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

In the matter of an Appeal under Section 331of the Code of Criminal Procedure Act No.15/1979

C.A.No.201-207/2014
H.C. Panadura No.2467/2008

1. Yon Merenna Seeman Hewage Nilantha Kumara Silva
2. Devaradurage Ujitha Kumara Soyza
3. Hengodage Sandun Chamara Silva alias Malukata
4. Hengodage Ruwan Chaminda Silva alias Suddha
5. Yon Merenna Seeman Hewage Darshana Silva
6. Pathirage Sumith Kumara
7. Yon Merenna Seeman Hewage Sanath Kumara

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

****

BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Palitha Fernando P.C. with Himalee Kularatne for the 1st and 3rd to 7th Accused-Appellants.

Darshana Kuruppu with Chinthaka Udadeniya for the 2nd Accused-Appellant.

Suharshi Herath S.S.C. for the respondent

ARGUED ON : 12th November, 2018, 07th January, 2019, 25th January, 2019 & 07th February,2019.

DECIDED ON : 17th May, 2019

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ACHALA WENGAPPULI, J.

The 1st to 7th Accused-Appellants (hereinafter referred to as the 1st to 7th Appellants) were indicted before the High Court of *Panadura* by the Hon. Attorney General on three counts. The 1st count of the indictment reads that the Appellants were members of an unlawful assembly which had the common object of causing hurt to one *Hewage Kithsiri Silva* alias *Mahatun* on or about 14.08.2005 at *Pinwatta* of *Panadura*. The second count reads that the Appellants were members of the said unlawful assembly when one or more members of the said assembly caused the death of the said *Hewage Kithsiri Silva* and they knew that such offence could have been

committed in prosecution of the said object and they continued to be in the membership of the said unlawful assembly at the time of committing such offence. Thirdly the Appellants were charged that they shared common intention with others in causing death of the said *Hewage Kithsiri Silva.*

Upon their election to be tried without a jury, the trial commenced with recording of their plea of not guilty. After the prosecution case was closed all the Appellants made dock statements and called a witness on their behalf.

In delivering its judgment, the trial Court convicted all the Appellants for all three counts. They were imposed a term of six month imprisonment, in respect of the 1st count while in respect of the 2nd count the Appellants were imposed death penalty after recording their *allocutus.*

Aggrieved by their conviction to the indictment and imposition of death sentence, the Appellants sought to challenge its validity by invoking appellate jurisdiction of this Court seeking to set aside the said conviction and sentence.

In support of the appeals of the 1st, 3rd, 4th, 5th, 6th and 7th Appellants, learned President's Counsel raised two primary grounds of appeal, the scope of which he later expanded during submissions. The two grounds of appeal that had been raised before us are as follows:-

a. the trial Court has failed to carefully evaluate the evidence of the purported only eye witness to the incident,
b. the trial Court has erroneously rejected the evidence of the solitary witness for the Appellants.

Learned Counsel for the 2nd Appellant (the 3rd Accused-Appellant as per the docket) contended that the trial Court has erroneously convicted him when there was no evidence of his participation to the alleged incident by which the death of the deceased was caused.

It is appropriate that we consider the submissions of the Appellants, in the backdrop of a short summary of evidence that had been presented before the trial Court by the prosecution as well as the Appellants, which exercise would undoubtedly equip us for proper appreciation of the contention of learned Counsel for the Appellants.

The prosecution relied on the solitary eye witness to the incident, the 16 year old son of the deceased, *Prasad de Silva* (PW2), as to the circumstances under which the death of the deceased was caused and the wife of the deceased *Dilrukshi de Silva* as to the circumstances that prevailed prior to the incident which resulted in the death of the deceased and its immediate aftermath. It also relied on the evidence of the investigating officers and the Consultant Judicial Medical Officer who conducted the post mortem examination on the body of the deceased.

Prasad, in his evidence claimed that he was at home reading a newspaper and at about 1.45 p.m. a three wheeler had stopped in front of his house. He identified the 1st, 3rd, 4th, 5th and 7th Appellants who had arrived in it as its passengers and the 6th Appellant as the driver. The 2nd Appellant followed the three wheeler on foot. The 1st and 5th Appellants have called out for the deceased to come out of the house. *Prasad* saw a T56 firearm with the 1st Appellant while the 5th and 7th Appellants possessed two "small pistols". He also saw "manna" knives with the 3rd and 4th

Appellants. *Dilrukshi*, who also saw the arrival of the three wheeler had identified the 1st Appellant with a T56 weapon, 3rd and 4th Appellants with manna knives, 5th and 7th Appellants with pistols and the 6th Appellant with a sword. Sensing danger, *Dilrukshi* responded to the calling out for her husband by the Appellants with the explanation that her husband is not at home and pleaded with them not to harm him. The 3rd Appellant had thereafter peeped through the window of the front room in which the deceased was having a nap after his lunch. The 3rd Appellant had then alerted the 1st Appellant and the others that the deceased was there. Upon his discovery, the deceased jumped out of the room, through a window, and ran towards the Galle Road through neighbouring gardens and thereby avoiding getting onto any public road.

The witnesses claimed that at this juncture the group had split into two in their act of chasing after the deceased. *Prasad* claims that the 1st, 2nd and 7th Appellants had run after the deceased while the others got into the three wheeler and proceeded in the direction where the deceased ran. *Dilrukshi* however claims all of the Appellants ran after the deceased and she is not sure whether the three wheeler had followed the deceased's trail or not.

Having witnessed the Appellants' act of chasing after his father, *Prasad* too had run after them. He saw the 1st Appellant firing at the deceased who was running away from his pursuers. *Dilrukshi* also had heard several shots being fired as she walked with difficulty in that direction due to the reason that she was in her last stages of her pregnancy. The group had chased after the deceased only along the main road. At one point of time *Prasad* lost sight of the deceased near the land belonging to

one *Bindu Kumara,* (who was later called as a witness for the Appellants) which had a parapet wall at its boundary along the main road. The deceased entered the property through its canal side boundary and the Appellants were about 30 feet chasing behind him. The 4th, 6th and 7th Appellants, who have arrived there at that time in the three wheeler had joined with others. Earlier on he stated that he saw the 7th Appellant walking with the 1st Appellant. The group then confronted the deceased and thereafter the 1st Appellant shot at him. The deceased fell down after the gun shot and was thereafter surrounded by the Appellants. The witness did not see what each of the Appellants did to the deceased who fell down after the shooting.

Thereafter, the Appellants left the scene passing the place where the witness was. The 1st Appellant then told *Prasad* that they did not kill his father. The witness at that point of time ran to the place where the deceased was lying and saw a bleeding wound on his neck. He was joined by his mother who arrived there after a few minutes.

Panadura Police Station received the 1st information about this incident through a telephone call at 2.00. p.m. and had arrived at the scene by 2.20 p.m.

IP *Priyantha* of *Panadura* Police conducted investigations and saw *Dilrukshi* and *Prasad* at the scene. The body of the deceased was found at No. 5, *Pirivena* Road, *Pinwatta,* and the statement of its owner *Bindu Kumara Silva* was recorded. A knife with a blade of 26 inches was recovered by the officer, along with three spent casings of T56 ammunition lying near the dead body. He inspected the front compound of the

deceased's house. IP *Priyantha* recovered two spent casings of ammunition along the Galle Road, eight spent casings of ammunition in front of a spice shop and a deformed bullet in front of the sub post office of *Pinwatta* which had its wall damaged due to gun shots. The house near the dead body was found also had a similar damage caused by gun shots. IP *Priyantha* states that all 13 spent casings of ammunition which were recovered by him, appeared to have been fired from a T56 rifle.

The Appellants were arrested at different times by the Police but there were no recovery of any firearms or cutting weapons subsequent to their arrests.

Consultant JMO Dr. Attygalle, who performed the post mortem examination on the body of the deceased, had observed a total of 13 external injuries. Of these injuries, the rifled firearm entry wound on the forehead had its corresponding exit wound in the neck, was termed as the only necessarily fatal injury due to the damage it had caused to the brain. Blackening was noted by the Consultant JMO around the said entry wound indicating that it had been fired at close range.

Another injury termed as an entry wound, also with blackening around it, caused by a rifled firearm was noted on the front of the chest of the deceased with a corresponding exit wound at his back. Two superficial cut injuries were also noted on the body of the deceased by the Consultant JMO, in addition to another superficial stab injury located on the right thigh. The body of the deceased also had several abrasions on its limbs. The deceased had a full meal of rice in his stomach and it also contained a certain amount of alcohol. The Consultant JMO expressed the opinion that

the cut and stab injuries, being superficial, may have been caused during a scuffle.

The death of the deceased was due to gunshot injuries to his head and neck.

When the prosecution closed its case, the trial Court had called for the defence as it was of the view that all the Appellants had a case to answer.

All Appellants made statements from the dock denying any involvement with the death of the deceased. They also called the owner of the property in which the body of the deceased was found. He was listed as PW3 on the back of the indictment but was not called by the prosecution in support of its case.

Bindu Kumara de Silva, an executive attached to a reputed private establishment, stated in his evidence that on that day he was having his afternoon nap after lunch, when he suddenly woke up to a sound of firecrackers. It was initially heard by the witness as coming from a distance but the sound of firecrackers continued thereafter indicating that it had shifted to a closer location indicating it moved towards his house. The witness was with his wife who was seven months pregnant with their first child at that time. She became overtly fearful upon hearing the sound of firecrackers and the witness had to devote his time and attention to console her. He waited for about ten minutes to venture out to see what the noise was about after it subsided.

After coming out of his house, the witness saw a few of his neighbours who have gathered outside his property, near the gate. They told the witness to check his vehicle for any damage that might have caused due to the gunfire. Only thereafter the witness found the body of the deceased lying near his vehicle. He knew some of the Appellants since they were from the same locality but did not see any of them when he came out of the house.

His wife was terrified upon hearing about the fatality. She developed a condition that needed urgent medical attention. The witness attended to his wife by seeking medical help but unfortunately due to this condition, she eventually miscarried.

He did not see either *Prasad* or *Dilrukshi* near the body when he first saw it although he saw them at a later point of time, upon his return after telephoning the Police. By then there was a large crowd of onlookers who have gathered around.

This is the summary of evidence that had been placed before the trial Court by the parties.

Learned President's Counsel, in substantiating the first ground of appeal that the trial Court has failed to carefully evaluate the evidence of

the purported solitary eye witness to the incident, relied on the following grounds seeking to challenge his credibility;

i. *Prasad* who claims to have been the only eye witness to the shooting has made his statement to the Police implicating the Appellant only after a lapse of three months and therefore his evidence becomes unreliable since it fails the test of spontaneity,

ii. his explanation for the delay, attributed to personal safety is not a valid reason owing to the fact that he was residing with his mother until the 7th day almsgiving ceremony was over and therefore has had ample opportunity to make a detailed statement in addition to the short statement he made in identifying his father's body,

iii. the trial Court erroneously considered his evidence given at the inquest in accepting his evidence as truthful and reliable when there was no material to establish that *Prasad* in fact gave evidence at the inquest,

iv. the trial Court has failed to attach sufficient weight to the omission that had been highlighted by the Appellant on the evidence of *Dilrukshi* that she failed to mention in her statement which was made on the same day of the incident, that her son had run after the Appellants and that he did witness the incident of shooting,

v. the trial Court has failed to consider the evidence of the Police that they were looking for an eye witness to the incident but found none, until *Prasad* made a belated statement,

vi. the trial Court has failed to consider the evidence of *Dilrikshi* that when she reached the place of the incident *Prasad* was already holding his father, but no blood was seen on his clothing, and therefore his claim of being there at the time of the shooting is not probable,

vii. the trial Court has failed to consider the evidence of motive as relied on by the prosecution in the proper perspective of the possibility of false implication of the Appellants,

viii. the trial Court erroneously concluded that the medical evidence corroborates the evidence of the eye witness since there was no corroboration provided by the fact that the deceased had gunshot wounds, which was obviously the case after a bout of shooting.

In relation to the second ground of appeal that the trial Court has erroneously rejected the evidence of the solitary witness for the Appellants, the learned President's Counsel submitted that there was no acceptable reason attributed by the trial Court in totally rejecting the evidence of the only defence witness *Bindu Kumara de Silva.* It was also contended that the evidence of the said witness satisfies all the tests that are employed in evaluating credibility of witnesses and therefore the trial Court was clearly in error in rejecting the same and thereby denying the benefit of any reasonable doubt that might have arisen in favour of the Appellants in respect of the credibility of the purported eye witness of the prosecution.

The basis of the submission is, in view of *Bindu Kumara de Silva's* evidence, that the claim of *Prasad* that he witnessed the shooting which resulted in the death of the deceased becomes improbable as he was not seen by the said defence witness when he came out of his house for the first time after the shooting subsided. The defence witness was emphatic that he saw the mother and son only after he returned to the place for the 2nd time after making a phone call to Police.

The 2nd Appellant's contention in support of his ground of appeal that the trial Court has erroneously convicted him when there was no evidence of his participation to the alleged incident which resulted in the death of the deceased, is clearly on the footing that there was no evidence to implicate him.

Learned Senior State Counsel in her submissions sought to defend the conviction of the Appellants by the trial Court by its decision to act upon the evidence of *Prasad, by* highlighting the fact that only two contradictions that were marked off his evidence. Those contradictions were on trivial matters which does not really affect his reliability as truthful witness for the incident. The claim of belatedness and its explanation had been considered in detail by the trial Court and in the judgment it was clearly stated the reasons for acceptance of the testimony of witness. Therefore, learned Senior State Counsel contended that the challenge on the reliability of the eye witness mounted by the Appellants is without any merit.

It is also her contention that the Appellants have made a "confession" to *Dilrukshi* admitting their complicity to the murder when

they met her soon after the death of the deceased and that too on their way back from the scene. She relied on the evidence of firing 13 shots is a clear manifestation of the collective intention of the Appellants who chased after him.

Having referred to the evidence presented by the parties before the trial Court, the several grounds of appeal relied upon by the learned Counsel for the Appellants as well as their submissions in support of them and the submissions made in reply by the learned Senior State Counsel for the Respondent, we believe that now is the appropriate stage to consider them in detail.

The complaint by the learned President's Counsel that the solitary eye witness made a belated statement which rendered his evidence unreliable to be acted upon by a trial Court should be considered at the outset.

It has been held in ***Sumanasena v Attorney General*** (1999) 3 Sri L.R. 137, by *Jayasuriya* J that;

> *"... just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the belated witness."*

Perusal of the judgment of the trial Court reveals that it had in fact considered the belatedness of *Prasad* in making a statement to Police three

months after the incident, in order to determine the reason attributed for such delay is acceptable to it or not. The witness himself admits that he made a detailed statement after about three months, in addition to the short statement he made when he identified the dead body prior to its post mortem examination. The reason attributed by the witness for his delay is that, having participated in the 7th day almsgiving of his dead father, he took shelter in one of his relative's house at *Mahawa* since he felt his life would be threatened if he was to remain in *Pinwatta* area thereafter.

During cross examination of *Prasad,* learned Counsel who defended the 1st and 5th Appellants at the trial, it was elicited that he made a statement to Police during post mortem examination and also gave evidence during the inquest held on the following day after the incident. The witness was repeatedly cross examined as to his evidence at the inquest by all the Appellants.

The incident is dated 14.08.2005. Witness *Dilrukshi* stated her statement was recorded on that day itself by the Police. Learned Counsel for the 2nd, 3rd and 4th Appellants clarified during trial that witness *Prasad* made his first statement on 15.08.2005 at 4.15 p.m. and his 2nd statement was recorded on 13.11.2005. Learned Counsel for the 7th Appellant clarified that from the witness that inquest proceedings were also held on the following day i.e. 15.08.2005.

There was no omission or contradiction marked off the evidence of *Prasad* at the trial on his claim of identifying the Appellants and witnessing the act of shooting upon the evidence he had given at the inquest proceedings. Contradiction 2V1 from the inquest proceedings was marked

in relation to his assertion before the trial Court that his father slept in the front room. It was suggested to him that he came running after hearing the gun shot and only at that point of time he did see the Appellants near his home.

The trial Court, in considering the admitted fact of belatedness of *Prasad* in making a detailed statement to Police, accepted the explanation provided for the delay that the witness changed his residence to *Mahawa* due to threats to his life. Nonetheless the trial Court also considered the question of truthfulness and reliability of the evidence of *Prasad* in the light of the fact that there was no inconsistency highlighted off his evidence at the inquest and the 2nd statement that had been made after three months.

We find no illegality in the said process of evaluation that had been undertaken by the trial Court on the evidence of the sole eye witness in assessing credibility. The trial Court in the said process could have equally noted that the much highlighted "belatedness" does not really affect the evidence of *Prasad* in the absence of any omission or contradiction with his evidence before the trial Court and his evidence at the inquest proceedings in implicating the Appellants. The trial Court is clearly entitled to come to a finding that *Prasad* presented a sequence of events at the inquest which is consistent with his evidence at the trial Court in the absence of any contradiction or omission marked by the Appellants on material points, when they in fact have highlighted the fact that he gave evidence at the inquest during their cross examination of the witness on other trivial matters.

Coomraswamy in his **Law of Evidence** (Vol. II Book 2 at p. 1057) describes the test of spontaneity in following terms:-

> *"The promptness with which a witness makes his statement to the police soon after an incident would be a point in his favour on the ground of spontaneity. On the other hand, the belatedness of such a statement would tend to reduce the weight of the evidence of that witness, particularly where there were opportunities for tampering with his evidence."*

Certainly, the submission of the learned President's Counsel on this point is valid if *Prasad* made his statement belatedly for the first time implicating the Appellants and when considered with the background of admitted prior enmity among the two parties. As already noted, it is therefore reasonable to assume, in the absence of any contradiction or omission, that he did implicate all the Appellants in his evidence before the inquirer into sudden deaths. It is our view that, the witness had implicated the Appellants at the earliest available opportunity he has had and that too before judicial proceedings where possibility of exerting influence by a third party is minimal. Contrary to the submissions of the Counsel, there was clear evidence, elicited by the Appellants themselves, that the witness *Prasad* did give evidence before the inquirer into sudden deaths. Hence, the trial Court did not import the reference to inquest proceedings all by itself but was invited to consider them by the Appellants themselves.

The contention of the learned President's Counsel that the evidence of the solitary eye witness *Prasad* does not satisfy the test of spontaneity therefore fails.

Whether there were threats to his life and whether it was due to those threats he shifted residence becomes insignificant factor in favour of the Appellants in this setting. But *Prasad's* conduct is consistent with the inference that his implication of the Appellants at the inquest may have justified entertaining such an apprehension by him and his mother. The motive attributed to making an accusation belatedly against the Appellants as contended by them before us, therefore also fades into insignificance owing to this factor.

Learned President's Counsel's submission based on the evidence of the police officer who stated that they were looking for an eye witness to the incident but found none until *Prasad* made a belated statement too loses its impact in the light of the above finding since it is clearly a wrong "opinion" expressed by the investigating officer without having a complete appraisal of the material available at that point of time.

Learned President's Counsel invited our attention to the omission marked off the evidence of *Dilrukshi* in her failure to mention in her statement to Police that her son, *Prasad,* had run after the Appellants who were chasing behind her husband. Here too, no such omission was marked off her evidence at the inquest. In these circumstances, the said omission assumes lesser significance in assessing the weight of the evidence of the eye witness; in determining the question of fact whether

he was there at the place of the incident to witness the shooting due to which the death of the deceased was caused.

The failure of *Dilrukshi* to observe any blood on the clothing of her son, who held the deceased, though might be relevant, could not be taken as a factor which would taint her evidence in its entirety justifying its total rejection as untruthful and unreliable. Given the mental condition she was in, having placed under stressful conditions, her power of observation may have been impaired. Her advanced state of pregnancy coupled with the factors of an armed gang chasing after her husband few minutes ago, the proclamation of the 1st Appellant that her husband is no more and seeing her husband with bleeding injuries on the lap of her son are sufficient to justify the failure of the witness to observe such details.

One of the complaints against the judgment of the trial Court by the learned President's Counsel is that it had treated the evidence of the consultant JMO who stated that the deceased had suffered two gunshot wounds as an item of corroboration of the eye witness account provided by *Prasad* as to the death of his father was erroneous since the witness was fully aware that his father was fired at by his assailants.

Having perused the judgment of the trial Court, we are not inclined to agree with the learned President's Counsel on this issue.

The context in which the above statement made in the judgment by the trial Court is the claim by the witnesses that the deceased was fired at repeatedly by the 1st Appellant when all of them had chased after him. The trial Court considered the observations of damage noted on the walls of buildings due to gun fire and the evidence relating to the recovery of

spent ammunition casings along the route taken by the Appellants in support of the said sequence of events as described by the witness. The word used by the trial Court in describing the effect of these two items of evidence is " සනාථ" instead of the word " තහවුරු" which is the generally used term by Judges to denote the word in corroboration. This we find a correct statement since it is consistent with the claim of the prosecution witnesses that the deceased was repeatedly fired at and the independent observations by the investigators supports the said claim.

In view of the above considerations, we are of the opinion that the first ground of appeal relied upon by the learned President's Counsel, on behalf of the Appellants (except for the 2nd Appellant) has no merit.

The second ground of appeal that had been raised by the learned President's Counsel should be considered next. It was contended before this Court that the trial Court has erroneously rejected the evidence of the solitary witness for the Appellants.

In his submissions in support of this ground of appeal, learned President's Counsel highlighted the fact that the defence witness, who was employed as a senior executive at a reputed Company, had no reason to suppress any evidence in relation to the incident and due to the tragedy of losing his first child after a miscarriage as a direct result of this incident, he would not have had any affiliation or sympathy to the perpetrators who were responsible for the incident of shooting. However, according to the learned President's Counsel, the trial Court has failed to note these obvious considerations in its undertaking of the evaluation of his evidence for credibility and reliability and thereby, arriving at an

erroneous conclusion that the defence witness's evidence is tainted with partiality and therefore it should not be accepted as a truthful and reliable account of the incident. He accordingly argued that the evidence of the said reliable defence witness raises a reasonable doubt as to the claim of the sole eye witness that he was there soon after the shooting was over attending to his father, and the Appellants are entitled to the said benefit of doubt.

The trial Court, in its evaluation of the defence witness of his credibility, had primarily considered the probability of his assertion that he did not even make an attempt to see what was going on in his own garden, even though he could hear the sound like "firecrackers" for no apparent reason. As a result of this, the trial Court had drawn an adverse inference that the witness's claim of not seeing the incident is an improbable one. It also inferred that his claim of not seeing any of the Appellants there is made due to his partiality in favour of the Appellants who were his neighbours.

In ordinary circumstances, the probable behaviour of a person who was placed under similar circumstances as the defence witness, would be to make at least an attempt to find out the reason for the unexpected firecracker sound coming from his own garden at least out of curiosity , especially when there was no apparent threat to his own safety since he was in his own bedroom with windows closed and curtains drawn. The trial Court was right to consider this aspect of his evidence in applying the test of probability when it evaluated his evidence for credibility. Unfortunately the trial Court failed to consider the circumstances as referred to by the learned President's Counsel, to test the defence

witness's evidence whether under those set of circumstances his failure to investigate the cause for the sound is probable claim or not.

Adding to the circumstances in favour of the defence witness's credibility, the reason attributed by him in shifting his focus to the condition of his wife rather than the sound of firecrackers coming from his own compound, was that the lady was terrified due to this unexpected and sudden loud noise. The fact that the witness did not venture to see the incident when it happened is tacitly supported by the witness's own testimony when he said that his wife was almost petrified when she overheard him informing the Police about the dead body found in his garden. If the witness had even looked out of his windows and saw the incident of shooting as it happened, it is highly unlikely that he had to go outside to investigate. His wife was equally unaware as to what happened just outside their home until she heard her husband reporting it to Police. No sooner she overheard the telephone conversation, she developed signs which required medical attention and the witness had to attend to the urgent medical emergency on one hand and to assist the investigation on murder that had just taken place on the other. The claim of the witness that he did not know that a person was shot in his own compound is further supported by his evidence that he saw few villagers who have gathered outside his gate and told him to check his vehicle for any damage which may have caused it due to the shooting and the body was seen only when he went to inspect his vehicle. This supports the witness's claim that he was totally unaware as to the murder of the deceased up until that point of time.

The witness claimed when he ventured out to see what happened after about 10 minutes since the sounds of firecracker ceased, he did not see any of the Appellants, some of whom he already knew as individuals from his own locality. He did not see either *Prasad* or *Dilrukshi* near the dead body but claims to have seen them when he returned to the scene after informing the Police and attending to his terrified wife.

It is natural for the persons who were involved with the murder to disappear from the scene of crime without lingering around thereafter. The absence of the Appellants at the scene therefore is a natural and a probable occurrence. Even if the defence witness is partial towards the Appellants, he had no reason to deny the presence of *Prasad* at the scene unless he knew that *Prasad* is an eye witness and therefore it helps the Appellants, if he denies his presence at the scene. It is clear from the Police evidence that they recorded the witness's statement no sooner they arrived at the scene. Only thereafter a statement from *Dilrukshi* was recorded at her residence. *Prasad* implicated the Appellants only on the following day during the inquest. Therefore, it is highly unlikely that the defence witness was privy to the existence of an eye witness to the incident and therefore wilfully denied his presence at the scene in order to provide a partial account of the incident in favour of the Appellants.

During cross examination of the defence witness, learned State Counsel elicited evidence with a view not to discredit the witness, but to explain away the delay of the witness's act of coming out of the house to see what had happened. Not a single contradiction or omission was marked during the lengthy cross examination by the State. There was no suggestion by the State that he lied under oath in order to protect the

Appellant from punishment or that he deliberately lied by stating that he did not see *Prasad* near his father's body when he came out of the house for the first time and ten minutes after the incident of shooting.

In view of the above reasons the trial Court was clearly in error when it limited its evaluation of the defence witness applying the test of probability only to one aspect of his evidence and completely failing to appreciate other probabilities. It also failed to apply the other tests on evaluation of credibility. It has been consistently held by Superior Courts that there should be no differentiation of evaluation of a witness's testimony depending on the party who calls him. Both the witnesses for the prosecution and defence must be treated equally in dealing with evaluation of their evidence, except an accused as a witness, for he is protected by several rules in relation to limits of his cross examination.

In the unreported judgment of this Court, ***Sisira Bandaula alias Mahatun v Attorney General*** CA 122/2006 - decided on 09.10.2014, where *Goorneratne* J. elaborated on the duty of the trial Court to evaluate the case presented by an accused on following terms;

> *"It is very unfortunate that this Court has to observe that the trial Judge has not considered and given his mind to the defence case properly. If there were contradictions, it is the duty of the trial Judge to deal with them in the same manner he dealt with the prosecution case and decided as to whether such infirmities go to the root of the defence case. The prime duty of the trial Judge is to weigh the evidence*

correctly and decide whether the defence case is capable of creating a reasonable doubt in the prosecution case."

The trial Court, in its judgment did not clearly state the "inconsistencies" that had compelled it to reject the evidence of defence witness. In these circumstances we hold that the trial Court has acted contrary to the principles laid down in the said judgment.

The 2nd ground of appeal raised by the learned President's Counsel therefore has merit in it.

The said determination by this Court that the evidence of the defence witness was wrongly rejected by the trial Court alters the case for the prosecution significantly. The evidence of the eye witness that he went up to the place where his father was fallen soon after the Appellants have left becomes an unreliable claim as a result. The witness for the defence stated in his evidence that he came out of his house after about 10 minutes since the sound of firecrackers ceased. If the defence witness's estimation of time of ten minutes is correct, then *Prasad* had not reached the body of his father for more than ten minutes. *Prasad* claimed that he saw the shooting of his father from a distance about 20 meters. It is highly improbable that he would take more than ten minutes to reach a place only 20 meters away where his father was lying after being shot at. This factor alone renders his claim of witnessing the incident of shooting, which resulted in the death of his father, highly unreliable.

However, that factor does not necessarily compel a Court to consider *Prasad,* a 16 year old school boy at the time, as a deliberate liar

who concocted a total fabrication to implicate the Appellants due to their prior animosity since the prosecution had failed to verify the basis of the estimation of time from the defence witness, during cross examination. Therefore, it is our view that this is not a situation where the maxim *falsus in uno falsus in omnibus* applies to his evidence.

In ***Samaraweera v Attorney General*** (1990) 1 Sri .L.R. 256 *Perera* J held that:-

> *" In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so.*

His lordship cited the following passage from the judgment of the Court of Criminal Appeal by T.S. Fernando J in ***Francis Appuhamy v The Queen*** 68 N.L.R. 437 in support of the said pronouncement;

> *"We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly, in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or*

enemies of such witnesses. In that situation, the Judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

The resultant position is that the remainder of *Prasad's* evidence could be acted upon, if found reliable enough, to determine other questions of facts, having regard to the totality of the evidence presented before the trial Court. However, the prosecution is now bereft of any reliable evidence as to the incidents that took place where the deceased received his only necessarily fatal gunshot injury to his head.

In order to decide on the challenge mounted by the Appellants on the validity of their conviction by the trial Court, this Court must then consider the extent to which the unreliability of *Prasad's* evidence affects the prosecution in establishing its case beyond reasonable doubt.

Learned President's Counsel highlighted that the trial Court had found the Appellants guilty of 1st and 2nd counts in the indictment but there was no finding in relation to the 3rd count which alleged that the Appellants committed murder and are punishable under Section 296 read with Section 32 of the Penal Code. They were sentenced also only on the 1st and 2nd counts. This is reflected in the proceedings of 31.07.2014.

However, the trial Court, at the penultimate paragraph of its judgment, had clearly found all the Appellants guilty to all counts contained in the indictment (සියළුම අධි වෝදනාවන්ට). Therefore, the Appellants were, in effect, found guilty to all three counts by the said judgment of Court even though they were sentenced only to two counts

which could probably be due to an oversight. We note that the trial Court zhad adopted hitherto unknown procedure in pronouncing its judgment and sentencing the Appellants.

In the judgment itself, after having found all the Appellants guilty to all counts in the indictment, the trial Court had immediately imposed death sentence on all of them. Then in the last paragraph of the judgment, it had recommended the sentence of death should be carried out against all the seven Appellants since they were guilty to a murder committed in a cruel manner. Then in the proceedings of 31.07.2014, the Court first imposed the sentence of six month imprisonment in respect of the 1st count. Then the Court proceeded to pronounce its determination of the guilt of the Appellants to the 1st and 2nd counts having already punished the Appellants for the 1st count. The trial Court then called for the *allocutus* of the seven Appellants and recorded them followed by the imposition of death penalty for the second time.

Since it is clear that the trial Court, in its judgment had found all seven Appellants guilty to all the charges contained in the indictment, this Court accepts that they have been duly convicted on all three counts even though the Court proceedings of the same day reflects otherwise, which could clearly attributable to an oversight.

Therefore, in these circumstances this Court must consider whether the conviction of the all seven Appellants on each of the three counts that contained in the indictment could be maintained in view of the fact that *Prasad's* evidence on the incident of shooting by the Appellants, as

a result of which the death of the deceased was caused, considered unreliable for the reasons stated in the preceding paragraphs.

As already referred to at the very commencement of this judgment, the prosecution sought to impute criminal liability on each of the Appellants on the basis of their being members of an unlawful assembly. It is alleged that they formed an unlawful assembly to cause hurt to the deceased and in the same course of transaction one or more members of the said assembly caused his death and that they knew such offence could have been committed in prosecution of the said common object and they continued to be in the membership of the said unlawful assembly at the time of committing such offence.

It is therefore important to identify the applicable legal principles in relation to the imputation of constructive criminal liability under the concept of unlawful assembly.

Section 138 of the Penal Code of Ceylon defines the term unlawful assembly and its different forms which are dependent on the common object of each such assemblies. Section 146 of the said Code then imposes vicarious criminal liability on each member of such an unlawful assembly as it states;

> *"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every*

person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

Dr. Gour in his treatise titled *The Indian Penal Code* (13th Ed) has identified several factors which should be established by the prosecution when it sought to impose "constructive criminality" on an accused by invocation of provisions of Section 149 of the Penal Code of India. These factors listed at p. 528 are as follows;

a. *there was an unlawful assembly,*
b. *that the accused was a member thereof at the time of committing the offence,*
c. *that he intentionally joined or continued in that assembly,*
d. *that he knew of the object of the assembly,*
e. *that an offence was committed by a member of such assembly,*
f. *that it was committed;*
    i. *in prosecution of the common object of the assembly, or,*
    ii. *was such, as the members of the assembly knew to be likely to be committed in prosecution of their common unlawful object.*

Prof. Peiris in his book titled ***General Principles of Criminal Liability in Ceylon*** notes (at p. 68) that;

" ... while section 146 introduces into our law a principle of vicarious criminal liability this principle has legitimate application only where the accused

entertains some mens rea, at least in the form of the required awareness of a probable consequence of the formation or continuance of the unlawful assembly, even though the mens rea attributable to the accused does not coincide with that ordinarily appropriate to the offence of which he is convicted."

These being the fundamental considerations that are involved in applying constructive criminal liability under Section 146 of the Penal Code, we note that ***Dr.Gour*** thereafter proceeds to consider the limitations of the scope of Section 149, (which is similar to Section 146 of the Ceylon Penal Code) in imposing constructive criminal liability in the following terms (at p.524);

"... a person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he endorses all that the other members say or do, nor is he , therefore, responsible for their acts of which he was not clearly cognisant."

He further adds that;

"... the members of an unlawful assembly may have community of object only up to a certain point, beyond which they mere differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to information at his command, but also according to the extent to which he shares the community

of object and as a consequence the effect of this section may be different on different members of the same unlawful assembly."

This approach in the imposition of constructive criminal liability requires a closer examination of the evidence presented against each member of the unlawful assembly, if a particular accused were to find guilty to an offence, another member of such assembly had committed. This effectively brings in a requirement of an individual treatment of each of the accused by a trial Court.

The Supreme Court, in ***Bandaranaike v Jagathsena and Others*** (1984) 2 Sri L.R. 397, has emphasised this point as it states that;

"In a case where there are several accused, the case against each accused must be considered separately. Omnibus evidence of a general character must be closely scrutinised in order to eliminate all chances of false or mistaken implication of innocent persons."

Divisional bench of the Supreme Court in ***Samy and Others v Attorney General*** (2007) 2 Sri L.R. 216 reiterates this principle as their Lordships have held;

"It is well settled law that mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is something which would make him a member of such an unlawful assembly... in a case of this nature it will be safer to

look for some evidence of participation by him before holding that he is a member of the unlawful assembly."

This is an approach consistently adopted by our Courts. In ***Andriyas v The Queen*** 67 N.L.R. 425 the Court of Criminal Appeal held thus;

"... mere membership of an unlawful assembly did not render each member of that unlawful assembly criminally liable for an offence committed by some other member thereof... such liability arose at law when the existence of certain other element or elements specified in section 146 of the Penal Code had been established."

In ***Samy and Others v Attorney General*** (supra) their Lordships have added the below quoted text from ***Gour*** (11th Ed, Vol. II, p.1296) which effectively discouraged imputation of presumptive involvement of each member. The text reads thus;

"Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears axes etc., this kind of omnibus evidence has to be very closely scrutinized in order to eliminate all chances of false or mistaken implication."

Divisional bench of the Court of Appeal, in ***Ranawaka and Others v The Attorney general*** (1985) 2 Sri L.R. 210 held the view that;

> *" ... the offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members... the act must be one which upon evidence appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object."*

A similar view was expressed by the Court of Criminal Appeal in ***The King v Sellathurai*** 48 N.L.R. 570.

The Appellate Courts have therefore clearly laid down the applicable principles of law in relation to imposition of constructive criminal liability and had imposed a burden on the prosecution in establishing its case on those terms.

If the prosecution seeks to impose constructive criminal liability upon an accused who had been a member of an unlawful assembly, then it was incumbent upon it to satisfy the trial Court to the required degree of proof that such member of that unlawful assembly had shared the common object in his mind which could be inferred from any overt act attributed to him .

On the question of burden of proof in relation to imposition of criminal liability under unlawful assembly, in a recent judgment of the

Supreme Court by the Chief Justice *Dep* in ***De Mel and three Others v Attorney General*** - SC/TAB/2A-D/2017 - decided on 11.10.2018, held a similar view when it was emphasised that;

> *"... it is their burden not only to establish the common object but also to prove that the existence of the common object is the only conclusion consistent with the facts and circumstances existed at that point."*

In ***Kulatunga v Mudalihamy*** 42 N.L.R. 331 it was recognised that the prosecution must prove there was an unlawful assembly with a common object as stated in the charge and not any other.

Thus, having referred to the applicable law, we now turn our attention to consider whether the trial Court has properly applied them to the evidence presented by the prosecution, in order to determine the legality of the imposition of constructive criminal liability on each of the Appellants, when it convicted them on the 1st and 2nd counts of the indictment.

The evidence of both witnesses, *Prasad* and *Dilrukshi* are consistent about the arrival of the Appellants in a three wheeler and that they were armed with different types of weapons which could be used to inflict injuries ranging from simple hurt to death of a person. The witnesses were emphatic that they saw a T56 weapon in the hands of the 1st Appellant, although they did describe the other fire arms which some others have possessed as "small pistols". There were more than five persons. They have alighted from the three wheeler and 1st and 5th Appellants have called the

deceased to come out. In those circumstances, it is natural to infer, that those who arrived at the house of the deceased, may have been motivated by the common objective of causing same harm to the deceased.

However, none of them uttered any threatening words or displayed any form of violence on *Dilrukshi* who, though sensed trouble with their arrival, courageously met them at the entrance to her house. None of the Appellants even made an attempt to come into the house forcibly to verify the truth of her claim that the deceased was not at home. Instead, only the 3rd Appellant peeped through the window to the front room and informed others that the deceased was there. It is not clear from the evidence that the deceased, upon him being discovered by the 3rd Appellant, had jumped out of the house through which window. Whether it was the same window or a different one was not clarified by the prosecution. If he had jumped out of the same window through which the 3rd Appellant, who had a pistol with him, had peeped in then that factor is in favour of the 3rd Appellant as his failure to use the firearm might negate any intention to cause hurt to the deceased. The deceased, having jumped through the window had thereafter opted to run through the adjoining garden to get away from the Appellants and thus avoiding taking the public road and thereby offer an easy target for the Appellants.

It is at this stage the group had split into two. *Prasad* claims that 1st, 2nd and 7th Appellants opted to walk while others went in the three wheeler. Although this evidence is at variance with his mother who stated that the group of men had run after her husband but she did not notice the three wheeler.

The Appellants, although decided to chase after the deceased, kept themselves to the public road and did not trespass on any other property in order to pursue the fleeing deceased.

This item of evidence adds a complication to the prosecution case as each group had less than five members each when they commenced their chase of the deceased. Beyond this point, the eye witness account of *Prasad* could not be utilised to impute criminal liability on the Appellants. Although it is possible to infer that upon seeing the deceased fleeing from them, the Appellants decided to mount a chase. But when the group split into two and went in the direction of Galle Road keeping to the public road, a question arises whether both groups had in fact chased after the deceased as the witness claimed? *Prasad's* evidence that the two groups had met thereafter at *Bindu Kumara's* garden. Being found that part of his evidence unreliable, it could not be utilised to decide whether there were more than five members of the original group who had reassembled there.

His evidence that he met the 1st Appellant after the incident of shooting could be accepted as it is supported by his mother. *Dirukshi* also met the 1st Appellant who still had the T 56 weapon in his hand, in the company of other Appellants. The 1st Appellant told *Dilrikshi* that "අන්න උඹේ මිනිහා මහතුන් ඉවරයි".

Both these witnesses claimed that they met the "Appellants", apparently returning after the incident. The prosecution was content with this omnibus reference to the Appellants and thus deprived its case of specific details of the presence of each of the Appellants there. Prasad said initially there were 7 Appellants while Dilrukshi said there were only 6.

There was no reference to three wheeler and to the person who drove it. In the absence of specific details as to who and who were there this item of evidence loses its reliability and weight. But there is clear and specific reference to the 1st Appellant as to what he had in his hand and what he said.

In effect the prosecution is therefore left only with the evidence in relation to the initial incident at the house of the deceased and the subsequent "return" of the "Appellants" presumably from the scene of crime. Due to unreliability of *Prasad's* claim of being an eye witness the case presented by the prosecution turns itself in to a case based on circumstantial evidence from a case based on an eye witness account.

The deceased had received two firearm wounds inflicted on his person upon being fired at close range. The injuries that could be attributable to cutting weapons are merely superficial ones as per the opinion of the Consultant JMO. Thus it creates an ambiguity whether they are intentional or accidental. A cutting weapon was also seen lying near the body when the Police visited the place.

The circumstances that were placed before the Court of Criminal Appeal in ***Wilson Silva v The Queen*** 76 NLR 414 are easily comparable to the circumstances that are highlighted before us in relation to the instant appeal.

In the said case, the Court of Criminal Appeal referred to nature of the injuries suffered by the deceased by stating that ;

> *" ... the deceased had sustained a total of sixteen injuries, only one of which, head injury alleged to have been inflicted by the 3rd accused, was necessarily fatal. The other fifteen injures, all of which were on the hand and legs, were not necessarily fatal, even considered cumulatively"* and *"The entire case for the prosecution rested upon the evidence of an alleged eye-witness."*

The deceased in the appeal before us also suffered only one necessarily fatal gunshot injury to his head and other injuries could not be considered as necessarily fatal injuries, even when considered cumulatively.

Having considered the evidence presented before Court, *Weeramantry* J. stated that :-

> *"The questions whether a person is aware of facts which render an assembly unlawful, whether he intentionally joins such an assembly or continues in it, and whether the common object of the assembly is to commit an offence, are all matters which must be determined from a series of circumstances. The acts or omissions of each alleged*

participant, the weapons used, the manner of their arrival at the scene, their prior utterances and so to speak every circumstance of significance in this regard would have to be evaluated. Such a task is only possible upon the basis of rules relating to the evaluation and assessment of circumstantial evidence.... On the degree of proof required of the sharing of a common object, the governing principles are no different from those relating to the degree of proof of common intention, and the authorities hereinafter referred to, showing that such a conclusion must be an inescapable one, would be applicable."

Applying these considerations to the instant appeal, it is our considered view that the prosecution has failed to prove beyond reasonable doubt as to the commencement and continuation of the unlawful assembly which alleged to have commenced with the common object to cause hurt to the deceased and ending with causing his death. It also failed to prove that there were five or more Appellants who were present up to the point of the death of the deceased. Although there were circumstances that justify an inference that there would have been more than one person present at the time the death of the deceased was caused, there was no reliable evidence in relation to their identities.

As the learned Counsel for the 2nd Appellant submitted that there were no clear and reliable evidence against each of the Appellants that they

were members of an unlawful assembly at any point of time which had the common object of causing hurt to the deceased.

The mere presence of the Appellants with deadly weapons does not necessarily give rise to the inference that they had common object of causing hurt to the deceased since their conduct falls short of the required degree of proof. The prosecution must prove that their common object was to cause hurt and no other. The circumstances relates to the incident at the house could give rise to multiple inferences that the group may have entertained other common objects as well, such as intimidation, trespass, abduction, in addition to hurt.

In ***Raut v State of Bihar*** 2002 Cri LJ 560, the Supreme Court, having considered the fact that;

> *"... It is admitted that no member of the unlawful assembly except Bahiya Mani Raut, inflicted any injury on the person of the deceased despite the fact that they were allegedly armed with weapons like lathis"*

and has held that

> *"There is no sufficient evidence prosecution which could prove beyond reasonable doubt that all the appellants had a common object of committing the crime of murder."*

This determination supports our view that, in the absence of any other evidence to justify an inescapable interference that their common object is to cause hurt to the deceased in spite of the fact that the Appellants were in possession of deadly weapons when they arrived at the house of the deceased, the prosecution has failed to establish the 1st and 2nd counts to the required degree of proof. The Appellants are therefore entitled to be acquitted of the 1st and 2nd Counts of the indictment presented against them by the Hon. Attorney General.

The 3rd count was levelled against the Appellants on the basis that they shared a common murderous intention with others when causing death of the deceased.

In considering the complicity of the Appellants under this basis of criminal liability, a divisional bench of this Court, in its judgment of ***Wijithasiri and Another v The Republic of Sri Lanka*** (1990) 1 Sri L.R. 56 laid down the following principles of law;

i. the case of each accused must be considered separately,

ii. that the accused must have been actuated by common intention with the doer of the act at the time the offence was committed,

iii. common must not be confused with similar intention entertained independently of each other,

iv. there must be either direct or circumstantial evidence of a pre-arranged plan or some other evidence of common intention,

v. *there 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.*

Returning to the evidence presented by the prosecution we must now consider the available evidence against each of the Appellants.

It is evident that the Appellants had arrived at the house of the deceased in a group armed with weapons. It is also evident that the 1st Appellant was its leader since it was he with another who called out for the deceased. It was he, to whom the 3rd Appellant reported that the deceased was there inside the house. The evidence of *Prasad* is that it was the 1st Appellant fired at the deceased as he fled from his pursuers upon being discovered. *Dilrukshi* a prosecution witness and *Bindu Kumara,* the only witness for the defence are consistent in their evidence that they heard a series of shots being fired. The Police had recovered 10 spent T56 casings along the route taken by the Appellants in their pursuit of the deceased. They also noted damage caused to several nearby buildings due to gun shots, a factor strongly supports the witness's description of the continued firing whilst chasing after the deceased.

The deceased had suffered two gunshot injuries which are due to close range firing using a rifled firearm and three spent casings of T56 ammunition were recovered lying near the body of the deceased.

It is clear that only the 1st Appellant who was in possession of a T56 weapon immediately before the firing began and he continued to possess a T56 soon after the firing was over, as seen by *Dilrukshi* and *Prasad.* It was

the 1st Appellant who told *Dilrukshi* about her husband's fate when he met her on his way back. Although she had varied as to the exact words uttered by the 1st Appellant at different times, she was effectively conveyed the message by the 1st Appellant that her husband is no more. The 1st Appellant did not deny making such a statement, in his statement from the dock and did not suggest his denial to the witness during his cross examination of the witness on this issue.

Therefore, it is our firm view that the prosecution has placed sufficient evidence to draw the irresistible and inescapable inference against the 1st Appellant as the person who shot the deceased at close range using a rifled firearm since it was only him who had a T56 firearm a weapon which matched with the description by the Consultant JMO as the one used in the shooting of the deceased before and after the event. His declaration of the fate suffered by the deceased confirmed his presence at the scene. The location of the necessarily fatal injury of the deceased proved beyond any doubt that when the 1st Appellant fired that shot at close range had clearly intended the death of the deceased and thereby satisfying 1st limb of Section 294 of the Penal Code.

In view of this reasoning we affirm the conviction of the 1st Appellant to the 3rd count on the indictment.

However, the prosecution has failed to prove the identity of any of the other Appellants who may have been present when the deceased was shot at and therefore are entitled to be acquitted from the 3rd Count of the indictment as well.

In conclusion we make the following orders;

i. All Appellants are acquitted from the 1st and 2nd Counts by quashing their conviction by the trial Court to the said counts,

ii. The 2nd to 7th Appellants are acquitted from the 3rd Count by quashing their conviction by the trial Court to the said count,

iii. The 1st Appellant's conviction for the 3rd count and the sentence of death imposed is affirmed,

iv. The appeals of the 2nd to 7th Appellants are allowed,

v. Appeal of the 1st Appellant, Yon Merenna Seeman Hewage Nilantha Kumara Silva, is dismissed.

The relevant High Court is directed to issue a fresh warrant in line with the orders made by this Court.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL