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

In the matter of an Appeal in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/0440/2019

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/8075/15

Wijemuni Madhura Manaranga De Silva

ACCUSED

AND NOW BETWEEN

Wijemuni Madhura Manaranga De Silva

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Kapila Waidyaratne, P.C. with Akkila Jayasundara and Akhila Mathishi for the Accused-Appellant
	: Ayesha Jinasena, P.C., Solicitor General, with Malik Azeez, S.C. for the Complainant-Respondent
Argued on	: 11-07-2024, 12-07-2024, 17-07-2024, 18-07-2024, and 24-07-2024.
Written Submissions	: 30-04-2021 (By the Accused-Appellant)
	: 21-09-2021 (By the Complainant-Respondent)
Decided on	: 15-10-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for committing the following offences.

1. That he caused the death of Pihimbiyage Sachethana Sandamali on 16-12-2012 at Ratmalana within the jurisdiction of the High Court of Colombo, and thereby committed the offence of murder punishable in terms of section 296 of the Penal Code.
2. At the same time and at the same transaction, he caused the death of Wijemuni Ishan Bhanuka De Silva, and thereby committed the offence of murder punishable in terms of section 296 of the Penal Code.
3. At the same time and at the same transaction, he caused the death of Wijemuni Kushan Sandaruwan De Silva, and thereby committed the offence of murder punishable in terms of section 296 of the Penal Code.

Sachethana Sandamali mentioned in the 1st count was the legally married wife of the appellant and the deceased persons mentioned in the 2nd and the 3rd count are the two young children of the appellant born out of the marriage with the deceased Sandamali.

It needs to be noted that this is a matter where the Hon. Attorney General has preferred a direct indictment to the High Court under the powers vested in him in terms of the Code of Criminal Procedure Act No. 15 of 1979.

After trial without a jury, the learned High Court Judge of Colombo found the appellant guilty as charged, and he was sentenced to death in relation to all three counts preferred against him. On the basis of being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

This a case where the prosecution has mainly relied on circumstantial evidence to prove the charges against the appellant in addition to the confessional statement made by the appellant to the learned Magistrate of Mt. Lavinia in terms of section 127 of the Code of Criminal Procedure Act.

At the trial, the prosecution has called the following witnesses in order to prove the charges against the appellant.

PW-01 Chanuka Fernando, who was the brother of the deceased Sandamali.

PW-02 Kalyani Silva, who was the mother the appellant.

PW-05 Dhanushka Jayasekara.

PW-06 Anuruddha Gunawardena.

PW-07 Susima Warnakulasooriya.

PW-09 G.A. Irangani who was a servant at the house of the deceased.

PW-10 who had an intimate relationship with the appellant.

PW-14 Chandana Kumara Pathirana.

PW-17 Neetha Sriyani.

PW-22 who gave evidence on behalf of Lanka Electricity Company Limited (LECO).

PW-23 Police Inspector Eric Rohana.

PW-25 Chief Inspector of Police Dharmasiri Wijewardena.

PW-31 Chief Inspector of Police Kamal Pushpakumara, PW-34 Judicial Medical Officer (JMO) Wasanthi Ariyarathna who conducted the postmortems of the deceased.

PW-35 Senior Assistant Government Analyst Roshan Fernando who produced the Government Analyst Report.

PW-36 the then learned Magistrate of Mt. Lavinia before whom the confessional statement was made by the appellant.

The prosecution has marked productions P-1 to P-11 at the trial. When a defence was called by the learned High Court Judge, the appellant has chosen to make a lengthy dock statement and no other witnesses had been called on his behalf.

At the hearing of this appeal, the learned President's Counsel, although he has submitted 12 grounds of appeal in his written submissions, crystallized the said grounds of appeal in the following manner for the consideration of the Court. He invited the Court to consider the grounds of appeal together as they are interrelated.

Grounds of Appeal

1. The learned trial Judge has failed to apply his judicial mind to arrive at a finding whether the prosecution has proved its case beyond reasonable doubt, thus the conviction is against the law and contrary to evidence.
2. The learned High Court Judge has drawn incorrect inferences from the matters in the evidence, therefore, has failed to consider plausible

alternative inferences that can be drawn from the circumstantial evidence relied on by the prosecution.

3. The learned High Court Judge has failed to properly analyze and legally consider the doubtful, false, and inconclusive evidence of the prosecution witnesses and thus, had failed to consider at least a reasonable doubt has arisen in relation to the evidence against the appellant.
4. The learned High Court Judge has been prejudiced from the very commencement of the trial, therefore, has not or failed to evaluate the circumstantial evidence to arrive at a just and a fair decision, and thus, denied the appellant a fair trial.
5. The learned High Court Judge had failed to consider the defects and improbabilities in the investigation, which clearly cause doubt in the prosecution case, thereby misdirected, which amounts to a miscarriage of justice.
6. The learned High Court Judge had failed to properly analyze the narration of the defence, thus, has failed to properly consider the defence, and thereby, had improperly rejected the same.

In view of the above grounds of appeal, I find that although six separate grounds of appeal were raised by the learned President's Counsel, all the said grounds of appeal revolves around the argument that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt, and the learned High Court Judge has failed to consider the evidence in its correct perspective, and also failed to properly evaluate the defence put forward by the appellant, and thereby, a fair trial was denied and a miscarriage of justice occasioned to the appellant.

In view of the above, I find it necessary to briefly consider the facts that came to light at the trial before considering the grounds of appeal urged in detail.

Facts in Brief

The deceased Sandamali was around 31 years of age at the time of her death, and was married to the appellant. They have gotten married as a result of a love affair. After the marriage, she and the appellant had lived in the house belonging to the appellant situated in Ratmalana area. The appellant's mother was also living with them in the same house. They have had a 3-year-old son named Ishan Bhanuka De Silva and another son born one month prior to this incident, namely, Kushan Sandaruwan De Silva. The appellant had been working previously at the Brandix Garment Company, but during the time relevant to this incident, was attached to another company.

The deceased's parents and her other siblings including PW-01 Chanaka Fernando was living in Mt. Lavinia area, a few kilometers away from the house where the deceased Sandamali and her family lived. The evidence shows that there were no family disputes between them and they have had a peaceful married life. The evidence also shows that since the 2nd child Sandaruwan was born one month prior to the incident by way of a caesarean operation, the deceased Sandamali and her two children had been sleeping in a separate room of the house where they were found dead, and the appellant had been sleeping in another room of the same house.

In the morning of 17-12-2012 at around 7.30 while getting ready to go to work, PW-01 has received a phone call from the appellant's house informing that his sister and her children had faced an emergency and to come to their house. After the information, his mother and father had left in their motorbike to the house of the appellant and PW-01 has taken the bus. After reaching the house, he has come to know that his sister and her two children are dead and has seen their bodies on a bed in their room with burn injuries.

He has seen the appellant seated on a chair in a somber mood. He has observed him looking downwards while continuously stroking his head. He has also seen

and spoken to the mother of the appellant and the servant, who were the other inmates of the house.

The room where the bodies were found had air conditioning and things seemed to be that the death had been caused due to an accidental fire and no one has suspected any foul play at that time. After the police conducted the initial investigations, the bodies have been taken to the Kalubowila General Hospital for the postmortem. Since it had been informed that the postmortem will be carried out the following day, which is on the 18th, all the relatives and the appellant had returned to the appellant's house. PW-01 has also given a statement to the police. After coming to the house, the appellant had been in the same somber mood and had looked restless. He had been thinking in a restless manner while walking back and forth inside the house and drinking water from time to time. When the PW-01 inquired from the appellant as to what happened when he went to the house in the morning, the appellant had only looked at him, but has not replied. PW-01 has not probed further from the appellant. After returning from the hospital to the appellant's house, he has gone back to his own house and has returned in the night. By that time, since the police had informed them that the bodies will be handed over to the appellant after the postmortem, they had been getting ready for the funeral arrangements at the house of the appellant.

The appellant had gone to bed around 10.00 p.m. and on the following day morning, namely on the 18th, while they were getting ready to go to the hospital for the postmortem purposes, he has come out of his room around 7.00 - 7.30 in the morning and has requested PW-01 to come into the room. He has told the PW-01 that he may not be able to take part in the funeral proceedings, and if that happens, he had already given Rs. 200,000/- to his friend Roshan and to conduct the last rites using that money.

When questioned as to why he is saying so, the appellant had told him that he took the elder child to Katubadda K-Zone and the child fell asleep while returning

in the car, so he carried the child to the room and kept him on the bed, and if there are any fingerprints, it would be a problem, and that is why he is saying so. PW-01 has replied saying that it cannot happen as a child will not be carried in such a manner. However, the appellant has insisted that he is not certain, and if such a thing happens, to conduct the funeral rites using the money he gave to his friend.

After coming out of the room, PW-01 has informed of what the appellant told to one of his relatives, but he has not taken what he was told any further.

After conducting the postmortems, he has come to know that the three deceased persons had died not due to an accident, but it was an act of homicide. He has come to know that the police have arrested the appellant at the hospital after the postmortem was conducted. Later, the bodies of the victims had been handed over to PW-01 to conduct the funeral. He was also the one who has identified the dead bodies of his sister and the two children at the postmortem. It has been his evidence that he could not believe that her sister and the children had been killed and that the appellant is a suspect because there were no known issues between his sister and the appellant in their married life. His sister has been a kindergarten teacher at the time she met with her untimely death.

Under cross-examination, it has been suggested to the witness that although he has stated about his suspicions in his police statement, he has failed to state what the appellant has alleged to have said to him about the possibility of having his finger marks on the child, to which he has replied saying that as far as he remember, he said so, but he was not in a fit state of mind due to the unbelievable thing that happened to his sister and the children.

The appellant's mother (PW-02) in her evidence has come up with the fact that the appellant was an adopted child when he was an infant. However, she and her husband had made sure that fact would not come to light. Her husband has passed away in the year 2005, and after the appellant married the deceased Sandamali, his family and PW-02 had lived in their house. They had employed a

female servant (PW-09) who lived in the house with them. Her evidence reveals that the house had 3 doors from which one can enter the house, and since one of the doors had a broken key, the inmates of the house used to place a barrier from inside the house so that it cannot be opened from outside during the night.

On 17-12-2012, she has woken up as usual in the morning and while watching TV at around 6.00 - 6.15 a.m., she has felt dizzy due to her diabetic condition and had alerted the appellant about that. The appellant has called his wife, who was sleeping in the room, placing the blame on the mother for eating too many sugary items on the previous day. After that, PW-02 has informed the servant to tell the deceased Sandamali to prepare tea, as it was she who usually does that in the morning. Since there was no response from her when called, PW-02 has attempted to open the door of the room, and has failed. Thereafter, she has called the appellant who came and opened the door, and has seen a line of fire around the bed where the deceased Sandamali and the children were sleeping. Seeing that, her first reaction had been to take the younger child out, but when entering the room, she has slipped and had fallen unconscious. Later, she has come to know that Sandamali and the two children are dead and had believed that their death had been due to an accidental fire.

When her son was preparing to go and attend the postmortem on the 18th, through grief, she has asked him as to what happened for which he has answered that he is also trying to find the reason. He has informed her that he has given some money to Roshan, meaning one of the boarders of the house, and to use that money for funeral arrangements if he gets late to return home after attending the postmortem.

Her evidence has revealed that the house had two annexes which were given on rent, but access to them had been from the outside of the main house. She has also revealed that there had been no issues in the married life of the deceased Sandamali and the appellant, and that they have had a peaceful married life.

It has been her evidence that only after the appellant was arrested, she revealed to him at the Mt. Lavinia police station that he was their adopted child.

In this matter, the domestic servant mentioned by the other witnesses has also given evidence and has corroborated what the PW-02 has stated in Court. PW-05 is a neighbour and a relative of the appellant and also a person who reached the place of the incident, hearing the cries of the appellant and PW-02.

The next witness of importance is PW-10. By the time she gave evidence in Court, she was a teacher, and during the time relevant to this incident, she had been studying a French Diploma Course in Colombo. She has commenced her studies just after completing her Advanced Level studies and used to travel from her home in Marawila area to Colombo using public transport to attend to her studies. While travelling to Colombo, she has met another boy who introduced himself as a person attending classes as well, and they have exchanged their phone numbers. This has happened during the later part of 2012.

About a month after this incident, she has started receiving a large number of missed calls for which she has not called back. Thereafter, she has received two SMS messages with her name and other details, which has resulted in her answering the phone. When she inquired as to how he got her number, the caller has informed that he got it from one of his friends, who is attending classes. The caller has informed her that he has seen her and had indicated an interest in commencing an affair with her. He has introduced himself as Madhura and had informed that he is a Manager attached to a private company, and a person living in Kalutara area. He has also given details of his family and introduced himself as a person of 28 years of age. These calls have continued, which has developed into an affair.

However, she has only met this person three occasions during this episode, and on the 1st day they met, she has travelled with him to Marawila in his car. He has informed her that he is unmarried and is looking forward to start a married life.

According to her evidence, he has conducted himself in an exemplary manner, which has led her to believe that he is a genuine person who is really interested in entering into a serious relationship with her and to get married to her. On the 3rd day they met, he has proposed to her and even informed her of his plans of getting married at Mt. Lavinia Hotel, and had also given a ring pretending that he is unaware as to which finger a wedding ring should be put. Since she has found the person to be genuine, she has decided to introduce him to her parents. All these things had happened within a period of 3 weeks after they met for the 1st time.

On one Sunday in December 2012, and after returning from attending the Church services, she has seen the number of calls taken by the person whom she came to know as Madhura and now planning to get married to her, and several SMS messages as well. Although she has not called him at that particular time, she has called back in the night. The person has informed her that he is faced with an issue with his company and that there is an investigation being carried out against him in relation to a tender expected by the company, which went to a rival company. He has informed her further that he will have to travel to Singapore in that regard and he may not be able to contact her for several days. On the following day, he has given a call again and had informed her that because he made several calls to her previously, the company might contact her as well and to keep the phone switched off, which she has refused. He has also suggested that if questioned, to inform that this number belongs to her husband and it is for the husband the said calls were received. She has also refused that request informing him that since she is not a married person, she is not going to say such a thing.

When questioned as to why he was telling that to her, he has informed her that he was telling so because she may also face issues. On the following day, she has received another call from him, and when she questioned, he has informed that he returned from Singapore and wanted her to come and meet him at a

certain place. Once she refused his request, the telephone line has got disconnected.

On the same evening, she has received another call informing her that the caller is from the Criminal Investigation Unit of the Mt. Lavinia Police. She has been informed that she should come to the police station with her parents. The caller has wanted the phone to be given to an elder of the house and when that request was complied, it had been informed to her mother that a murder has been committed, and has questioned whether she knows a person called Madhura. After coming to Mt. Lavinia Police, she has come to know that the person who proposed her to get married was the appellant, and he is now suspected of murdering his wife and two children.

She has also stated in her evidence that while she and her family members were watching the 8 o'clock news on Sunday, she received a call from the appellant and was informed to change the channel to another particular TV channel. He had informed her that the teledrama that is being telecasted in that channel had been filmed in one of his houses.

The prosecution has placed as evidence, the SMS conversations that had taken place between PW-10 and the appellant, and also the phone call details.

The mother of PW-10 has given evidence on this matter and has confirmed the evidence of PW-10.

According to the evidence of PW-34, the JMO who conducted the postmortem examination on the three deceased persons, she has observed several burn injury marks on the body of the deceased Sandamali, and has also observed several contusions placed over anterior and both sides of the neck with sharp muscle contusions and both superior horns of thyroid fractured and thyroid gland contused. The JMO has also observed diffused contusions present over both angles on her mouth among other injuries.

It has been her opinion that the deceased Sandamali has died due to application of pressure on her neck and that the victim had been dead at the commencement of the burn injuries on her body.

The JMO has opined that the 3-year-old child Kushan has also died due to manual strangulation of the neck. She has observed several contusion marks over the right anterior upper neck apart from other burn injuries. It has been her opinion that the deceased child Kushan were also dead by the time of the commencement of the burn injuries.

The younger child Ishan has died due to complications of burn injuries, and there had been no other injuries on his body.

Apart from the earlier mentioned witnesses, the prosecution has also called PW-36, who was the learned Magistrate of Mt. Lavinia at that time, and who recorded the confessional statement by the appellant in terms of section 127 of the Code of Criminal Procedure Act.

She is also the person who conducted the inquest as to the death of the deceased. According to her initial observations at the inquest, deaths appeared to have been caused as a result of an accidental fire due to a candle lit in the room. However, she has come to know after the postmortem examinations that the deceased Sandamali (the mother of the two children) and the elder child has died due to strangulation, and the younger child has died as a result of burn injuries. She has identified the appellant as the person who identified himself as the husband of the deceased Sandamali when she visited the scene of the incident, and had known by 19-12-2012, that the said person was the suspect in this matter. The appellant had been produced before her in the chamber at around 5.00 p.m. on 19-12-2012.

When he was produced, the Head Quarters Inspector (HQI) of the Mt. Lavinia police, who accompanied the appellant, has informed the learned Magistrate that the appellant wishes to make a statement to her. When she inquired him about his intentions, he has informed that he is going to obtain legal advice and would

decide on that. Since the police have requested to detain the suspect for further period of 24 hours to conduct investigations she has allowed the said application. When the HQI informed her that the appellant intends to make a statement, she had made sure that the police officer was not in her presence when she questioned the appellant in that regard.

Apart from stating that he wishes to obtain legal assistance, he has said nothing about any influence imposed on him by the police or any other party. The learned Magistrate has also not observed any obvious signs of discomfort or injuries on his body, other than him looking disturbed over some issue.

The HQI of Mt. Lavinia police has again produced the appellant before her on 20-12-2012 at around 2.30 p.m., and at that time, she has questioned him again about his intention to make a statement to her. In order to give some time for the appellant to think over it, she has directed him to be detained at the prison lock up of the Magistrate's Court of Mt. Lavinia under the care of prison officials.

Around 4.15 in the afternoon, she has directed the prison officials to produce him before her at the chamber, where she has questioned the appellant whether he still intends to make a statement and has explained the legal consequences of making such a statement. She has also explained that even if he makes a statement or not, he will not be handed back to the police, but to the prison officials.

The learned Magistrate has given clear evidence in relation to the steps taken by her to make sure of satisfying herself that the statement made by the appellant is voluntary. The learned Magistrate has taken steps to record the statement with the aid of a typist attached to the Mt. Lavinia Magistrate's Court in terms of section 127 of the Code of Criminal Procedure Act and followed the due procedural steps after the statement was completed.

On 11-04-2013, some four months after the said statement, an Attorney-at-Law representing the appellant has made submissions before the Court claiming that the earlier statement made by the appellant was not a statement made

voluntarily, in other words the Attorney-at-Law has set the ground work for the appellant to claim that his statement was involuntary. The learned Magistrate has taken steps to make an order in that regard as well.

When the prosecution wanted to mark the said statement of the appellant made in terms of section 127 of the Code of Criminal Procedure Act as P-12 at the trial, the Counsel who represented the appellant has objected to its being marked on the basis that the said statement was not made voluntarily, which has resulted in the learned High Court Judge deciding to hold a *voir dire* inquiry to ascertain whether the statement has been made voluntarily.

At the inquiry, the learned Magistrate has been extensively cross-examined by the Counsel who represented the appellant and it has been claimed that the appellant has been severely assaulted and compelled to make the statement. It has also been the position that the appellant was not produced before a psychiatrist before he was made to make the statement.

Apart from the learned Magistrate, the Court typist who typed the statement, listed witness PW-05 Inspector of Police Eric Rohitha, who was the then OIC of the Crimes Division of Mt. Lavinia police station, and also the then HQI of Mt. Lavinia police, Assistant Superintendent of Police Kamal Pushpakumara (PW-31) has been called by the prosecution at the inquiry.

The stand taken up by the appellant had been that he was severely assaulted after taking him into custody and thereby, the police officers forced him to make a statement of this nature. It appears that at one stage, the appellant has filed a private plaint against several police officers including the HQI of Mt. Lavinia police station for assaulting him.

At the inquiry, the appellant has given evidence. He has taken up the position that after his arrest, he was continuously assaulted and questioned. He has admitted that on 19th December, he was taken to the Kalubowila Hospital and was produced before a doctor. It has been his position that by that time; he was suffering from the effects of his assault and the doctor recommended him to be

produced before a psychiatrist. He has also stated that even though he requested legal assistance from the learned Magistrate, that did not happen and has also claimed that when he was produced initially on the 19th and the 20th of December, the police officers who produced him were present when he was forced to state that he wishes to make a statement to the learned Magistrate.

He has given evidence in graphic detail of the assaults he had to undergo at the hands of the police officers and had also produced documents to show that he wanted to make another statement in order to retract from his earlier confessional statement.

Although the appellant has been cross-examined in detail as to the incident where he was ultimately convicted, for purposes of considering whether the learned High Court Judge has correctly admitted the statement of the appellant as evidence, I will only consider the relevant portions of evidence that directs at the *voir dire* inquiry, and consider the rest of the evidence as evidence led before the Court at the trial proper.

After the conclusion of the *voir dire* inquiry, the learned High Court Judge has pronounced his order on 12-09-2018, where it was held that the statement made by the appellant to the learned Magistrate of Mt. Lavinia in terms of section 127 of Code of Criminal Procedure Act was a statement made voluntarily and had thereby allowed it to be led as evidence.

Accordingly, the prosecution has marked the said statement comprising of eight pages as P-12.

The earlier mentioned PW-31, the then HQI of Mt. Lavinia police has been again called to give evidence at the trial proper, and the police officer who observed the scene of crime (PW-25) has also been called by the prosecution to substantiate his findings when he visited the scene of the crime.

Apart from the police officers who have given evidence, the prosecution has called PW-35, the Senior Assistant Government Analyst (hereinafter referred to as the

G.A.) who inspected the scene of the crime and prepared his Report marked P-13.

The G.A. has observed 3 possible entrances to the house and has determined that there had been no forced entry to the house. He has described the level of the damage occurred to the furniture and the bed linen, and also has observed a blue-coloured saucer plate on the burnt-out mattress, two used match sticks and a melted candle, which has made him to determine that the electrical shortage has not been the cause of the fire.

He has seen the body of the deceased Sandamali and her younger child on the mattress and the other child's body on the floor. It has been his opinion that the fire has not commenced from the place where he found the saucer plate and the candle, but from two other places of the mattress. He has expressed his professional opinion as to why he reached that conclusion. He has also ruled out any flammable liquid being used to set up the fire. He has ruled out any forcible entry into the room, which was a sealed and an air-conditioned room. He has observed that the fire has not spread to other areas of the room because the room was sealed and due to lack of oxygen.

The prosecution has called the Area Manager of Lanka Electricity Private Limited, who has examined the house where the fire occurred. He has confirmed by producing the report marked P-14 that there had been no electrical defect in the electricity wiring system of the house.

The earlier mentioned Scene of crime officer's (SOCO) evidence (PW-25) reveals some interesting observations made by him. He is a person who has had extensive experience and training as a SOCO. Apart from the other observations, he had observed that the wall clock of the room has stopped at 00:00:56, which has made him to determine that the fire may have commenced a short period before the wall clock came to a stop after midnight due to the heat generated by the fire. He has also observed on the burnt-out bed, the infant in the posture of

sucking milk from the deceased Sandamali's breast. The other child's body has been on the ground next to the bed.

The way the bodies were found had raised a suspicion in the mind of PW-25 as his experience had been to the effect that under the circumstances he observed, a victim would normally shout and make an attempt to escape from the fire which has not occurred in this instance. His observation has been that the fire has not commenced from the candle which was on the saucer plate found on the bed, but from elsewhere. He has also observed that since the two match sticks found were in good condition, the said match sticks may have been introduced subsequently. He has identified the appellant as the person who came forward as the husband and the father of the deceased respectively. His evidence shows that after the postmortem revealed that the deaths have occurred as a result of a homicide, his team have conducted another extensive search and investigation at the scene of the crime.

He has done an extensive investigation in order to find whether there was any possibility for someone to enter the house from outside and has ruled out such a possibility. In the process of his investigations, and in order to find out the appellant's mobile phone details, PW-25 has forwarded the appellant's phone to the University of Moratuwa for a scientific analysis. Since it had been reported that the University would need the password of the Apple phone owned by the appellant for their further investigations, PW-25 has recorded a further statement from the appellant while he was incarcerated in the Kalutara prison. Nonetheless, the appellant has claimed that he cannot remember the password.

Under cross-examination, the witness PW-25 has also confirmed that although there were two annexes on the upper floor of the house, there was no connection to gain entry from the upper floor to the lower floor, as the staircase to the upper floor was from the outside of the house.

Once the prosecution closed its case, the learned High Court Judge, after having considered the evidence led before him, has decided to call for a defence from the appellant.

The appellant has made a lengthy dock statement and had stated that he had no reason whatsoever to cause the death of his wife and two children. He has denied that he made the section 127 statement voluntarily, and had made a lengthy statement to the effect that he was forced to make the statement after being assaulted by the police. He has also referred to several shortcomings in the investigations. In the process of his dock statement, he has admitted that he had a connection with PW-10 for a period of 3 weeks, but has claimed that it was not a reason for him to commit a gruesome act like this. He has claimed that he is innocent of committing the crime.

The Consideration of the Grounds of Appeal

As I have stated previously in this judgment, since the circumstantial evidence made available by the prosecution against the appellant and also the confession made to the Court by the appellant has been considered relevant, I find it appropriate to consider whether the determinations made by the learned High Court Judge in relation to the voluntariness of the appellant's statement to the learned Magistrate of Mt. Lavinia can be considered correct, or whether there is any basis for this Court to consider that the learned High Court Judge should have rejected the statement to be admitted as evidence.

It was the position of the learned President's Counsel that the prosecution has failed to establish that there was no force or inducement on the part of the police for the appellant to make a statement before the learned Magistrate.

It was an admitted fact that the appellant made a statement before the learned Magistrate of Mt. Lavinia. However, since it was contended that his statement was not voluntarily made, and the learned Magistrate has failed to follow due process, and also the prosecution has failed to establish that the statement was

voluntarily made, I find it necessary to consider the legal principles that a trial Judge should have in mind when considering evidence at a *voir dire* inquiry.

The relevant section 127 of the Code of Criminal Procedure Code under which the learned Magistrate has recorded the confessional statement of the appellant reads as follows;

> **127. (1) Any Magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.**
>
> **(2) Such statement shall be recorded and signed in the manner provided in section 277 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.**
>
> **(3) A Magistrate shall not record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily, and when he records any such statement he shall make a memorandum at the foot of such record to the following effect: –**
>
> **I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.**
>
> **(Signed) A. B. Magistrate of the Magistrate's Court.**

When a statement recorded under section 127 of the Code of Criminal Procedure Act is sought to be produced as evidence in a case against the maker of such a statement, and if an objection is raised on the basis that the statement made was not voluntary, the trial Court is required to hold an inquiry in order to determine the voluntariness of the statement before such a statement can be allowed as evidence.

I find it relevant to quote from the Supreme Court judgment in **SC/TAB/1A and 1B/2020 (decided on 11-01-2023)** where it was observed;

> "*Despite a judge not being normally required to determine questions of fact before the final judgment, in certain selected occasions the judge is called upon to do the same, particularly when a disputed question of fact must be determined in order to decide whether an item of evidence should be admitted. On these occasions the judge alone determines questions of fact and may generally tend to hear witnesses in order to do so. This procedure is called a "trial-within-a-trial" or "voire-dire."*
>
> *The procedure at a voire-dire inquiry usually involves various steps including objection being made when the evidence is to be called, and the judge then hearing the evidence before ruling on admissibility, unless the circumstances are exceptional.*"

It is well settled law that a confession can only be proved against a person only if it is not irrelevant in terms of section 24 of the Evidence Ordinance.

For matters of clarity, section 24 is reproduced below.

> **24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceedings from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making if he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.**

Although the case of **Mahadevan Yogakanthan Vs. Republic of Sri Lanka, C.A. Appeal 41/2010 decided on 12-06-2012**, is a case where similar provisions contained in section 16 of the Prevention of Terrorism (Temporary Provisions) Act were considered, I find it relevant in the context of the appeal under consideration.

Per Ranjith Silva, J.

"According to this section it appears that the burden of proving that it was not voluntarily rest on the accused-appellant. But what is important is the language the legislature has used in Section 24 of the Evidence Ordnance. It states that 'when it appears to Courts' to guarantee the accused person in criminal proceedings absolute fairness. Thus, Section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the court, after proper examination and a careful analysis of the evidence and the circumstances of a given case, holds to the view that there appears to have been a threat, inducement or promise, though this is no strictly proved, the Court must refuse to receive in evidence the confession. In other words, the burden appears to be, the burden cast by the subsection 2 of section 16 of the Prevention of Terrorism Act is a very light burden because there is not much that the accused has to prove. From the given circumstances of the case, sometimes a court of law may be able to decide whether it appears that the confession was not voluntary."

S. Vivekanadan and Another Vs. S. Selvaratnam 79 (1) NLR 337 was a case decided before the provisions of the Prevention of Terrorism Act came into operation as to the acceptability of a confession. It was held:

"Section 24 of the Evidence Ordinance does not require positive proof of improper inducement, threat, or promise to justify rejection of confession. If the court after a proper examination and careful analysis of the evidence and the circumstances of the given case comes to the view that there appears to have been a threat, inducement, or promise offered, though

this is not strictly proved, then the court must refuse to receive in evidence the confession. The burden is on the prosecution to prove that the confession is voluntary and there is no burden of proof on the accused to prove the inducement, threat or promise."

Per Malcolm Perera, J.

"At the outset, the Court must determine the meaning of the word appears. I think what the Court has to decide is not whether it has been proved that there is a threat, inducement, or promise, but whether it appears to Court that such threat, inducement or promise, was present. I am inclined to the view that the word "appears" indicates a lesser degree of probability than it would have been, if the word "proof" as defined in section 03 of the Evidence Ordinance has appeared in section 24."

When considering the evidence placed before the trial Court, I do not find any basis to conclude that the learned Magistrate has failed to follow due procedural steps before she went on to record the statement made by the appellant.

The appellant has been produced before the learned Magistrate for the first time in her chamber at Mt. Lavinia Magistrate's Court. The appellant being a resident of the same area would not have any difficulty to realize that he is being produced in a Courthouse. The learned Magistrate being the Judge who held the inquest, the appellant would not have any difficulty in realizing that he is being produced before the same Judge.

It is clear from the evidence of the learned Magistrate that when the police informed her that the appellant wants to make a statement, she has immediately commenced the relevant procedural steps as required when a confessional statement is recorded. She has ordered the police to leave the chamber and obviously in the presence of the other Court officials, the appellant has been questioned in that regard. He has informed that he will consult his lawyers and inform, which shows that the appellant was well aware of his legal rights.

As correctly stated by the learned Magistrate, at the *voir dire* inquiry, there is no obligation for the Court to provide the appellant with legal assistance, neither has it been requested. Accordingly, the learned Magistrate has allowed the detention of the appellant for another 24 hours as requested by the police for the purposes of further investigations. After he was produced for the 2nd time in her chamber on the following day, the learned Magistrate has again asked him whether he wants to make a statement. When the answer was positive, she has not proceeded to record the statement straightway, but has handed over the appellant to the remand authorities to make him understand that he will not be sent back to the detention of the police and for him to think further.

Although the appellant has claimed that he was assaulted at the remand cell by prison inmates, it is not clear that the said incident happened on the day where the statement was recorded or on a subsequent day when the appellant was produced from remand custody. The appellant has claimed at the trial that he was severely assaulted and tortured by the police, forcing him to make a confession.

However, it is abundantly clear that when he was produced before the learned Magistrate for the 1st time after his arrest, the learned Magistrate, as required by law, has observed the appellant. Other than being appeared to be in a somewhat disturbed mind, she has failed to observe any signs of assault, injuries or torture by observing him. He has appeared to be in good health. Under the circumstances, it is my view that when the learned Magistrate specifically questioned him as to whether he intends to make a voluntary statement to her, the appellant should have informed her that he was assaulted and tortured. When questioned by the Magistrate, if the appellant had the sensible mind to inform the Judge that he will consult his lawyer and inform whether he is going to make a statement, I see no impediment for him to inform the threat or inducement he has taken up at the trial and at the hearing of this appeal, to the Magistrate.

Supposing for any reason he had the fear of more threats or torture since the application by the police on the 1st day was to have him under detention for a period of 24 hours more, he had no impediment to mention that fact to the learned Magistrate when he was given a detailed description of his rights by the learned Magistrate before the statement was recorded on the 2nd day.

This clearly goes on to show that there had been no threat or inducement by the police for the appellant to make a confessional statement. I am of the view that the subsequent application in April 2013 claiming that he was tortured and forced to make a confession was an attempt to prepare a case for him in subsequent proceedings, which clearly appears to be an afterthought. I am of the view that subsequent claims made after several months have not created a situation where it can be assumed that the appellant has been made to make the confessional statement under duress.

The learned President's Counsel also made an attempt to portray the confession made by him to the learned Magistrate of Mt. Lavinia as a result of his mother informing him while he was in the police custody that he was not her natural child, but adopted, which may have disturbed his mindset.

I find no reason to agree that the appellant made the confession involuntarily as a result of being informed that he was an adopted child. I am of the view that his mother informing that fact to him only after his arrest is perfectly justified. After the appellant was adopted as an infant, PW-02 Padma Kalyani and her husband have decided to leave the area where their family members lived and to come to Colombo in order to raise the appellant as their own child. They have provided everything possible for him and he was their only heir. They have lived in their house peacefully until this incident happened. It appears that PW-02 being the grandmother has loved the children beyond description. She and the deceased Sandamali have had a very cordial relationship. Under the circumstances, the news that her loved ones have been killed and her own son is the suspect may

have come as a great shock to PW-02. This may be the very reason why she was prompted to inform the appellant that he was their adopted child.

If the appellant had a disturbed mind as a result of that information, he had no reason to inform the learned Magistrate on the 1st day that he will speak to his lawyer and to whether to make a statement. Nowhere in this case I can find a reason to believe, that fact has played any part in making the confession.

The learned President's Counsel questioned as to why the police allowed the mother to come and talk to the appellant when he was under police custody. I find that the same question can be raised as to why the police did not allow the appellant to talk to his own mother while under police custody, if such an argument suits him.

Making submissions before this Court, the learned President's Counsel submitted that the prosecution has failed to lead the most crucial witnesses to establish that there was no threat or inducement for the appellant to make the statement. He pointed out that the prosecution has failed to call the prison officials under whose custody the appellant was kept on the 2nd day before he was allowed to make the statement to the learned Magistrate, and claimed that the prosecution has failed to establish the chain of custody of the appellant, which in his view was an important matter.

It is abundantly clear from the order of the learned High Court Judge that the learned High Court Judge was very well processed of the legal requirements in determining whether a confessional statement made by a suspect can be admitted as evidence in a case against him. With that in mind, the learned High Court Judge has well considered the evidence led in that regard to determine whether the confession was voluntary or not.

The learned High Court Judge has considered whether keeping the appellant under police custody for 24 hours more after producing him before the learned Magistrate and informing her that the appellant is willing to make a statement had anyway contributed towards the voluntariness of the appellant's statement

and has found no reasons to accept such an argument. The learned High Court Judge has well considered whether the appellant had any reasons to refrain from informing the learned Magistrate that he was forced to make a statement under duress and to claim later that he was assaulted and tortured.

After analyzing the evidence in its correct perspective, the learned High Court Judge has determined that he cannot accept the version of events narrated by the appellant with a clear reasoning, for which, I have no reason to disagree.

For the above reasons as considered, I am of the view that the statement made by the appellant to the learned Magistrate of Mt. Lavinia marked, as P-12, at the trial has been a voluntarily made statement, and therefore, acceptable as evidence against the appellant.

Having determined as so, I will now proceed to consider whether the circumstantial evidence made available to the Court by the prosecution has proved the case beyond reasonable doubt against the appellant, while considering the matters put forward by the learned President's Counsel in countering the circumstantial evidence, and also the doubts in that regard as claimed by the learned President's Counsel.

In the case of **The King Vs. Abeywickrama 44 NLR 254**, it was held:

> **Per Soertsz, J.,**
>
> *"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 hypotheses of his innocence."*

In the case of **Don Sunny Vs. The Attorney General (1998) 2 SLR 01**, it was held:

1) *When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the*

offence. On consideration of all the evidence, the only inference that can be arrived at should be consistent with the guilt of the accused only.

2) *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*

3) *If upon consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

In the case of **The King Vs. Gunaratne 47 NLR 145**, it was held:

"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion. The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."

In the case of **Regina Vs. Exall (176 English Reports, *Nisi Prius* at page 853) Pollock, C.B.**, considering the aspect of circumstantial evidence remarked;

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like of a rope composed of several codes. One strand of the rope might be insufficient to sustain the weight, but stranded together may be quite of sufficient strength."

The 1st piece of circumstantial evidence against the appellant has been his behaviour towards PW-06 Roshan, who occupied one of the annexes of the house. While he was washing his clothes, at around 6.30 a.m. in the morning on 17-12-2012, the appellant has come and knocked on his door. After having a chat with him for few minutes over a vehicle transaction, he has left. About 15 minutes later, PW-06 has heard a scream from the main house and when he ran towards the house, he has seen the incident that has occurred.

In the morning of the 18th, while the inmates of the house were preparing for the funeral arrangements, the appellant has come to his room and had given him an iPad, a laptop bag, and Rs. 200,000/- for safe keeping, and had informed him to give the money to his mother if she asked for it.

This confirms the evidence of PW-01 where he says that while they were preparing to attend the postmortem examination, the appellant wanted him to come to his room and informed him that if he is unable to attend the funeral, he has given Rs. 200,000/- to his friend Roshan and to use that money to arrange the funeral. When questioned as to why he is saying so, he has gone further to say that because he took the elder son to the K-zone on the previous day, there may be finger marks on his body, which appears to be letting out an obvious fear that the appellant carried in his mind, knowing very well of what he did.

The evidence of the JMO clearly shows that the elder child has died as a result of manual strangulation. It is therefore clear that the appellant had been attempting to provide explanations for such an eventuality.

The fact of PW-01's failure to mention that in his police statement made after the arrest of the appellant does not create any doubt as to the fact that such a statement has been made by the appellant to PW-01 when taking the evidence of PW-01 and PW-06 together. It is quite obvious that for a person overwhelmed with emotions, after seeing his sister and her two children dead in their own house and later coming to know that they have died as a result of homicide, and

that it was the husband of his sister who is the suspect of causing such deaths, he may have missed mentioning this fact to the police.

However, for the reasons as considered above, I find ample justification for the failure by PW-01 to not mention it in the police statement.

The learned President's Counsel took pains to argue that there was a possibility for a 3rd party to enter the house as one of the doors could not be locked, and the learned High Court Judge has failed to consider that fact in favour of the appellant.

However, it is amply clear from the evidence of the police as well as the G.A. that there was no basis to come to such an inference. It is clear from the police evidence, as any police investigator would do in such instances, that the police have looked for clues whether any forcible entry into the house has been made. The Scene of Crime Officer has given clear evidence in this regard. At the initial stage of the inquiry, he has checked the three possible entrances to the house to satisfy that no forcible entry has been made. After the arrest of the appellant as the suspect, the Scene of Crime Officer has conducted a further detailed examination of the scene of crime and has again satisfied himself that no forcible entry has occurred.

Even the evidence of the mother of the appellant and that of the servant who was the other inmates of the house clearly showed that when they woke up for the day, there was no evidence of forced entry into the house. Being inmates of the house for a long period, if somebody has entered through the door which was blocked from the inside of the house because the lock of the door was broken, they would have been the 1st persons to observe such a breaking in, this includes the appellant as well.

Apart from the police investigators, the G.A. has given clear evidence to say that he too considered whether there had been any forced entry into the house and the room where the bodies were found and had concluded that it was not so.

The learned President's Counsel made submissions before the Court that the failure of the investigators to conduct DNA tests on the bodies of the deceased was a major flaw in the investigations. He was of the view that since the cause of death had been due to manual strangulation, and if the victims struggled with the attacker at that time, there can be a possibility of having some DNA material on the underside of the nails or some other parts of their bodies, which would have definitely helped to identify the attacker.

It is clear that no DNA testing has been done for obvious reasons. There could not have been any basis to conduct a DNA test to identify the bodies as they had been clearly identified. Once the bodies were set on fire, especially that of Sandamali, who is the wife of the appellant, there is no possibility of leaving foreign DNA material intact in such a body. It is amply clear that the investigators have not gone on the path of DNA evidence because there was no basis for them to do as such.

Another matter taken up by the learned President's Counsel was that the police failed to take down statements of the other boarders of the house, who occupied the two annexes, in order to exclude any possibilities.

PW-06 Roshan, who was one of the boarders the appellant has gone and met just before he heard the screaming from the house, has given clear evidence to say that other than him, who also returned to his annex during the night after going to his home for the weekend, there were no other boarders who occupied the annexes on the day or the day previous to the incident. Even if their statements were recorded, it would not result in any help to the investigators as the police have already concluded that there was no forced entry to the house and also there was no possibility for the inmates of the annexes to enter the house, as the entrance to the annexes were completely separate from the house.

Commenting on the phone call which the police instructed the appellant to make to PW-10, his female friend in order to entice her to come and meet the appellant,

the learned President's Counsel was of the view that this was an attempt to obtain evidence improperly. However, I find no basis to agree with such a remark.

The evidence of PW-10 clearly shows that the appellant had pretended that he is leaving to Singapore in order to assist a company inquiry. That has been the very reason as to why PW-10 has inquired the appellant when she received the impugned call, whether he returned. However, since she has not agreed to his request to meet, the police have subsequently taken a call to her and had acted very responsibly. The have informed the parents of PW-10 of the incident and had wanted PW-10 to come to the Mt. Lavinia police with her parents, and thereafter, her statement had been recorded.

I have no reason to believe that this was an unfair investigation or an attempt to obtain evidence illegally.

Although it was claimed that police attempted to obtain illegal evidence and also a confessional statement because there was no evidence against him, I have no reason to agree.

Even at the time the appellant made the confessional statement, there was sufficient circumstantial evidence gathered by the investigators against the appellant showing that it was only he who could have done such a gruesome act which caused the deaths of his wife and his own children.

There had been no dispute that the appellant has coaxed the PW-10 to develop a love affair with him whom he met just three weeks before this incident occurred. The evidence of SMS messages and phone detail records clearly shows that after this incident, the appellant has made an attempt to distance himself from her by advising her to delete the SMS messages, and requesting further to say that she is married and that the calls were to her husband.

The evidence also shows that the appellant has attempted to show PW-10 that he is going overseas to justify any failure by him to maintain the contact and the relationship he developed with her, apparently fearing arrest. All these pieces of

evidence can be considered as circumstantial evidence in relation to the connection he had with PW-10, which directly provides a connection to the murders.

As correctly pointed out by the learned Solicitor General, the behaviour of the appellant towards PW-10 amply demonstrates his subsequent conduct, which is also material circumstantial evidence in a case of this nature.

It was submitted that the learned High Court Judge has failed to consider the discrepancies in the police evidence in favour of the appellant. The only discrepancy that can be claimed as a discrepancy, if it can be treated as such, is what the HQI of the Mt. Lavinia police station and the Officer-in-Charge of the Crimes Division has stated as to the way they acted when the appellant was produced before the learned Magistrate of Mt. Lavinia, which relates to a question whether they were inside the chamber or outside of it, when the learned Magistrate questioned the appellant.

The learned Magistrate has given clear and uncontradicted evidence in that regard. Hence, I find no reason to accept that there had been discrepancies in the police evidence.

It is trite law that any contradiction, omission or *inter se* and *per se* contradictions of evidence have to be material contradictions or omissions, which creates a doubt in the prosecution case. Trivial contradictions or omissions, which create no doubts as to the evidence should not be regarded as relevant.

In the case of **Mahathun and Others Vs. The Attorney General (2015) 1 SLR 74**, it was held:

(1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
(2) Too great a significance cannot be attached to minor discrepancies, or contradictions.

(3) What is important is whether the witness is telling the truth on the material matters concerned with the event.

(4) Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

(5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

> *"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks 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 tender 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."*

The Indian Supreme Court, in the case of **Ramakant Rai Vs. Madan Rai AIR 2004 SC at 84**, observed;

> *"A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot*

afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately, on the trained intuitions of the Judge. While the protection given by the criminal proceeds to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

It is also a universally accepted principle that no person is expected to have a photographic memory of the things, which is a true fact in relation to a layperson, as well as to an official witness.

It was held in the case of **Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)**;

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

4) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

It was submitted that the learned High Court Judge has failed to consider the confessional statement made by the appellant in relation to the other evidence led in the case, for which I have no reason to agree.

It is amply clear from the judgment that the learned High Court Judge has not only based his judgment on the confession, but has independently considered the circumstantial evidence and had considered all the pieces of evidence as a whole in order to reach his final findings.

Although, motive is not a matter that needs to be proved in a criminal case, the evidence of PW-10 shows a possible motive, though maybe unbelievable to many ordinary human beings, as a reason for the gruesome crime committed. Even though it was contended that the behaviour of the appellant in attempting to distance from PW-10 may have been due to other reasons, and that aspect should also have been considered by the learned High Court Judge, I find that there was no basis for such a consideration as the evidence clearly provides that his attempts to distance himself from PW-10 had been to cover his past acts and nothing else.

It was strenuously argued that a fair trial was not granted to the appellant, the conviction was based on incorrect findings, there was a miscarriage of justice towards him, and as a result, it is not safe to allow the conviction to stand.

For the reasons as considered above, I find no basis to agree with any of such contentions since the police who conducted the investigations into the incident have conducted a thorough and fair investigation in this regard. The police have not proceeded to arrest the appellant at the very outset of the inquiry, although the evidence of the SOCO shows that the police had suspicions about an inmate of the house being responsible for the deaths, and that the deaths could not have been accidental. However, they had waited until the Postmortem Report was available where it was confirmed that the deaths were not accidental, but homicidal.

There is nothing to believe that the appellant was forced to make a confessional statement to the learned Magistrate of Mt. Lavinia and the due process were not followed in that regard. Even after the appellant attempted to retract from the confessional statement more than four months after the incident, the learned Magistrate has allowed such submissions to go as part of the case record so that fair play can be ensured.

Another unique aspect that needs consideration in this case is that it was the same learned High Court Judge, who heard the case from the beginning to the end over a period of nearly two and a half years, has pronounced this judgment. The case brief shows that large volumes of evidence have been led where lay witness accounts and scientific evidence has been placed before the Court. Under the circumstances, it is clear that the learned High Court Judge had the advantage of determining the demeanor and deportment of witnesses in arriving at his findings.

It is well accepted law that in such circumstances, an appellate Court will not lightly disturb such findings until the determination of the trial Judge is

manifestly wrong, which has occasioned a failure of justice towards an accused person.

In the case of **Chaminda Vs. The Republic (2009) 1 SLR 144,** it was held:

> *"An appellate Court will not lightly disturb the findings of a trial Judge who has come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by a trial Judge. Findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

For the reasons as considered as above, I find no merit in the grounds of appeal urged, as the learned High Court Judge has pronounced his judgment after well considering the evidence before him with clear reasoning and after being satisfied that the circumstantial evidence as well as the other evidence placed before the Court leads towards the only conclusion that it was the appellant and no one else who committed this gruesome crime.

The appeal is accordingly dismissed. The judgment dated 07-11-2019 and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal