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

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant

Vs.

S.C.Appeal No.14/2015

SC/SPL/LA Application

No. .16/2014

Court of Appeal Case No.186-187/2007

H.C. Matara, Case No. 119/2003

1. Somi Ranasinghe
2. Karunasiri Ranasinghe
3. Nihal Dissanayake Alias Hinni Mahaththaya

Accused

And

1. Somi Ranasinghe
2. Karunasiri Ranasinghe
3. Nihal Dissanayake Alias Hinni Mahaththaya

Accused-Appellants

Vs.

Hon. Attorney General

Attorney General'sDepartment,

Colombo 12.

Complainant -Respondent

AND NOW

1. Somi Ranasinghe
2. Karunasiri Ranasinghe

1st &2nd Accused- Appellant -Appellants

Vs.

Hon. Attorney General

Attorney General'sDepartment,

Colombo 12.

Complainant-Respondent-Respondent-

3. Nihal Dissanayake Alias Hinni Mahaththaya

3rd Accused-Appellant-Respondent

BEFORE : **E.A.G.R. AMARASEKERA J.**
A.H.M.D. NAWAZ J.
ACHALA WENGAPPULI, J.

COUNSEL : Palitha Fernando PC for the 1st and 2nd Accused-Appellants in S.C. Appeal No. 14/2015.
Anil Silva P.C. with Nandana Perera for the 3rd Accused-Appellant in S.C. Appeal No. 25/2015
Rohantha Abeysuriya P.C. ASG for the Hon. Attorney General

ARGUED ON : 16th July, 2021

DECIDED ON : 04th June 2025

****

ACHALA WENGAPPULI, J.

The 1st and 2nd Accused-Appellants and the 3rd Accused-Appellant (hereinafter referred to as the "1st , 2nd and 3rd accused" were indicted before the High Court of *Matara* for committing the murder of *Ganegoda Gamage Upali Nishantha* on 20.03.1998 at *Denagama.* The three accused opted for a trial without a jury. The High Court, by its judgment pronounced on 16.10.2016, found the three accused guilty of murder and imposed death sentence on them. The 1st and 2nd accused have preferred a joint appeal against their convictions while the 3rd accused too preferred an appeal on his own by way of a separate petition of appeal. Both these appeals were taken up for hearing before the Court of Appeal, and by its judgment dated 11.12.2013, that Court proceeded to dismiss the appeals after affirming the convictions and sentences imposed on the accused.

The 1st and 2nd accused sought special leave to appeal against the said judgement of the Court of Appeal in SC Spl. LA No. 16 of 2014 whereas the 3rd accused sought special leave to appeal in SC Spl. LA No. 15 of 2014. These two applications were supported before this Court on 05.02.2014 and this Court was pleased to grant special leave to appeal in SC Spl. LA No. 16 of 2014 (SC Appeal No 14 of 2015) on following questions of law: –

a. Whether the learned Judges of the Court of Appeal have failed to analyse and evaluate the evidence led on behalf of the prosecution and thereby the 1st and 2nd appellants have been deprived of a fair trial?

b. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the evidence led at the trial disclosed a common murderous intention of the 1st and 2nd appellants?

c. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that a common murderous intention was formed on the spur of the moment considering the evidence led at the trial?

In respect of SC Spl. LA No**.** 15 of 2014 (SC Appeal No 25 of 2015), special leave to appeal was granted in respect of the following questions of law –

d. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the contradictions and omissions marked in the evidence of *Genegoda Gamage Piyadasa* do not shake

the credibility of his evidence inasmuch as the contradictions go to the root of the Prosecution case?

e. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the evidence led at the trial disclosed the 3rd appellant's common murderous intention?

At the hearing of the two appeals before this Court on 16.07.2021, learned President's Counsel who represented 1st and 2nd accused, learned President's Counsel who represented the 3rd accused, as well as the learned Additional SG, who represented the Attorney General, have consented to have these two appeals amalgamated and pronouncement of a common judgment.

The contentions that were advanced by the learned President's Counsel for the accused before this Court were centred primarily on two grounds, as the several questions of law on which leave was granted would indicate. While they collectively challenged the acceptance of the evidence of the solitary eye witness for the prosecution, as credible and reliable account of the incident, by both the Courts below as an erroneous decision, learned President's Counsel for the 1st and 2nd accused further contended the fact there were altogether 12 contradictions and 4 omissions that were marked off the alleged eye witness's testimony in itself is sufficient to reject that evidence altogether as that witness had demonstrably lied to Court and testified to an incident which he did not witness.

While this contention was presented on the basis of an erroneous assessment of the testimonial trustworthiness of the said eyewitness, in addition

learned President's Counsel presented their other contention that it was upon on erroneous imposition of criminal liability on the basis of sharing a common murderous intention, that their clients were convicted, which, in view of the evidence presented by the prosecution at the trial, appears to have formed on the spur of the moment.

Learned President's Counsel for the 3rd accused, particularly contended that the evidence against his client is limited only to calling out the name of the deceased person and throwing a stick at him at the end. He invited attention of Court to the evidence of the eyewitness, who himself admits that the 3rd accused did not cause any physical injury to the deceased and, contrary to the allegation of a shared common murderous intention with other two, he actually acted as a mediator by trying to diffuse the tense situation that had arisen earlier on that evening.

In view of these submissions by learned Counsel, I now tun to the evidence presented before the trial Court.

The deceased is the only son of the solitary eyewitness to the incident, *Ganegoda Gamage Piyadasa.* The father and son operated a wayside boutique shop built adjacent to their house, facing *Matara – Walasmulla* main road. The witness *Piyadasa* lived in that house along with his wife, an unmarried daughter and the deceased son. The 1st and 2nd accused, who are brothers of the same family, lived in the adjoining land. The 3rd accused also lived just across the street. The two brothers and the 3rd accused are closely related to each other.

Referring to the sequence of events that culminated with the causing of the death of the deceased, the witness *Piyadasa* said in his evidence that, in the

evening of 20.03.1998, his wife and daughter went out to a nearby house in order to make a telephone call to their elder daughter who has just given birth. The deceased has gone somewhere with his two-wheel tractor. *Piyadasa* was alone at his boutique shop and, at about 5.30 p.m., the 1st accused, the 2nd accused, and his wife have walked into that shop. Both the 1st and 2nd accused appeared to be under the influence of liquor. The 1st accused, having walked up to the cashier's table where *Piyadasa* was standing, abused him for about five minutes and threatened that both of them will be killed. He also attempted to smash up some glass bottles on the floor. The 2nd accused, who was also with his brother, however remained silent during this episode. The witness also observed a knife, kept by the 2nd accused in his trouser pocket. After some time, the three of them have left without causing any further trouble to the witness.

After about a half an hour since the three of them left, the deceased returned to the boutique shop in his tractor, carrying a load of cement bricks. Having parked the vehicle in front of the boutique, the deceased went into the house, by walking through the shop. At that time, *Piyadasa* was serving two of his customers and did not disclose the incident involving the 1st and 2nd accused to his son. After a few minutes, *Piyadasa* saw the three accused walking past his shop and continuing towards his house. He then heard the 3rd accused calling out to the deceased " මල්ලී, මල්ලී,". He also heard the deceased shouting "ඔදු අම්මෝ". That sound came from the direction of his house. Since *Piyadasa* was serving one of his customers at that time, after hearing the cries of his son, he looked through the rear window of the shop, but could not see what was happening. He then ran out of the shop through its rear door and saw the 1st and 2nd accused stabbing the deceased.

The two accused, after having pinned the deceased to the earth embankment at the rear of the house, were stabbing him. The witness described the manner in which the two accused stabbed his son, as if the two accused stabbed were in a contest (තරඟෙට ඇන්න). He also said in evidence that he did not count the number of stabs each accused has inflicted.

As *Piyadasa* rushed in shouting that his son is being stabbed and then the deceased started running towards him. He was bleeding profusely from his injuries. At that point, the 3rd accused threw a piece of stick at the running deceased, on which he tripped over and fell on the ground face down. The 1st accused thereafter stabbed the deceased once more on the back of his torso (කොන්ද) and tried to lift him with the knife still inside the body. Thereafter, the two accused have turned towards the witness threatening him that he too would be 'finished' (තෝ ඉවර කරනවා). Thereafter, the three accused have dispersed and the witness drove the tractor to bring his wife. Having met her and, after briefly describing that the 1st and 2nd accused had "finished" their son, drove back to taken the deceased to the hospital. On his way, *Piyadasa* met the 1st accused coming in the opposite direction driving his car. The two vehicles met over a culvert and when the 1st accused brandished his knife, *Piyadasa* ran off, leaving his tractor in the middle of the road.

After transporting the deceased to the hospital, the witness complained of the incident to *Hakmana* Police Station at about 7.30 p.m.

It is from this narrative provided by *Piyadasa* during the trial, the accused were able to mark several contradictions and omissions, to which they invited attention of this Court, in support of their contention that the High Court as well

as the Court of Appeal erred in its failure to afford them the benefit of doubt that arise in the prosecution case due to them.

In these circumstances, it is incumbent upon on this Court to consider the multiple contradictions and omissions that were particularly highlighted by the learned President's Counsel before this Court, along with the suggestions made to the witness during cross examination, in order to consider the determination made by the Courts below on the question whether the eye witness testimony is a credible and reliable account of the incident, in the light of applicable principles of law.

Of the multiple inconsistencies that were highlighted before the High Court, learned President's Counsel invited our attention to a set of contradictions, forming the contradictions marked as "V1" to "V4". These inconsistencies relates to *Piyadasa's* denial of stating to the police that the 1st accused was abusing them from his house and the deceased has questioned the reason for the said verbal assault ("V1"), denial of stating to police that the deceased, by responding to the 1st accused's verbal assault, said that they (the accused) were harassing them for over 10 years and having assaulted *Piyadasa,* they broke his shoulder ("V2"), denied of having stated at the inquest that the deceased has questioned the 1st accused, why they continue to harass them for over a period of 10 years ("V4"), denial of stating to police that the deceased had a piece of stick in his hand and the 3rd accused told him to put that away ("V3"), and were relied on by Counsel, in support of their aforesaid contention.

The effect of these inconsistencies, that arise out from the contents of the statement made to police by *Piyadasa* and his testimony in the inquest, is that the witness has made an attempt to downplay of any form of involvement on the

part of the deceased that could be construed as a contributory factor in the escalation of the situation, that eventually lead to his death. If what *Piyadasa* said in his statement is true, then, not only did he suppress the fact that his son's questioning of the 1st accused during his verbal assault, but also suppressed the fact that the deceased had a piece of a stick in his hand. Similarly, *Piyadasa* has also suppressed the fact that he too was assaulted by the accused and broke his shoulder, along with the fact that the 1st and 2nd accused, have continuously harassed them for no apparent reason for over a period of ten years.

The evidence of *Piyadasa* is that he made his statement to police soon after he brought the deceased to the hospital, which point he was pronounced dead. Naturally *Piyadasa* would have been distraught with the death of his only son and in that mental state he has made the statement. Similarly, the inquest was held on the following day, and even before the last rites of the deceased was performed. Irrespective of the mental state of the witness at the time of making the statement, the fact remained that he has made reference in that statement to the fact that his son has enquired from the 1st accused, who was abusing them even at that point of time, for a reason for their continuous harassment. He also mentioned to the police of the fact that the deceased also had a piece of stick in his hand, when he made enquiries from the 1st accused. These factors needed to be considered in the light of the submissions made by the learned President's Counsel for the 3rd accused, who contended that the deliberate act on the part of *Piyadasa* in the suppression of the '*genesis*' of the incident, which ought to be taken as a factor that casts a doubt on its acceptability as a truthful account.

Piyadasa, being an obviously interested witness, and for some unexplained reason, has failed to divulge these details before the High Court and denied having stated so to the police. However, it must also be noted that there are no

contradictions on any of these points marked through his testimony during the non-summary proceedings as all of them relates to inconsistencies with his police statement and his evidence at the inquest. This particular factor was noted by the learned High Court Judge and considered and taken note during his evaluation of the evidence of the sole eyewitness.

Except for the evidence that the 1st and 2nd accused have threatened *Piyadasa* and his son with death, just half an hour before the actual stabbing has taken place, the prosecution evidence makes no reference to any long-standing enmity on the part of any of the accused. Considered in this light, the suppression of the '*genesis*' of the attack, as contended by the learned President's Counsel for the 3rd accused, has effectively denied the prosecution of any evidence regarding this important factor. The only evidence is the threats issued by the 1st and 2nd accused when they came into the shop earlier on, in the same evening. In fact, the High Court has considered the contents of these highlighted portions of the statement of *Piyadasa* that were presented before it as contradictory statements, in spite of the fact that they could not be considered as '*evidence*', in order to arrive at a finding whether there was a sudden fight that erupted between the accused and the deceased.

In the light of the submissions made by Counsel, what should be considered by this Court is whether the Courts below have erred in law by accepting *Piyadasa* as a truthful and credible witness owing to these inconsistencies.

The judgment of ***The Queen v Julis*** (1963) 65 NLR 505, reveals that one of the questions presented before the Court of Criminal Appeal for determination was, in a situation where two of the prosecution witnesses have admitted they

falsely implicated an accused, whether it was still open to the jury to act on their evidence against the other accused. *Basnayake* CJ, after referring to the maxim; *falsus in uno, falsus in omnibus,* observed that (at p. 519) *"[I]n applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood."* Thus, even in an instance where a witness has admittedly lied under oath, his testimony need not be blindly and automatically rejected for that reason alone. Before a witness is found to have uttered a deliberate falsehood, the trier of fact should consider whether any of the factors that referred to by *Basnayaka* CJ, have contributed to the situation and then to arrive at a finding on the credibility of that witness. That being the consistent approach adopted by the superior Courts in dealing with a witness who uttered a falsehood under oath, in relation to dealing with inconsistencies of an average witness's testimony, who only denied having stated something different, that do not affect the core of his primary narrative, need not be given much of a significance, especially when that narrative satisfies the test of probabilities.

In this context, it is relevant to consider at this point of the effect of the three omissions that were marked off the evidence of *Piyadasa* on his credibility. During cross-examination of the 1st and 2nd accused, *Piyadasa* admitted that the incident of stabbing commenced with the deceased crying out loudly "ඔදු අම්මෝ", which in turn had alerted the witness to rush out of his shop to investigate. The witness failed to mention this fact in his police statement, in the inquest proceedings or in the non-summary proceedings. Clearly, the assertion that *Piyadasa* heard the cries of his son was presented in the High Court for the first time, and that too after a lapse of nine years.

Perusal of the evidence of *Piyadasa* in its entirety, reveals that the said witness also stated that, upon seeing the incident of stabbing, he shouted "ඛුදු අම්මෝ". He also shouted that my son is being stabbed. According to the witness the entire incident of stabbing has taken less than five minutes. This indicates the words "ඛුදු අම්මෝ" has featured in the evidence quite regularly, not as an item of evidence that has been introduced into the narrative belatedly, but as a natural reaction to the situation being unfolded before the witness.

The inconsistencies and omissions are, as it was submitted, in respect of the '*genesis*' of the incident. The narrative of the incident including what he saw and did during the incident and its immediate aftermath is, according to learned High Court Judge, is corroborated by other evidence.

This Court, in ***Dharmasiri v Republic of Sri Lanka*** (2012) 1 Sri L.R. 268, was called upon to consider the issue whether the mere belatedness and failure of the 1st witness to name the appellant in his statement, under the given circumstances, does not render the witness's evidence unreliable or lacking in testimonial creditworthiness; or the presence at the incident of the 1st and 2nd eyewitnesses is doubtful. In answering the said issue in the affirmative, this Court quoted a pronouncement made by *Jayasuriya* J, in ***Banda and Others v Attorney General*** (1999) 3 Sri L.R. 168 (at p. 172) to the effect that " *[O]missions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions*", with approval (at p. 277). Consideration of relative probabilities of the deceased screaming "ඛුදු අම්මෝ", it need not be emphasised here that the said act attributed to the deceased is clearly a natural reaction of a person, who was placed in such a situation. This reasoning is further strengthened when the number of stabs and

blunt trauma injuries the deceased has sustained within an interval of few minutes.

In the instant appeal too, in view of the circumstances under which the witness made statements to police and given evidence at the inquest, his failure to state that there was some reaction on the part of the deceased in his evidence, does not support a conclusion that his evidence should be rejected on the premise that he uttered a deliberate falsehood for denying that he stated so to the investigators in those instances. This view is further strengthened by the fact that the witness was neither questioned whether such an incident (the verbal interaction of the deceased) never happened, nor was he questioned that he stated so, in order to falsely implicate the accused to a crime they did not commit. In this regard it is relevant to consider the suggestions put to the witness by the three accused.

When the 1st and 2nd accused suggested to *Piyadasa* that he did not witness the incident of stabbing, his replied that what he disclosed before Court was what he saw with his own eyes. Similarly, when the 3rd accused also suggested that he has given evidence on an incident which he himself imagined of, the witness replied what he says now is exactly what he saw. The 3rd accused further suggested to the witness that he did not see the assault by a stick, but the witness asserted that it is a true fact.

It is to be expected that, *Piyadasa,* being the only eyewitness, asserting in his evidence that he witnessed the incident of stabbing and the accused's making every attempt to challenge this claim. However, the suggestion put to *Piyadasa* that he was not there at the scene is reduced to a mere proposition, when one considers the fact that he operates a boutique shop for living. It is clear from the

police observations the incident of stabbing has taken place in front of the house and close to the rear of the shop building. *Piyadasa* said in his evidence when he heard cries of his son, which alerted him of the stabbing, while he was serving a customer. If the shop was kept open, in fact it was, and with his wife being away, it is undisputable that *Piyadasa* obviously remained there and therefore has witnessed the incident by which the deceased came by his death.

The High Court has devoted significant space in its judgment to consider the effect of these several inconsistencies and omissions, in assessing the testimonial trustworthiness of the sole eyewitness for the prosecution. That Court, in justifying its decision to accept *Piyadasa's* evidence, concluded that there was no reason, either apparent from the evidence presented before it or from the suggestions put to the witness, that he falsely implicated any of the three accused to the incident of stabbing. Thus, these suggestions put to the witness has made no impact on his trustworthiness at all.

It is also to be noted that it was same trial Judge, who commenced the trial and continued to preside over the trial, until its conclusion at which point that the three accused were found guilty to the charge of murder. Learned High Court Judge, having observed the demeanour deportment of the eyewitness, particularly during cross- examination, has decided to accept his evidence as credible and reliable account of the incident.

Hence, the opinion formed by the learned trial Judge upon consideration of the demeanour and deportment of the only eyewitness in the witness box, is entitled to be given its due weightage in the determination of the credibility of a witness, essentially of being a question of fact.

It is noted earlier on that the High Court, in determining to accept *Piyadasa's* evidence as credible, found it corroborated by independent medical evidence. The evidence is that the 1st and 2nd accused have stabbed the deceased, as if there was a contest and, when the witness saw the stabbing, his son was facing him while the two accused were facing the deceased. The medical evidence reveals that the deceased suffered altogether 35 external injuries. Of these injuries, there were 20 stab injuries that penetrated into the plural cavity of the deceased, coupled with corresponding internal injuries to the larynx, lungs, heart, liver and kidneys. According to the JMO, injury Nos. 5,6,7,9,10,11,23,26 and 24 were necessarily fatal injuries and it is highly unlikely that the deceased would survive even for half an hour.

What is relevant in the present context is the fact that there were 12 stab injuries observed by the JMO, on the front of the deceased's chest area, and thereby amply supporting the witness's claim that he saw repeated acts of stabbing by the 1st and 2nd accused, when the deceased was facing him. The medical evidence also supports the witness's claim that he saw the 1st accused stabbing the deceased on his torso (කොන්ද), after he tripped himself over a piece of stick, that was thrown at him by the 3rd accused and fallen on the ground. Injury No. 10 was located at the back of his chest, near the spinal cord and penetrated into the abdominal cavity to cause a one-inch-long injury on the left kidney of the deceased. Injury No. 30, a minor injury seen on the right knee of the deceased, and injury No. 10, clearly supports the witness's claim that the deceased fell down while attempting to run away from his assailants and was stabbed on his torso.

In addition, the conduct of the witness upon being threatened with a knife near the culvert, is corroborative of conduct of a person who witnessed a gruesome attack on a loved one. *Piyadasa* said in his evidence that on his way back; after informing his wife of the stabbing, he met the 1st accused coming in the opposite direction in a car and he stopped his tractor near a culvert and fled. The fact that the witness's tractor was found near the culvert is confirmed by his wife, who walked pass it and by the police, as there was heavy traffic built up caused by the tractor that had stalled on the middle of the road near a culvert.

What made *Piyadasa* to flee in such an unusual manner from the 1st accused, who merely showed him a knife, whilst seated in his car?

The conduct of *Piyadasa* in this instance is quite unusual when compared with another average person, who was threatened in a similar fashion and qualified to be taken as an over-reaction. However, *Piyadasa's* said conduct could be understood, only if one considers the perspective of what he has witnessed a few minutes before. This is a person whose only son was brutally stabbed to death by the 1st and 2nd accused before his own eyes. The death threat issued by the 1st accused, after coming into the shop, early in the evening became a reality when the 1st and 2nd accused have stabbed the deceased to death. *Piyadasa* by then believed for certain that his life too is under a serious threat. When *Piyadasa* saw the 1st accused for the second time near the culvert with a knife, irrespective of the latter's restricted mobility to act immediately while being seated in a car, but after having witnessed the manner in which his son was stabbed, he was not prepared to take any chances. Thus, *Piyadasa* left his tractor on the middle of the road and fled away from what he perceived as an imminent threat to his life.

In appeal, the three accused have apparently placed heavy reliance on the ground of appeal that the trial Court has fallen into grave error when it decided to accept *Piyadasa's* evidence as credible evidence. The Court of Appeal, after considering the process of evaluation of the testimonial trustworthiness of *Piyadasa* undertaken by the High Court and after making a detailed references to each of these inconsistencies, has arrived at the conclusion that the learned trial Judge made no error in the determination of the said question of fact. In considering the said ground of appeal, the Court of Appeal has guided itself from the reasoning of the judgment by the Supreme Court of India in ***Uttar Pradesh v M.K. Anthony*** AIR (1985) SC 48, where an approach, similar to the one taken in the above cited local judicial precedents, was adopted. The apex Court of India stated that:

> *"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".*

In ***Veerasamy Sivathasan v Attorney General*** (SC Appeal 208/2012 – decided on 15.12.2021) and ***Chamila Perera v Republic of Sri Lanka*** (SC Appeal No. 171/2012 – decided on 04.11.2024), this Court made references to the above reproduced segment of the judgment of Court in ***Uttar Pradesh v M.K. Anthony*** (ibid) .

After having carefully perused the judgments of the High Court as well as of the Court of Appeal, I am of the firm view that the acceptance of *Piyadasa's* evidence as truthful and reliable account of the incident during which his son suffered fatal injuries, could not be faulted as an erroneous decision.

Moving on to the contention of the learned President's Counsel for the 1st and 2nd accused that the evidence presented by the prosecution failed to establish the two of them were actuated by common murderous intention as, if at all, it has to be formed at the spur of the moment, in the absence of a pre-arranged plan to commit murder. Learned President's Counsel for the 3rd accused also contended that, in view of the admission made by the sole eyewitness that the involvement of his client is restricted to calling out the name of the deceased and throwing a piece of stick at him, and therefore imposition of criminal liability on the basis of common murderous intention by the High Court and the Court of Appeal, affirming the said conviction are clearly erroneous decisions.

In view of the contentions advanced by learned President's Counsel for the accused on imposition of criminal liability on the basis of Section 32 of the Penal Code, it is convenient to consider the contention of the 1st and 2nd accused prior to the consideration of the contention advanced on behalf of the 3rd accused.

Learned High Court judge has relied on several items of evidence to satisfy himself of the existence of a common murderous intention entertained by each of the three accused in committing the murder of the deceased. These items of evidence include the calling out the deceased by the 3rd accused, the place where the attack on was carried out, the repeated use of a club to attack the deceased, the manner in which multiple acts of stabbing were inflicted, the area of the body

which had the greatest number of stab injuries, coupled with the evidence of subsequent conduct of the accused, particularly of the 1st accused.

The Court of Appeal considered the contention, presented before it by the learned President's Counsel for the 3rd accused that he did not share a common murderous intention with the other two accused. It appears from the judgment of that Court that neither the 1st and 2nd accused have presented a ground of appeal based on common intention nor raised same in their joint petition of appeal. In relation to the 1st and 3rd accused, the only ground considered by that Court was the correctness of the assessment made by the High Court on testimonial trustworthiness of *Piyadasa.*

In view of the questions of law on which this appeal was argued on, it is necessary to devote some space in this judgment to consider this aspect in a more detailed manner.

The evidence is clear that there was some animosity entertained by the 1st and 2nd accused against the deceased and his father. Judging by their conduct, it supports an inference that the said animosity was directed mostly towards the deceased. Having had the opportunity to cause bodily harm to *Piyadasa* inside his shop, the 1st and 2nd accused have resisted that temptation and have withdrawn after issuing only death threats. When the deceased returned home after about half an hour later, the situation changed drastically. Instead of the two accused, who came earlier on, the 3rd accused also joined them, in search of the deceased after seeing him returning home.

It was the 3rd accused who called out for the deceased "මල්ලි, මල්ලි" and lured the latter out of his house. Then the attack on him commenced without a warning and the deceased cried "බුදු අම්මෝ". The 1st and 2nd accused have

repeatedly stabbed the deceased mostly on his chest and chased after him shouting "නෝ ඉවර කරනවා" when the latter made an attempt to escape them. The 1st accused stabbed the deceased once more while *Piyadasa* shouted "බුදු අම්මෝ". After a while the 1st accused threatened *Piyadasa* once again near a culvert, making him to flee after abandoning his tractor on the road.

The repeated acts of stabbing clearly justify an inference that there was a prearranged plan of the accused as the two accused lost no time when the deceased emerged out of his house to spring into action and, within a matter of less than five minutes, have inflicted multiple deep stab and cut injuries, totalling to almost 30 injuries, resulting in his death. The murderous intention entertained by the persons who stabbed the deceased is easily established. It is the common meeting of the minds of the two that is disputed before us, but the evidence, taken in its totality, is clearly supportive of the conclusions reach on that point by both Courts below. Hence, I am of the view that the said conclusion is well supported by the evidence and in line with the applicable principles of law.

The High Court, after considering the evidence against the 3rd accused, formed the view that his involvement with the incident was not to save the deceased from attack but to contribute to the attack and has acted according to a pre-arranged plan along with the other two accused. The Court of Appeal, in affirming the conviction of the 3rd accused to the count of murder, has itemised the evidence against him and considered them in the appliable principles on Section 32 of the Penal Code. It then proceeded to reach the conclusion that the evidence has established that the 3rd accused shared a common murderous intention with the others. The appellate Court further added that " … *common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment.*"

In limiting the complicity of the 3rd accused to the murder of the deceased, learned President's Counsel has relied strongly on the admission of *Piyadasa* that he only heard him calling out "මල්ලි, මල්ලි" and saw him throwing a piece of club at the deceased. Learned Counsel further submitted that the role played by the 3rd accused in the incident was therefore more akin to that of a mediator, who tried to bring about a settlement between the two fighting parties. Hence, learned Counsel argued that the prosecution, in these circumstances, has totally failed to establish beyond reasonable doubt that the 3rd accused shared a common murderous intention with the other two and, on that account alone, he ought to have been acquitted from the count of murder.

In dealing with the contention that the 3rd accused was merely acting as a mediator, it must be noted that the said position was taken up for the first time before the Court of Appeal, except for a mentioning that before the trial Court in passing, by a question put to *Piyadasa.* Learned Counsel who represented the 3rd accused before the High Court, merely asked *Piyadasa* for his opinion, whether the 3rd accused came there to mediate. The witness denied this indirect suggestion with an emphatic denial and proceeded to clarify his answer by clearly implicating the 3rd accused as the person who lured the deceased out from his house by calling out "මල්ලි, මල්ලි". The 3rd accused did not take up the position that he was merely trying to mediate at that point in time, during his statement made from the dock. Except for registering the denial of attacking the deceased with a club, as he was somewhere else when the incident happened, the 3rd accused's only other claim made in his dock statement was *Piyadasa's* accusation against him is totally a lie.

When the sequence of events, as narrated by *Piyadasa,* is examined carefully in its entirety, it could be observed that he did not claim to have

witnessed the point at which the attack on his son had commenced. The witness only saw the three accused were walking past his shop. Within minutes he heard the 3rd accused calling out for the deceased. *Piyadasa* heard the 3rd accused call "මල්ලි, මල්ලි" from the direction of his house, just outside the rear entrance of his shop, while attending to one of his customers. He became alarmed of the attack and ran towards the back of his shop, only when he heard the deceased crying out "බුදු අම්මෝ". What he saw at that point of time was the 1st and 2nd accused were stabbing his son, as if they had a contest. The witness also saw the 3rd accused stood by in the vicinity. When the deceased started running towards the witness only the 3rd accused sprang into action. The 3rd accused, having picked up a piece of a club/stick, threw it at the running deceased, who suffered multiple stab injuries. The 1st and 2nd accused too were chasing after the deceased. They shouted that the deceased that he would be finished off (තෝ ඉවර කරනවා). The flying piece of club/stick, which the 3rd accused threw at the deceased, hit one of the legs of the deceased. After tripping over that piece of wood, the deceased fell on the ground. It was at that point the 1st accused has stabbed the deceased on his torso, for the last time.

The totality of the evidence of the eyewitness is considered, it is reasonable to conclude that the role played by the 3rd accused in this incident, is far from being an innocent neighbour who intervened to mediate between two parties, or an innocent bystander who happened to go past, but stopped to witness the incident, but more of a co-conspirator, who acted on a pre-arranged plan, intervening at the correct time. The 1st and 2nd accused had ample opportunity to mount an attack on the witness when they abused him inside the shop. The witness was alone and at least the 2nd accused had a knife with him. But for some reason they did not. The fact that, prior to the incident of stabbing, the 1st and 2nd

accused have limited their actions only to a verbal abuse against *Piyadasa*, supports the inference that their target in fact was the deceased and not the witness.

Piyadasa admitted that the 3rd accused had no prior history of animosity towards the deceased. If not for the act of the 3rd accused in calling out "මල්ලී, මල්ලී", the deceased would not have walked out of his house, given the animosity that exists between him and the 1st and 2nd accused, and thereby exposed himself to a great danger. By answering the call made by the 3rd accused, the deceased has unsuspectingly exposed himself to a mortal danger. *Piyadasa's* evidence is clear on this aspect.

In the preceding part, whilst dealing with the common murderous intention entertained by the 1st and 2nd accused, I have concluded that the two of them lost no time when the deceased emerged out of his house to spring into action and, within a matter of less than five minutes, have inflicted multiple deep stab and cut injuries, totalling to almost 30 injuries. Since the 1st and 2nd accused chased after the deceased, who started to run by stating "නෝ ඉවර කරනවා ", the 3rd accused effectively prevented the heavily injured deceased, who was bleeding profusely, from escaping his assailants, by throwing a piece of club at his legs. It could be a co-incident that the deceased had tripped over it and fell down. But the intention of the 3rd accused is clear that he wished to facilitate the other two of their avowed task of finishing the deceased off.

Now I wish to deal with the admission made by *Piyadasa* limiting the role played by the 3rd accused to calling out the deceased and throwing a stick at him. It is already noted the number of injuries the deceased has suffered that resulted in his death and *Piyadasa* only saw the latter part of the stabbing. The void

created by the absence of any evidence as to the commencement of the attack is filled by the medical evidence.

It is the opinion of the medical expert that injury Nos. 1,2 and 3, being superficial abrasions, could have been caused by pressing the blunt end of a pole/ club/stick onto the skin of the deceased, but quite forcefully. The injury No. 12, located in between shoulders, measured 22 inches in length and about 5 inches in its width. The expert witness was of the opinion that the deceased could have been assaulted with a club to cause that injury, repeatedly on almost the same spot, causing that cluster of contusions. He was also of the opinion that the club, produced marked "P1", if used for about four or five times to assault the deceased, could have caused contusions, in the manner he observed on the body of the deceased.

This factor, in my view strongly supports the role of all three accused in the attack on the deceased. The reason is that the deceased, who was conscious during the entire attack, would have tried to avoid being hit by the club. But the several contusions that are parallel to each other indicate that each blow by the club has landed on the same area of the body, because both the attacker and the victim remained in the same positions throughout the attack using the club. This is possible only if the deceased being held by others. The 1st and 2nd accused, who only had knives with them, could not have assaulted the deceased with a single club. They would have commenced their stabbing after the 3rd accused attacked the deceased with a club.

During this sustained assault with a club, the 1st and 2nd accused have obviously held the deceased, facilitating the 3rd accused, to aim his blows to the exact spot repeatedly, perhaps to weaken the deceased. The timing of the scream

"බුදු අම්මේ", when considered in this perspective, coincide perfectly with this attack. In this respect, it is very relevant to note that the expert witness has further opined that it could well be that the deceased was assaulted with a club during the initial stages of the attack, before being repeatedly stabbed. He further stated that similarly it is more likely that several persons were involved with the attack on the deceased. The JMO, who performed the post mortem examination on the body of the deceased, has already performed over 1000 such examinations and his opinions, based on scientific knowledge and experience, could undoubtedly assisted the trial Court as well as the appellate Court, in the determination of the guilt or innocence of the three accused on the charge levelled against them.

In spite of the strong *prima facie* case being established against the 3rd accused by the prosecution, he offered no explanation in his dock statement, at least by stating why he came along with the other two accused in search of the deceased. If the 3rd accused's involvement is that of a mediator, as he now trying to portray for himself, it could have presented for the consideration of the trial Court. Thus, the presumptive evidence presented against him by the prosecution through the eyewitness testimony became conclusive on his complicity in the murder.

In view of these considerations, I answer the questions of law in SC Appeal No 14 of 2015 are as follows:

a. Whether the learned Judges of the Court of Appeal have failed to analyse and evaluate the evidence led on behalf of the prosecution and thereby the 1st and 2nd appellants have been deprived of a fair trial? No.

b. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the evidence led at the trial disclosed a common murderous intention of the 1st and 2nd appellants? No

c. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that a common murderous intention was formed on the spur of the moment considering the evidence led at the trial ? No. There was pre-arranged plan.

The questions of law in SC Appeal No 25 of 2015 are answered as follows :

d. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the contradictions and omissions marked in the evidence of *Genegoda Gamage Piyadasa* do not shake the credibility of his evidence in as much as the contradictions go to the root of the Prosecution case? No.

e. Whether the learned Judges of the Court of Appeal have misdirected themselves when they held that the evidence led at the trial disclosed the 3rd appellant's common murderous intention? No.

In view of the answers to the questions of law on which the two appeals were heard, I affirm the judgment of the High Court convicting the three accused for murder the sentences of death imposed on them along with the judgment of the Court of Appeal in dismissing their appeals.

Accordingly, SC Appeal No 14 of 2015 and SC Appeal No 25 of 2015 are dismissed.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKERA J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ J.

I agree.

JUDGE OF THE SUPREME COURT