the following grounds of appeal:

1. Whether the Learned High Court Judge has erred in law in admitting the evidence of PW1 at the non-summary inquiry under Section 33 of the Evidence Ordinance.
2. The Learned High Court Judge has erred in holding that the evidence of PW1 is trustworthy to be relied upon.
3. The Learned High Court Judge has erred in holding that the prosecution has proved the common murderous intention on the part of the 2nd Appellant beyond a reasonable doubt.
4. The Learned High Court Judge has erred in rejecting the dock statement of the 2nd Appellant.

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

1. The Learned High Court Judge has wrongly admitted the deposition of PW1 under Section 33 of the Evidence Ordinance as trustworthy evidence.
2. Whether the prosecution proved the case beyond reasonable grounds.
3. Whether the prosecution failed to establish common murderous intention.
4. Whether the Learned High Court Judge failed to appreciate that there were mitigating circumstances.
5. Whether the Learned High Court Judge had reversed the burden to the Appellants.
6. Whether the Learned High Court Judge has correctly evaluated the dock statements of the Appellants.

7. Appropriateness of the sentence imposed on count number five, attempted murder.

In the first ground of appeal, both the Learned Counsels strenuously argued that relying on the evidence of PW1, whose evidence was admitted under Section 33 of the Evidence Ordinance, has caused great prejudice to the Appellants as they mainly argued that the Learned Trial Judge had failed to consider all the circumstances relating to whether PW1 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, in his evidence given in the non-summary. He had clearly seen the attack on the deceased before he could escape from the crime scene with injuries. However, he had passed away before he could give evidence before the High Court.

Section 33 of the Evidence Ordinance states:

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount or delay or expense which, under the circumstances of the case, the court considers unreasonable:

Provided-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation:

A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Section 33 of the Evidence Ordinance provides for the admissibility of evidence given in a previous judicial proceeding. It serves as an important legal exception to the general rule against hearsay, therefore, allowing previous testimony to be submitted and used as substantive evidence in a subsequent trial or a subsequent stage of the same proceeding.

As per the Evidence Ordinance, the best evidence principle requires witnesses to testify in person, which would allow to test their credibility. However, Section 33 mitigates situations where a witness is unavailable; past recorded evidence can then be admitted without the witness being recalled. As such, Section 33 ensures that justice ensues, even when witnesses become unavailable.

In **Leelawathi Menike v Attorney General** [2008] 2 SLR 1 the court held that:

> *"(4) Court has no discretion as to admitting a deposition when the witness is dead, cannot be found, is incapable or is kept out of the way, deposition of such witness is declared to be relevant and must therefore be admitted.*
>
> *(5) When the requirements in Section 33 of the Evidence Ordinance are satisfied Section 33 governs the reception as substantive evidence of the testimony given in a former judicial proceeding. The reception of narrated testimony permitted by Section 33, is tantamount to an exception to the hearsay rule the basis is that the evidence was originally given on oath and was subject to cross-examination. These characteristics invest the evidence so introduced with a degree of reliability comparable to a greater extent with pure viva voce evidence - the trial judge had not erred in relying on the evidence of witness R under Section 33".*

In this connection, it is relevant to note that **E. R. S. R. Coomaraswamy,** The Law of Evidence, Vol. I, at pages 492-493 states as follows:

> "The court has to exercise the power given in Section 33 with great caution and must insist on strict proof before holding that the witness is dead or cannot be found or has become incapable of giving evidence or has been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence or being kept out of the way by the adverse party has been proved, the court has no discretion and must admit the deposition, since Section 33 declares such deposition to be relevant and, therefore, admissible."

In the case of **Francis Samarawickrema v. Dona Enatto Hilda Jayasinghe** [2009] 1 SLR 293 it was noted that:

> "The basis of the application was that Mr. Kahatapitiya was dead, and that therefore evidence given by him in the course of the first trial in the same action "is relevant, for the purpose of proving, . . . the truth of the facts which it states..." Section 33 is one of the many exceptions found in the Evidence Ordinance to the hearsay rule, and has been considered by this Court in decisions such as Herath v. Jabbar, Cassim v. Suppiah Pulle, Kobbekaduwa v. Seneviratne and Sheela Sinharage v. The Attorney- General."

In the case of **Chandrakumar and Another v. Captain Samarawickrama** (2002) 2 SLR 153 it was held:

> "The primary object of recording a summary of evidence being to consider whether there is a prima facie case against the accused, it cannot be said that recording a summary of evidence is not a judicial

> proceeding. The direction given by the Judge-advocate to the Court Martial that the evidence given by D, at the stage of recording the summary of evidence was irrelevant and inadmissible under s. 33 Evidence Ordinance, is patently wrong as such the conviction has to be quashed."

Considering the above cited judgment and the writing, accepting evidence under Section 33, the Court has no discretion but to accept the evidence which has fulfilled the requirement under Section 33 of the Evidence Ordinance.

Both the Learned Counsels strenuously argued that in this case, the evidence appreciated under Section 33 of Evidence Ordinance is not a properly completed document. (P4). The numbering is incorrect or not in proper sequence.

As rightly argued by the Deputy Solicitor General appearing for the Respondent, even if there is a correction of the page number at page 3, where page numbering is repeated and hence same is corrected to read as page 3, there is no material to indicate that there is a missing part in between the two pages which was originally marked as Page 2.

The Learned High Court Judge in her judgment at pages 388-395 had considered this contention and correctly held that accepting the evidence of PW1 under Section 33 of Evidence Ordinance has not caused any prejudice to the Appellants. Hence, this ground has no merit.

In the second and third grounds, the Learned Counsel for the Appellants contends that the prosecution had failed to prove the existence of common murderous intention and thereby has failed to prove the case beyond reasonable doubt.

The Learned Counsel contended that as per the evidence of PW1, the interaction between the Appellants and the deceased was initiated with a verbal exchange. It was contended that the Appellants did not immediately

attack and there was a discussion before the alleged assault, and that the sequence of events is inconsistent with premeditated murder and if the Appellants had a murderous intention, the confrontation would likely have been immediately and without verbal exchange.

PW1 had clearly given evidence on how the incident happened. The deceased and PW1 had only replied to the questions put forward by the Appellants. When the deceased and PW1 denied that they did not do any dirty act towards them, the Appellants armed with swords attacked the deceased and PW1 immediately. Evidence clearly shows that the Appellants had come with arms to attack the deceased and PW1. This clearly shows the preparation of the Appellants to execute their preplanned objective.

In **Gunasiri and others v Republic** [2009] 1 SLR 39 it was held that:

> *"To establish the existence of common intention it is not essential to prove that the criminal act was done pursuant to a pre-arranged plan. A common intention can come into existence without a prearrangement. It can be formed on the spur of the movement."*

The Learned High Court Judge in her judgment had very correctly considered and analyzed the evidence and come to the finding that the Appellants had committed the murder and the attempted murder after actuating a common murderous intention. And thereby, prosecution had proved the case beyond a reasonable doubt. Therefore, these two grounds are also devoid of any merit.

In the 4th ground of appeal, the Learned Counsel for the Appellants contended that the Learned High Court Judge failed to appreciate that there were mitigating circumstances.

Mitigating factors would be specific factors relating to a crime, and such factors would not excuse the offence but would reduce the culpability of the defendant, thereby justifying the imposition of a lesser sentence. As such, it

would provide the relevant information needed to humanize the offender and assist courts to impose a punishment that is appropriate for the situation.

In the case of **Gurudeniya Lekamgedara Nishantha Bandara v. Attorney General** (S.C. Appeal No.62/2008), it was noted that:

> *"The said offence of murder in terms of Section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under Section 293 of the Penal Code, if any of the five exceptions to Section 294 could be shown to apply. The exceptions are as follows: grave and sudden provocation; exceeding in good faith the right of private defence; bona fide overstepping of the limits of his authority by a public servant; the plea of sudden fight and the case of a mother who causes the death of her child under the age of twelve months when the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to a child or by reason of the effect of lactation consequent to the birth of the child.*
>
> *For Exception No. 4, the following requisites must be satisfied: it was a sudden fight; there was no premeditation; the act was committed in a heat of passion; and the assailant had not taken any undue advantage or acted in a cruel manner."*

In the case of ***The King v. Fernando*** [46 NLR 256] it was distinguished:

> *"The trial Judge explained "premeditation as if it was synonymous with "intention". There was, then, misdirection in that respect. The jury, in view of that misdirection, and also in view of the observation made by the Judge that if they were not satisfied that the condition "without premeditation" was present on the evidence, they need not consider that*

exception any further, probably refrained from such further consideration."

In the case of **S.C. Appeal No. 168/2018**, (decided on 25.7.2025) it was further examined:

"The most relevant part in relation to the instant appeal of the said Exception is the section that reads "… in a sudden fight in the heat of passion upon a sudden quarrel". The said exception speaks of sudden fight which results upon a sudden quarrel. These phrases were used by the Legislature to denote a position that reflects a transformation of a quarrel to a fight within a very short duration of time. It is important to note in this context that the word "sudden" appears twice in the text of the said Exception and that too, after the phrase "without premeditation". The emphasis laid in the text of the section on the spontaneity of the act which resulted in the death of a person is therefore clearly recognisable.

The start of the quarrel and its escalation into a fight must happen within a short duration of time. The emphasis placed by the Section on the progressive but sudden escalation of the intensity of the degree of passion with which the opposing parties acts in a quarrel culminating with the act or acts that results in the fatality could easily be discerned from the phrase "… in a sudden fight in the heat of passion upon a sudden quarrel"

Further in the case of ***Palamura Hewage Harishchandra Kumarasinghe v. Attorney General*** (CA HCC 0070/2023) it was held:

"Our Courts have considered that to qualify under Exception 4 to Section 294 of the Penal Code, the Accused has to establish that the incident was committed without premeditation in a sudden fight in the heat of an argument. C. Ananda Grero, Culpable Homicide, Proof and Defences,

1988 at page 69: "Gour in the Penal Law of India states: "Pre-meditation may be established by direct or positive Evidence or by circumstantial evidence. Evidence of pre-meditation can be furnished by former grudges or previous threats and expressions of ill-feelings; by acts of preparation to kill, such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blows or other acts of violence are sufficient evidence of meditation."

The Counsel for the Appellants argued that the Learned High Court Judge had not considered the relevant mitigating circumstances when she found the Appellants guilty for the charges for which they were convicted. They mainly submitted that before the incident, according to the Counsel there was a verbal exchange that had happened between the parties and that the injuries were inflicted as a result of the said verbal exchange and therefore, the Appellants should have been convicted not for murder but for culpable homicide not amounting to murder.

When the deceased and PW1 were enjoying a cigarette after dinner, the Appellant had gone there and inquired from them why they do animalistic acts towards them. When the deceased and PW1 countered and asked what the animalistic act was done by them, and requested not to implicate them, the Appellants immediately sprang into action and cut the deceased to death and caused serious injuries to PW1. According to the evidence, the assault was done immediately when the deceased and PW1 replied to the utterance of the Appellant. Hence, no sudden fight had taken place between the parties.

Further, the Appellants had not taken up the defence of sudden fight during the cross examination of the witnesses both at the non-summary and in the High Court trial. They had taken the defence only at the later stage in their

dock statement. Had there been mitigatory circumstances, the Learned High Court Judge would have considered the same in the trial.

The Learned High Court Judge in her 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 her decision.

Next, both the learned Counsels, highlighting the following passage from the judgment contended that the Learned High Court Judge had reversed the burden of proof towards the Appellant. The relevant portion is re-produced bellow:

Pages 427-428 of the brief.

විශේෂයෙන් ඔහුගේ භාර්යාව සහ මවද ඒ අවස්ථාවේ නිවසේ සිටි බව ස්වකීය ස්ථාවරය වූයේ වී නම් ඔහුට ඒ අය අතුරින් යමෙකු පීවතුන් අතර සිටින්නේ නම් කැඳවීමේ හැකියාවද පැවතුනි. ඊටත් අතිරේකව ඔහුගේ අක්කාද එම නිවසට පැමිණ කතා කළ විට පමණක් මේ ගැන දැන ගත් බවට ඔහු පවසා තිබුණ නිසා ඔහුගේ සහෝදරිය ද ඔහු වෙනුවෙන් සාක්ෂියට කැඳවීමට හැකියාව තිබුනි. එහෙත් ඒ කිසිවෙකු ඔහු සාක්ෂියට කැඳවා නැත. අනෙක් අතට පැ. සා. 1 ගෙන් ලඝු නොවන පරීක්ෂණයේ දී හරස් ප්‍රශ්න විමසන විට ඔහු කිසිදු ආකාරයකින් මෙයට සම්බන්ධ නොවුණු බවට වන ස්ථාවරය හා ඔහු ඒ අවස්ථාවේ ඔහුගේ නිවසේම රැඳී සිටියාය යන ස්ථාවරය පිළිබඳව යෝජනාවක් හෝ විත්තිය අරඹයා සිදු කර නැත. එම තත්ත්වය පසෙක තැබුවත් මූලිකව සඳහන් කළ යුත්තේ තමන් ඒ අවස්ථාවේ නිවසට වී නිදාගෙන සිටි බවට ඔහු සඳහන් කරත්, එම කරුණ අධිකරණයට ඒත්තු යන ආකාරයට තහවුරු කිරීම සඳහා ඔහුට පහසුවෙන්ම කැඳවීමට හැකියාව තිබූ ඔහුගේ ලඟම ඥාතීන් හෝ කැඳවීමක් නොකිරීම මත ඔහුගේ විත්තිවාචකය තහවුරු වීමක් සිදු වී නොමැති බවයි.

Where the prosecution presents overwhelming evidence, a prima facie case is established, and as such a reverse burden makes it legally difficult or almost impossible to be granted an acquittal, as the defendant would now be fighting against undisputed facts brought by the prosecution. Thus, even compelling arguments may not suffice to secure an acquittal.

Although, the above cited portion of the judgment is a clear misdirection, the evidence presented by the prosecution is overwhelming and therefore, I conclude that it will not affect the outcome of the judgment.

In the next ground both the learned Counsels raised the question whether the Learned High Court Judge has correctly evaluated the dock statements of the Appellants.

A dock statement is an unsworn statement an accused person makes from the courtroom dock rather than giving sworn testimony. Evaluating it is crucial because, while it lacks the full probative weight of cross-examined evidence, it is legally treated as evidence that must be carefully assessed to safeguard the defendant's right to a fair trial.

Even if the statement is not fully believed, if its content introduces a reasonable doubt about the prosecution's case in the minds of the jury or judge, the accused is legally entitled to an acquittal.

A dock statement refers to an unsworn statement made by an accused from the courtroom dock rather than giving sworn testimony. The evaluation of such statements would be extremely important, as they would be legally considered to be evidence, and as such, must be carefully assessed to protect the defendant's right to a fair trial. Therefore, although a dock statement would lack the full probative weight as cross-examined evidence would, it still remains important to the case at hand. Further, even if the statement is not fully believed, if its content is sufficient to create a reasonable doubt regarding the prosecution's case in the perspective of the jury or judge, the accused would then legally be entitled to an acquittal.

In **Queen V. Kularatne** 71 NLR 529 at page 531 it was held that:-

> *"when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that,*

(a) if they believe the unsworn statement, it must be acted upon,
(b) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and
(c) that it should not be used against another accused."

The Learned High Court Judge had very correctly considered the dock statements of the Appellants in its correct perspective. She had given plausible reasons as to why she disregards the same. Therefore, it is incorrect to say that the Learned High Court Judge had simply disregarded the dock statements in her judgement.
In the final ground of appeal, both the Counsels contended whether the sentenced imposed on the 5th is excessive, given the circumstances of the case.

"Judicial discretion" or judicial sentencing freedom refers to an authority of a judge to determine the appropriate penalty within statutory limits for each case at hand. While judges would be independent and free from influence, this does not grant absolute freedom; such determinations would be confined within the limits of mandatory minimums, maximum sentences, appellate precedents and structures sentencing guidelines.

In Sri Lanka, there is no single, unified statutory Sentencing Act or any other codified sentencing guidelines for offences. Rather, sentencing is governed by the directions of the Penal Code and the Code of Criminal Procedure, and as such, final penalties are imposed on the discretion of the judge, who would be governed by the specified minimums and maximums in the statute.

According to the JMO, PW1 had sustained a cut injury on his right scapula which had been categorised as grievous injury sufficient in the ordinary course of nature to cause death. Under Section 300 of Penal Code the court can sentence an Accused up to 20 years with a fine.

The Learned High Court Judge, after considering all mitigating and aggravating circumstances submitted by both parties, correctly sentenced the Appellants for 15 years rigorous imprisonment with a fine.

In this case the Learned High Court Judge had considered the evidence presented by both parties to arrive at her decision. She has properly analyzed the evidence given by both sides in her judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution's 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)."*

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 material to the facts in issue".*

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 and committing attempted murder on PW1 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 Ratnapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL