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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Court of Appeal Case No.
CA/HCC/0137/2020
High Court of Balapitiya
Case No. HCB/747/2005

Complainant

Vs.

1. Ranmulu Sumitha Kumara De Zoysa alias Loku Hodaa.
2. Demuni Suranga Kumara De Zoysa.
3. Demuni Rangana Deshan De Zoysa alias Raja.
4. Ambawalage Sunil Kumara alias Podda.
5. Hithanadura Harendra Jayashantha De Silva.

Accused

AND NOW BETWEEN

1. Ranmulu Sumitha Kumara De Zoysa alias Loku Hodaa.

2. Demuni Suranga Kumara De Zoysa.
3. Demuni Rangana Deshan De Zoysa alias Raja.

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
K.M.G.H. KULATUNGA, J

COUNSEL : Kapila Waidyaratne, PC with Akila Jayasundara and Akhila Mathushi for the 1st Accused-Appellant.
Neranjan Jayasinghe with Randunu Heellage and Imangsi Senerath for the 2nd Accused-Appellant.
Palitha Fernando, PC with Harshana Ananda for the 3rd Accused-Appellant.
Azard Navavi, SDSG for the Respondent.

ARGUED ON : 15.10.2024

DECIDED ON : 16.12.2024

K.M.G.H. KULATUNGA, J.

Introduction

1. Five persons were indicted in the High Court of Balapitiya for the Murder of Handunetti Piyal De Silva committed on 01.02.2000 at Akurala, Kahawa in the Balapitiya area. Three charges were preferred, namely (1) for being members of an unlawful assembly punishable under section140 of the Penal Code; (2) for committing the murder of the said deceased whilst being members of an unlawful assembly punishable under section 296 read with section 146 of the Penal Code; and (3) for committing the said murder based on common intention punishable under section 296 read with section 32 of the Penal Code.

2. Upon the Accused so opting the trial proceeded before the High Court judge of Balapitiya without a jury. The Prosecution led the evidence of PW-02 Riyal De Silva and PW-03, Demuni Ranjith De Zoysa, PW-05 Rannulu Jagath Kumara De Zoysa, PW-13 Hithanadura Dinesh Janaka Kumara, PW-01 Dr. U.C.P Perera the pathologist, PW-15 IP Meththananda, and PW-17 PC 3019 Dharamasoma. Upon the close of the Prosecution's case, the defence was called for, and the first accused appellant opted to give evidence whilst the 2nd - 5th Accused made statements from the dock. The learned trial judge, by her judgement dated 23.04.2020 convicted the 1st, 2nd, and 3rd accused-appellants of count three, and acquitted them from counts one and two. Further, the 4th and 5th Accused were acquitted of all counts against them. It is against the said judgement that the 1st, 2nd, and the 3rd accused-appellants preferred this appeal. The accused-appellants who have tendered their respective written submissions separately were represented by separate counsel.

3. Before embarking to consider the grounds of appeal, it is necessary to set out very briefly the relevant facts on which the prosecution case against the accused-appellants substantially rests. The incident which

has given rise to the present criminal proceedings took place during the fore noon of the 1st of February 2000 in the village of Akurala, Kahawa in the general area of Balapitiya. That fateful morning the deceased was out in the vicinity of his village in search of work and was waiting at a roadside culvert referred to by the witnesses as the '*maha bokkuwa*' with his brother Riyal De Silva (PW-02). At this juncture the 3rd accused-appellant was seen riding a bicycle past them shortly thereafter followed by the 1st and the 2nd accused-appellants (hereinafter also referred to as the 1st and 2nd accused respectively). The 1st accused as he passed by has abused the deceased in filth and then left with the threatening utterance that he will go home and come back. Ten to fifteen minutes thereafter, the deceased with Riyal De Silva have walked towards Riyal's house which was about five hundred metres away and the deceased has stopped at his sister's house and Riyal De silva proceeded to his house which was in the neighbourhood. Within a short time, the deceased was chased by the 1st and the 2nd accused-appellants armed with swords when the deceased had run into Riyal's house, wanted some weapon as he is being pursued by the 1st and the 2nd accused-appellants. Riyal had then stepped out of his house when the two accused gave chase to him armed with swords. Riyal having taken to his heels has gone to a nearby land and hidden. The 3rd accused-appellant had come and handed over a gun to the 1st accused-appellant. The 1st accused-appellant had then gone up to the house, loaded the gun, and fired through the front window at the deceased, who was at the rear end of the house. Upon the shot being fired, the deceased had fallen when the 1st accused-appellant had gone up to the deceased and fired a second shot when he was on the ground. Thereafter, 1st and 2nd accused have left the scene together on a bicycle while the 3rd and the 4th accused have left along with them on another bicycle. The deceased had succumbed to his injuries as he was being taken to the nearby hospital.

4. The only eyewitness to the shooting is PW-13, Janaka Kumara, who happened to come there in search of the deceased. According to the medical evidence, the deceased had sustained two gunshot injuries, and the cause of death is shock and haemorrhage caused by the said gunshot injuries. The evidence of PW-15 IP Meththananda confirms the situation and the location of the scene of crime and the recovery of cartridges, pellets and waddings from the scene.

5. The grounds of appeal as urged on behalf of the 1st accused are as follows:

    1. *Failure of the trial judge to properly evaluate the contradictions inter se between witness testimonies;*
    2. *misdirection in applying legal principles (burden/standard of proof);*
    3. *prejudice and bias in evaluating the evidence and the improper rejection of the defense's evidence; and*
    4. *errors in law and fact regarding the expert medical opinion and circumstantial evidence.*

    The grounds of appeal urged on behalf of the 2nd accused are as follows:

    5. *Failure of the learned trial judge to take into consideration the contradictions of the Prosecution that go into the root of the case;*
    6. *that the learned trial judge arriving at a wrong conclusion that the 2nd accused-appellant participated in the crime with a common intention;*
    7. *that the learned trial judge had failed to take into consideration limb 03 of 293 (knowledge); and*
    8. *that the learned trial judge had misdirected herself regarding the standard of proof.*

    The grounds of appeal urged on behalf of the 3rd accused are as follows:

    9. *The learned trial judge has failed to establish the impact of the rejection of the evidence aimed at establishing an unlawful*

assembly on the rest of the case for the prosecution causing prejudice to the accused-appellants;

10. *the learned trial judge has failed to consider the infirmities of the prosecution witnesses in their proper perspective before acting upon their evidence, causing much prejudice to the accused-appellants;*
11. *the learned trial judge has misdirected herself in the assessment of the impact of a contradiction in the evaluation of the evidence of a prosecution witness, causing much prejudice to the accused-appellants;*
12. *the learned trial judge had misdirected herself on the degree of proof necessary for the purpose of establishing an ingredient of an offence in a criminal case;*
13. *the learned trial judge has failed to analyze the evidence in accordance with the well-established principles laid down by our court before concluding that the accused-appellant had acted in furtherance of a common intention;*
14. *due to one or more of the reasons set out above the accused-appellants have been denied a fair trial, which is guaranteed to person charged with a criminal offence; and*
15. *under all circumstances this is not a fit case to be sent for re-trial.*

Grounds of appeal Nos. 1, 3, 5, 9, 10, and 11

Failure of the trial judge to properly evaluate the *inter se* contradictions.

6. Grounds of appeal 1, 3 and 5 will be considered together. The main ground urged is that the learned trial judge had failed to consider the contradictions *inter se* which affect the credibility and reliability of the totality of the Prosecution's evidence.

7. It was submitted on behalf of both the 1st and 2nd accused-appellants that the learned trial judge has failed to consider the *inter se*

contradictions between the witnesses which according to the appellants create a serious doubt on the credibility and testimonial trustworthiness of the witnesses' evidence when considered in its totality. At this juncture, it is necessary to briefly summarise the evidence narrated by the main witnesses separately to consider the *inter se* contradictions in context.

Evidence of PW-02 – Handunnetti Riyal De Silva

8. PW-02, Handunnetti Riyal De Silva, the younger brother of the deceased, lived in a neighboring house on the same land with the deceased. Around 9:30 AM on the morning of the incident, he saw the deceased riding a bicycle alone near Pottawala, heading towards his home. While waiting at a culvert where laborers gathered in order to find work, PW-02 observed the 3rd accused, pass on a bicycle, followed 5–10 minutes later by the 1st accused on bicycle holding two swords, and the 2nd accused, riding the bicycle. Later in the day, while returning home, PW-02 encountered the 1st and 3rd accused on a bicycle, with the 1st accused holding a gun and shouting that the deceased had been shot. He also saw the 2nd and 5th accused following on a separate bicycle. PW-02 found the deceased shot and, with help, took him to the hospital before providing a statement to the Ambalangoda Police Station.

Evidence of PW-03 – Ranjith De Zoysa

9. According to PW-03, Ranjith De Zoysa, the brother-in-law of the deceased, on the morning of the incident, the deceased visited his house, and they went together to a field in search of work. On their way back, they encountered Loku Honda (1st accused), who approached them on a bicycle, unarmed. An argument ensued between the 1st accused and the deceased. After abusing in filth, the 1st accused had gone towards his house, the deceased had proceeded to his sister's house and PW-03 returned to his own house. Shortly afterward, the

deceased had come running to PW-03's house shouting that the 1st and 2nd accused were pursuing him with swords. PW-03 had stepped out of his house when the 1st and 2nd accused had started to chase behind PW-03 who had run for his dear life and managed to get away by going into a nearby land. He had observed the 3rd accused Raja arriving on a bicycle and handing over a gun to the 1st accused. PW-03 then heard from a person named Jagath Kumara (PW-03) that the deceased had been shot, though he did not witness this. On questioning PW-03 also recalls that there was some blood on the palm of the deceased when he saw him. He later saw the deceased at the hospital and made a statement to the Police the on that day or the day after the incident.

Evidence of PW-13 - Dinesh Kumara

10. PW-13, Dinesh Kumara, the sole eyewitness, testified that he was a neighbor of the deceased, whom he identified as "Heen Aiya". That morning at the request of the deceased's sister, PW-13 had gone in search of the deceased and found him inside Sepala's house (also the house of PW-03 Ranjith) with some blood in the palm. Then he had observed that the 2nd and 3rd accused arriving on a bicycle carrying a gun, which they handed to the 1st accused, (who PW-13 referred to as "Loku Aiya"). PW-13 had then seen the 1st accused load the gun with two cartridges and fire through a window of Sepala's house, hitting the deceased, who was inside. The deceased had then fallen to the floor after the first shot, and the 1st accused then had gone up to the deceased and shot again before leaving with the 2nd, 3rd, 4th, and 5th accused on bicycles. PW-13 later seen the deceased being taken to the hospital and made a statement to the Police.

Evidence of PW-05 – Jagath Kumara De Zoysa.

11. PW-05 is related both to the accused and the deceased. Initially, when he was called upon to give evidence, he claimed that he cannot remember clearly, however, upon being worn and summoned on a subsequent date,

this witness narrated that he is a cousin of both the deceased and the 1st accused-appellant. The witness had seen the deceased with PW-03 Ranjith De Zoysa, in some form of a fight with the 1st accused who happened to be armed with a sword. The 2nd accused also had been present with the 1st accused. After asking them not to fight, he claims to have left the scene and proceeded to his home. Then, with the hearing of an explosion, and shouting of a crowd, he had rushed and seen the deceased fallen near a coconut tree. At the same time, he had seen the 1st, and the 2nd accused leaving the scene. The 1st accused was seen carrying an object which appeared to be similar to a gun.

Contradictions *inter se.*

12. Now as for the alleged contradictions, it was submitted that according to PW-03 Ranjith Zoysa, the place of shooting is his house; and whereas according to PW-13, Janaka Kumara, it is the house of Sepala, and they contradict each other. On a careful reading of the evidence Janaka Kumara no doubt refers to the house of Sepala. Then he explains further that it is also the house of Ranjith Zoysa, both Sepala and Ranjith Zoysa appear to live in the same house, thus this is misconceived.

13. Next, it was argued that according to Ranjith Zoysa, the gun was handed over to the 1st accused by the 3rd accused when the 1st and 2nd accused were chasing Ranjith Zoysa. However, PW-13, Dinesh Kumara did testify that, 2nd and 3rd accused came on a bicycle and handed over the gun to the 1st accused. I will now consider these contradictions. Certainly, PW-13, Dinesh Kumara, in his evidence-in-chief has stated that the 2nd and the 3rd accused arrived on a bicycle with a gun and handed it over to the 1st accused. This evidence had been subjected to extensive cross-examination and a series of omissions from the Police statement (at page 189), the inquest (at page 190) and the non-summary (at page 190) have been elicited that PW-13 had not referred to the 2nd accused coming with the 3rd accused when the gun was handed over. This witness admits that he cannot clearly remember if the 2nd accused

came with the 3rd accused and concedes that his previous assertions may be correct. There is certainly a contradiction as alleged which the trial judge has not considered in context.

14. In evaluating the effect and import of this inconsistency, it is relevant to note that the witnesses have given evidence sixteen years after they witnessed this incident. The omission is that PW-13 Dinesh Kumara failed to state that the 2nd accused came with the 3rd accused when the gun was given to the 1st accused. It is correct that in the Police statement, the inquest, and the non-summary he had made no mention of the 2nd accused coming with the 3rd accused. Thus, in all probabilities, the presence of the 2nd accused at the point of bringing the gun is something that is narrated for the first time in giving evidence, sixteen years after the incident.

15. The issue for determination is whether this inconsistency has arisen due to the utterance of a deliberate untruth or if it is due to the faulty memory that is attributable to the lapse of time.

16. It is settled law that minor discrepancies should not be given undue emphasis, and the evidence is to be considered from the point of view of trustworthiness. The relevant consideration and test are whether such testimony inspires confidence in the mind of the trier of facts. If the evidence is not credible and cannot be accepted by applying the mind of a prudent man, then it certainly affects the credibility of the Prosecution version in general. An omission or the discrepancy should then go to the root of the matter or the fact in issue that is under consideration. [**Samaraweera vs. Republic** - [1991] Sri L R 256].

17. Then in **Veerasamy Sivathasan vs. Attorney General** [SC Appeal 208/2012 (15 December 2021)] cited the following dicta of the Indian case of **State of Uttar Pradesh vs. M. K. Anthony** [1985 AIR 48 (SC)] 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 scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in 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..."

18. Then F.N.D. Jayasuriya, J., in **Wickremasuriya vs. Dedoleena and Others** [(1996) 2 Sri L.R 95] held that.

"After a considerable lapse of time, as has resulted on this application, it is customary to come across contradictions in the testimony of witnesses. This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by witnesses; a judge must expect such contradictions to exist in the testimony. The issue is whether the contradiction or inconsistency goes to the root of the case or relates to the core of a party's case. If the contradiction is not of that character, the court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and

having regard to the demeanour and deportment manifested by witnesses."

19. In **Jagathsena vs. Bandaranayake** [(1984) 2 Sri LR 39] Colin-Thome J., held that when considering contradictions *inter se* between the testimony of two witnesses the trial judge should consider if the discrepancy was due to dishonesty or to defective memory or whether the witness' powers of observations were limited.

20. By any standard, the lapse of sixteen years is considerable and significant. It is natural and quite normal that it can affect the recollection of events witnessed by any person. PW-13 Dinesh Kumara in cross examination admits that if he had not referred to the 2nd accused previously it may be correct and that he cannot remember if the 2nd accused came. This witness had seen several events during that morning, where the 1st, 2nd and 3rd accused along with the 4th accused were present, arriving with the gun as well as leaving on two bicycles. In such circumstances, it is quite probable and natural for this witness to have made a mistake of this nature after 16 years due to faulty memory. It is more probable than not the discrepancy was due to dishonesty but due to defective memory and the witness' powers of observation being limited. PW-13 Dinesh Kumara is a chance witness who happens to be present at a crime scene by coincidence and may also be considered a disinterested witness as he has no has no personal interest in the outcome of a case. To my mind his evidence read as a whole appears to have a ring of truth. Thus, this discrepancy does not affect the credibility of the totality of the prosecution evidence.

21. Next inconsistency alleged is the *inter se* contradiction between the evidence of the Police Investigator PW-15 IP Mettananda and the eyewitness PW-13 Dinesh Kumara, where PW-13 Dinesh Kumara states that two shots were fired but IP Mettananda had recovered only one empty cartridge. This was highlighted as a contradiction or a matter

unexplained by the Prosecution. By the learned President's Counsel for the 1st accused. The argument advanced is that if there were two shots fired, then the Police should recover two empty cartridges. Certainly, the eyewitness PW-13 Dinesh Kumara has clearly stated that two shots were fired. Logically, then, there should be two empty cartridges. According to PW-15 IP Mettananda he has recovered several parts of the casings of SG cartridges, and P16 and P9 are clearly casings of two SG cartridges as well as P8 and P11 are two waddings. Thus, this submission is misconceived. In any event, as the medical evidence clearly confirms that the deceased had two separate gunshot injuries this confirms and corroborates the eyewitness. Accordingly, grounds of appeal 1, 3 and 5 have no merit.

Grounds of appeal Nos. 2, 8, 12 and 14

Misdirection as to the burden / standard of proof and fair trial.

22. The next ground of appeal is that the learned trial judge has failed to appreciate the burden of proof and misdirected herself that the standard of proof by referring to balance of probabilities. On the perusal of the judgment, it is correct that after considering evidence the learned trial judge has referred to the proof on a balance of probabilities at page 18 of the judgment. However, at the commencement of the judgement at page 4 adverting to the principles of law to be guided as the burden of proof and the standard of proof, the learned trial judge has correctly adverted her mind to the requirement of proof beyond reasonable doubt and the presumption of innocence. Similarly, at the conclusion at page 20 of the judgement, the learned trial judge has come to the specific finding that the prosecution has proved its case beyond reasonable doubt. The appellants have advanced this argument of misdirection based on this single reference to the civil standard of balance of probabilities made at page 18 of the judgment.

23. A misstatement of law by the learned trial judge as to the burden of proof or the standard of proof to that matter would be tantamount to a

denial of a fundamental right of any accused person as enshrined in Article 13(5) of our Constitution which stipulates that, 'Every person shall be presumed innocent until he is proved guilty'. A misdirection on the burden of proof is so fundamental in a criminal trial that it may vitiate a conviction. [**Nandana vs. Attorney General** (2008) 1 Sri L.R 51].

24. Then whilst writing a judgment a judge must have in his mind the principles of law for example the principle relating to presumption of innocence, the accused's right to remain silent, the burden cast on the prosecution to prove the case beyond reasonable doubt which stays throughout the case etc. [**Sarath vs. Attorney General** (Eric Basnayake J.) (2006) 3 Sri L. R96]. I would add that it is best that such advertence be manifested in the judgement.

25. The trial judge has in fact adverted to the correct burden and standard of proof of beyond reasonable doubt at the commencement and the end of her judgment. But the civil standard is also referred at one instance midway in the judgement. Thus, the trial judge has certainly been mindful of the required burden and the standard of proof in a criminal case. Hence, this is not an instance of a blatant unequivocal misdirection. It is if at all ambiguous. In this regard I find the following dicta of the Canadian Supreme Court enlightening in deciding this issue. That, "*trial judges are presumed to know the law: That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law.*" [R. vs. Burns, 1994 CanLII 127 (SCC): [1994] 1 S.C.R. 656 at pp. 664-65, 89 C.C.C. (3d) 193 at pp. 199-200.: R. vs. Smith (D.A.) (1989), 1989 ABCA 187 (CanLII), 95 A.R. 304 (C.A.) at pp. 312-13, affirmed 1990 CanLII 99 (SCC), [1990] 1 S.C.R. 991].

26. Considering the totality of the evidence the Prosecution has in fact placed evidence which is sufficient to prove its case beyond reasonable doubt and the fact that the trial judge has been mindful, adverted to the correct principles at the commencement and finally held that the Prosecution has proved count No. 3 beyond reasonable doubt makes it clear that the trial judge has alluded and adverted to and evaluated the evidence on the correct standard of proof; beyond reasonable doubt. Accordingly, this ground of appeal to my mind has no merit.

Grounds of appeal Nos. 6, 7, and 13

The trial judge arrived at the wrong conclusion that the accused-appellants participated in the crime with a common intention.

27. The Counsel submitted that to maintain a charge on the basis of common intention the mere presence is not sufficient. The prosecution must prove an overt act manifesting his sharing of the murderous intention and his mere presence is not sufficient. In the case of **Queen vs. Vincent Fernando** 65 NLR 265 this aspect was considered and opined that;

> *"A person who merely shares the criminal intention or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under Section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. In the Penal Code the words which refer to acts done extend also to illegal omissions."*

28. It is argued that the evidence is not sufficient to establish that the 2nd accused entertained a common murderous intention with the 1st accused and that there is no proof of a criminal act manifesting the criminal mind to find the 2nd accused guilty for count No. 03.

29. In the case of **King vs. Assanna and others** 50 NLR 324 Ramanathan J., stated that;

"W*here the question of common intention arises the jury must be directed that,*

i. the case of each accused must be considered separately;
ii. that the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed;
iii. common intention must not be confused with similar intention entertained independently of each other;
iv. there must be evidence of either or circumstantial evidence of a pre-arranged plan or some other evidence of common intention; and
v. the mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence of common intention unless there is other evidence which justifies them in so holding."

Then, in the case of **Don Somapala vs. Republic of Sri Lanka** 78 NLR 183 Thamotheram J., opined that, the requirement of common murderous intention against an accused could be satisfied by either having gone with the intention of committing the murder or at the spur of the moment joining in the act of committing the murder.

30. Let me consider the items of evidence against the 2nd accused from which an inference of the requisites of the sharing of the common murderous intention may be drawn. Firstly, the 2nd accused was present initially when the 1st accused abused the deceased and left threatening that he will come back. (evidence of PW-02 Riyal). Then, 1st and 2nd accused are seen coming on a bicycle with swords and also chasing the deceased as well (PW-03, Ranjith Zoysa). Then 3rd accused brings a gun and gives it to the first accused who shoots the deceased. Then both the 1st and the 2nd accused are seen leaving after the shooting on a bicycle

together with a gun. This series of participatory conduct of the 2nd accused clearly goes beyond the mere the presence. From the point of the utterance of a threat by the 1st accused then returning with weapons and also chasing the deceased as well as witness leaving together with a gun are all clearly indicative and lead to the necessary inference that the 2nd accused was aware and was acting together with the 1st accused with a clear intention in himself to cause death. What other inference is possible? I see none. Initially they had swords, which are not utensils used in day-to-day activities but lethal weapons with the potential to cause fatal injuries. Being armed and acting in this manner certainly demonstrates a clear intention to cause the death of the person so pursued. On the face of the above the only reasonable and irresistible inference is that the 2nd accused has actively participated and was sharing the common murderous intention with the 1st accused. The series of events and acts, the 2nd accused was seen together as opposed to one-off sudden incident by the first accused in the presence of the 2nd accused clearly excludes any other reasonable hypothesis that can be consistence with the innocence of the 2nd accused. In these circumstances, there is overwhelming evidence to establish that the 2nd accused was sharing the common murderous intention. Considering all the above issues it is crystal clear that the 2nd accused did have the requisite common murderous intention to commit the act of murder. Accordingly, this argument is misconceived.

31. Similarly, I will now consider the evidence against the 3rd accused, from which an inference of the requisites of the sharing of the common murderous intention may be drawn. The 3rd accused himself had been seen throughout the morning moving about with the 1st and the 2nd accused, by PW-02 Riyal De Silva. The 3rd accused was seen riding a bicycle followed by the 1st and the 2nd accused. The 3rd accused. Subsequently, when the 1st and the 2nd accused were pursuing the deceased and Riyal De Silva, armed with swords, the 3rd accused has come on bicycle with a gun which he then handed over to the 1st accused.

Then the shooting takes place, and thereafter, the 3rd accused was also seen leaving on a bicycle with the 4th accused, with the 1st and 2nd accused on another bicycle. Therefore, the 3rd accused, apart from being seen moving with the 1st accused, was instrumental in bringing the firearm when the 1st and 2nd accused were in hot pursuit of the deceased, so to speak. On the analysis of these items of evidence, cumulatively, the only reasonable and probable inference is that the 3rd accused was acting with a common murderous intention with the 1st accused. What other inference could be drawn when a person hands over a firearm in the heat of the pursuit by the 1st accused? Therefore, there is sufficient evidence to establish that the 3rd accused was acting together with the 1st accused, sharing a common murderous intention. The learned trail judge has considered these items of evidence, and correctly concluded as to the existence and entertaining of the common murderous intention between and amongst the 3rd, 1st, and 2nd accused persons. Accordingly, these grounds of appeal on common intention are misconceived.

Ground of appeal No. 3

Prejudice and bias in evaluating the evidence and the improper rejection of the defense's evidence.

32. The 1st accused opted to give evidence whilst the 2nd and 3rd accused opted to make statements from the dock. The 2nd and 3rd accused merely denied, and stated that they are not guilty. The learned trial judge has considered the defence evidence and dock statements at pages 15 – 18 of the judgement. Having summarised the 1st accused's evidence, the learned trial judge has rejected his evidence primarily considering the improbability of the reason given for absconding for twenty days. In coming to this determination, the following improbabilities have been considered. Firstly, the assertion that he has no envy with the deceased but he was prompted to abscond and hide in view of an incident between his father and The Police, twelve years

ago. There is no logical or rational reason for the 1st accused to go into hiding for such an incident which had taken place twelve years ago. Further, the failure to deny the evidence of a land dispute has also been considered as a basis for the rejection of the dock statement. Primarily, the basis of the rejection is the improbability. The reason for absconding is so improbable, it cannot be true. Thus, it is an utterance of a falsehood, that has tainted his entire evidence and to that extent, the learned trial judge has considered the 1st accused's evidence and rejected the same.

33. Similarly, the dock statements have been also considered and rejected on the basis that the statements do not create any doubt on the Prosecution case. As for the failure to evaluate the defence case, the main argument is that the dock statement had not been properly analysed and evaluated in the proper perspective. As for the dock statement it is now settled law that a judge should in evaluating a dock consider the following principles:

i. *"If the dock statement is believed it must be acted upon;*
ii. *If the dock statement creates a reasonable doubt in the prosecution case the defence must succeed;*
iii. *If the dock statement cannot be accepted or rejected the defence must succeed"* [**Queen vs. Kularatne** (71 NLR page 529)].

As stated above, the dock statements of the 2nd and the 3rd accused are mere denials and pleading of innocence and ignorance. The accused certainly have a right to silence, and if such accused exercised his right to silence, no adverse inference can be drawn from such silence. However, if an accused, on his/her own volition abandons this right and opts to make a dock statement, and fails to address the incriminating evidence against him/her, such dock statement becomes a deficient dock statement (per Jayasuriya J in **Ajit Samarakoon vs. The Republic** (Kobaigane Murder Case) [2004] 2 Sri LR. This is a ground to reject a dock statement. Though the learned trail judge has not stated in so many words, the in this instance is justified on this

basis. Thus, the trial judge's rejection cannot be found fault with. Accordingly, this ground of appeal has no merit.

34. It was submitted that PW-01 the Pathologist is not competent to express an opinion as to the distances of the firing and it is the preview of a forensic ballistics expert, or a firearms examiner and the trial judge erred when she considered the opinion of the Pathologist as to the distances. The doctor confirms that the deceased had two injuries caused by two gunshots fired at him. One, in the abdomen area, and the second on the back of the leg. Based on the spread of pellets penetrating the body, the doctor had expressed an opinion that this shot had been fired from a distance and possibly when the deceased was on a standing position. As for the second injury on the back of the leg, which had been an injury which had broken through the skin and bone, was also identified to be a gunshot injury probably by a shotgun and fired at a close range. Then expressed an opinion as to the probable distances based on the nature of these injuries. It is this last item with the probable disenchant which the pathologist is not competent to express an opinion.

35. However, PW-14, the Investigating Officer observed the scene and identified that a shot had been fired through a window. In view of the damage observed around the windowpane. Then, he has observed the place where the deceased had fallen, to be the other end of the said house and clearly has observed that the said place is visible and is in direct view from the window that was also damaged. He had given the distance between the window and the place where the deceased had fallen. Thus, even in the absence of the Pathologist's evidence as to the distances there is other evidence to corroborate PW-13 's' evidence as to the distance. As such this has not caused any prejudice or resulted in any miscarriage of justice.

Conclusion.

36. An appellate court that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they cannot be supported on any reasonable view of the evidence. The traditional test for unreasonable verdict applies to cases such as this one in which the verdict is based on an assessment of witness credibility. In short, while an appellate court must re-examine the evidence and to some extent reweigh and consider the effect of the evidence, great deference must be given to the findings of credibility made by the trial judge given the advantage he has in seeing and hearing the witnesses evidence. [**Alwis vs. Piyasena Fernando** 1993 1 Sri LR 119]. The contradictions *inter se* in this instance do not go to the root of the case or relate to the core of the prosecution's case and evidence of the witnesses is otherwise cogent, having regard to the Test of Probability and Improbability.

37. For the reasons adumbrated above, in our opinion, on the facts and the law, as there is no merit in any of the grounds of appeal urged by the 1st, 2nd, and 3rd accused-appellants, I see no merit in this appeal of the 1st, 2nd, and 3rd accused-appellants. I affirm the convictions and the sentences of each of these accused-appellants separately, and dismiss this appeal of all the accused appellants.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL