

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

*In the nature of an Appeal in terms of
Article 127 read with Article 128 of the
Constitution.*

SC Appeal No. 35/2020
CA Appeal No. CA 30/2009
High Court (Matara) No. 58/2004

Baranawila Liyanage Sunil
alias Wasthuwa
Accused – Appellant – Appellant

vs.

Honourable Attorney-General
Complainant – Respondent
- Respondent

Before:

Yasantha Kodagoda, PC, J.
A.L. Shiran Gooneratne, J. &
Arjuna Obeyesekere, J.

Appearance:

Ms. Indica Mallawarachchy instructed
by Mr. Upul Dissanayake for the
Accused – Appellant – Appellant.

Mr. Shanil Kularatne, PC, Additional
Solicitor General for the Complainant –
Respondent – Respondent.

Written Submissions filed on:

For the Appellant - On 10th July 2020,
21st March 2025, 20th May 2025 and 22nd
July 2025.

For the Respondent – On 2nd March
2022, 3rd March 2022, 7th April 2025 and
4th July 2025.

Argued on:

20th November 2024

Decided on:

10th July, 2026

JUDGMENT

Yasantha Kodagoda, PC, J.

Background and Introduction

- 1) This Judgment arises out of an Appeal presented to this Court in respect of a Judgment of the Court of Appeal dated 27th February 2017. That Judgment relates to an Appeal heard by that Court in respect of a Judgment dated 11th February 2009 pronounced by the High Court (Matara) wherein it had found the Accused – Appellant – Appellant (B.L. Sunil *alias* Wasthuwa - hereinafter referred to as the Appellant) ‘guilty’ of having on 9th September 1994 in Akuressa, committed the murder of one A.H. Jinadasa, and thereby convicted of having committed an offence punishable under section 296 read with section 32 of the Penal Code. The High Court had sentenced the Appellant to ‘death’. A co-accused named B.L. Jayasena *alias* Chuti (a brother of the Appellant), indicted alongside the Appellant, was acquitted by the High Court following trial.
- 2) Having considered a Petition addressed to this Court, *Special Leave to Appeal* was granted on the following questions of law raised on behalf of the Petitioner (present Appellant).
 - i. Have their Lordships of the Court of Appeal erred in concluding that the Dying Declaration had been judicially evaluated by the learned Judge of the High Court?
 - ii. Have their Lordships of the Court of Appeal erred by failing to consider the critical factual misdirection on the part of the learned Judge of the High Court in converting an item of circumstantial evidence to that of eye-witness testimony?

Additionally, this Court had granted permission to the learned Counsel for the Petitioner (now the 'Appellant') to raise the following question of law, as well:

- iii. Have their Lordships of the Court of Appeal erred by failing to consider that the Prosecution had not explained the injuries sustained by the Accused – Appellant at or about the time of the incident?

3) In view of the several questions of law in respect of which *Special Leave to Appeal* had been granted, in the course of this Judgment, I propose to consider the following:

- i. Prior to acting upon the Dying Declaration, did the learned Judge of the High Court (trial Judge) judicially evaluate and consider the probative value and evidential weight to be attached to that item of evidence?
- ii. Did the learned Judge of the High Court err in treating testimony relating to an item of circumstantial evidence as eye-witness testimony (an item of direct evidence) pertaining to the '*facts in issue*' (that being the specific incident of shooting)?
- iii. In the backdrop of certain injuries being found on the Appellant and such injuries not having been explained as part of the Prosecution's case, did the absence of such explanation give rise to a reasonable doubt regarding the case for the Prosecution or cause a miscarriage of justice to the Appellant?
- iv. Due to the answers to the afore-stated three questions or due to any other reason, can it be safely concluded that the Prosecution had proved its case beyond reasonable doubt, or in the alternative, has a reasonable doubt arisen and accrued in favour of the Appellant, which would necessitate the conviction of the Appellant to be quashed and the Appeal to be allowed?

4) Learned Counsel for the Appellant summed up her criticism of the impugned Judgment of the Court of Appeal, in the following manner: "... *the Court of Appeal in its appellate jurisdiction in examining the legality and the tenability of the judgment of the trial court has woefully failed in its appellate judicial obligation, thus leading to a dereliction of duty, consequently causing serious prejudice to the Accused Appellant and occasioning in a deprivation of a fair appellate review ... It is disheartening to note that there has been an abject failure on the part of the appellate court or is it fair to state that the appellate court has regrettably neglected to judicially scrutinize the findings and reasoning of the trial court, and a perusal of the judgment of the Court of Appeal amply*

demonstrates that their Lordships of the Court of Appeal had failed to judicially consider the grounds of appeal ...”.

- 5) By criticising the Judgment of the Court of Appeal in such a manner, the learned Counsel for the Appellant launched a collateral attack on the Judgment of the High Court, as well. Therefore, in the course of this Judgment, I shall deal with the criticisms levelled against both the Judgments of the Court of Appeal and the High Court.

Evidence relating to the incident presented by the Prosecution

- 6) The incident involving the death of the deceased had occurred around 10.00 p.m. on 8th September 1994, in an area called Imbulgoda in Akuressa, situated in the southern district of Matara. As it is customary for Buddhists, a priest had preached a Buddhist sermon [the first component of the 7th day religious rituals (“හත් දවසේ පින්කම”)] to confer merit on a recently deceased person called Dharmaratne, who had died by suicide. The crime referred to in this Judgment had taken place in the compound of the residence of Dharmaratne’s brother, Somaratne, where the Buddhist sermon was preached.
- 7) Approximately 500 persons had gathered at the compound of the funeral house in which the sermon was delivered. Among those present were Jinadasa (the deceased) and one Lionel. Following the conclusion of the sermon, some persons, including Jinadasa, had sat on mats placed under a tent that was in the compound. They had participated in “*Buuruwaa Geseema*” (“බුරුවා ගැසීම”). Such a venue (as witnesses of the case have adverted to) is referred to as a “*Buuru Pitiya*” (“බුරු පිටිය”). [“*Buuruwaa Geseema*” is a game of cards, which is prohibited by law due to betting (a form of gambling) that takes place parallel to the game of cards. Particularly in villages of this country, where people gather at night to stay for long durations, such as at funeral houses, it is not uncommon for some of those who have gathered to engage in “*Buuruwaa Geseema*”. It is also not uncommon for such venues to be raided by the police, and upon seeing the arrival of the police, for the participants of the illegal gaming and onlookers to flee, in fear of being arrested.]
- 8) Key Prosecution witness Lionel had also participated in playing this game. He has not specifically stated whether he participated in playing cards or engaged in betting. Suddenly, around 10.00 p.m., the Appellant, who was well-known and

closely related to Lionel, referred to by him as 'Wasthuwa' ("වස්තුවා"), had arrived at the scene from the hilly area situated to the rear of the house. He had been armed with a gun and had shouted, demanding "*Not even one person should run, all sit down*" ("එකෙක්වත් දුවන්න එපා. ඔක්කොම වාඩි වෙන්න."). The 2nd Accused (Appellant's brother), known to Lionel as Jayasena and referred to by villagers as 'Chuti Ayya' ("චුටි අයියා") was seen standing behind the Appellant, with a bottle in his hand. Lionel saw the Appellant aiming the gun towards the crowd that had gathered at the "*Buuru Pitiya*". Consequent to which, most of those gathered had promptly run away. Lionel stood there for a minute or so, and he too ran away. By the time Lionel ran some distance, and after a few minutes had lapsed, he had heard a shot being fired from the direction of the "*Buuru Pitiya*" ("බුරු පිටිය"). However, Lionel did not see the actual firing. He had later come to know that Jinadasa (the deceased) had sustained injuries and had later died.

- 9) Upon receiving information that some harm had befallen her husband, Jinadasa, the wife of the deceased, Siriyawathie, had, from her house, along with some others, rushed to Somaratne's house. At that place, she had seen her husband fallen on the ground. He was injured and was lying in a pool of blood. In the presence of those with whom she had gone to Somaratne's place, she had inquired from her Jinadasa as to what had happened to him.

The record of the High Court proceedings shows the following question and answer having been exchanged between the learned prosecuting State Counsel and the witness:

Question: "At that time, did your husband say anything?" ("එතකොට පුරුෂයා මොනවා හරි කතා කළාද?")

Answer: "Said, Diyalape Wasthuwa Shot. Hit with the handle of the gun." ("දියලපේ වස්තුවා වෙඩි තිබ්බා කියුවා. තුවක්කු මීටෙන් ගහලා.")

Under cross-examination, learned Counsel for the Defence had asked the following question, and received the undermentioned answer:

Question: "What did he say?" ("මොකද්ද ඔහු කීවේ?")

Answer: "Said, Diyalape Wasthuwa shot and hit his head with the barrel of the gun." ("දියලපේ වස්තුවා වෙඩි තියලා, තුවක්කු බටෙන් ඔළුවට ගැහුවා කියුවා.")

In the answers given by Siriyawathie to the learned Counsel for the Defence, it is important to note how she has described with clarity the sequence of the two

attacks on the deceased, as narrated to her by the deceased himself; first, the firing at the deceased, and thereafter, the blow to the head of the deceased.

10) According to Siriyawathie, at that time, she did not know who '*Diyalape Wasthuwa*' ("දියලපේ වස්තුවා") was, but later she got to know who he is, and that he is the accused (Appellant).

11) Thereafter, she, together with her own brother, Premasiri and another, had rushed the injured Jinadasa to the Akuressa Hospital in a three-wheeler. On the way, she had noted burn marks on the face of her husband. She has narrated what the Jinadasa told her on that occasion:

"Said, when I asked for some water to drink, the elder brother of Wasthuwa poured acid". ("බොන්න වතුර ටිකක් ඉල්ලුවාම, වස්තුවා කියන එයාගේ අයිසා ඇසිඩ් වත්කලා කියුවා.")

12) Having admitted her husband to the Akuressa Hospital, she had proceeded to the Akuressa Police Station and lodged a complaint regarding the incident. That complaint was the first information received by the police regarding the commission of the crime. She had later come to know that her husband had been transferred to the Matara Hospital and had thereafter passed away due to the injuries sustained by him.

13) According to the expert evidence provided by retired Judicial Medical Officer (JMO) Dr. D.W. Wijegunawardena, who had when he was in service, conducted the postmortem examination into the body of the deceased Jinadasa, as evidenced by a gun-shot entry wound observed on the posterior of the chest, the deceased had been shot with a firearm. The JMO had arrived at that finding based primarily on the laceration found on the posterior right side of the chest and the corresponding internal injuries. The JMO had expressed the view that the projectile that had entered the body had caused injuries to the internal organs, including the 11th rib on the right-side, lower lobe of the right lung, the diaphragm, and the liver. She has opined that the cumulative effect of those injuries was necessarily fatal. Additionally, there had been two lacerations on the right thigh. She had also observed burn injuries on the face, anterior aspect of the chest, the neck, the upper posterior parts of the chest and on the arms. The JMO has further observed that the burn injuries had been caused by acid coming into contact with the skin of the deceased. The deceased had died due to shock following extensive

internal bleeding (haemorrhage) as a result of the laceration of the right lung and the liver due to the firearm injury sustained by him. The Postmortem Report relating to the deceased had been produced by the Prosecution, marked “ප්‍ර. 1”.

- 14) According to the testimony provided by Chief Inspector (CI) Neranjan, who had investigated the murder of Jinadasa, at the residential compound of Somaratne (scene of the crime) situated in Imbulgoda (in Akuressa), there had been a tent inside which he had observed two mats which had blood patches on them. On the mats, he had found a broken piece of the butt end and the nipple of a firearm, four pellets, some currency notes, and playing cards belonging to two packs of cards. These items of real (physical) evidence (referred to generally as ‘productions’) had been produced by him at the trial. CI Neranjan had also noted that the location was well-lit, and therefore that it was possible for a person standing inside the tent to see a person standing at a distance of even 100 meters in the adjacent hilly area.
- 15) According to Sub-Inspector (SI) Jayawardena, it is he who had on the morning of 9th September 1994, recorded the complaint lodged by Siriyawathie. On 10th September 1994, he had recorded the statement of the Appellant, who at that time had been warded as an in-house patient at the Karapitiya Hospital in Galle. According to Jayawardena, the Appellant had been admitted to the hospital, as he had sustained a firearm injury. SI Jayawardena had observed that the Appellant’s right-hand wrist had been bandaged and that he had a cut injury on his left ring finger.
- 16) The case for the Prosecution did not include an explanation as to how the Appellant had sustained such injuries. Moreover, details relating to his arrest and thereafter his being produced before a Magistrate were also not part of the Prosecution’s case.

Impeachment of credibility and testimonial trustworthiness of Prosecution witnesses, Defence position (as reflected in cross-examination, including suggestions made to Prosecution witnesses) and Defence evidence

- 17) During the cross-examination of Lionel, he admitted that sometime prior to the incident, he had a fight with the Appellant. Sequel to which both of them had gone to the police station. However, details of that incident, as well as the outcome of the police inquiry have not been elicited. Nor is there a basis to conclude the proximity of that incident to the committing of the crime in this matter or their

relationship. Furthermore, it is necessary to note that, when Lionel was cross-examined, learned Counsel for the Defence has not suggested that (a) he was not present at the crime scene, (b) he did not see either the Appellant or the 2nd Accused arriving at the scene from the adjacent hilly area, (c) the Appellant was not armed with a gun and did not aim the gun at the crowd, (d) the Appellant did not use the words which Lionel claims that the Appellant did, (e) he did not hear the sound of a gun shot from the area of the crime scene, while he was fleeing from the scene, and (f) he was implicating the Appellant due to previous animosity he had between himself and the Appellant. Thus, in effect, the entirety of Lionel's evidence stands unassailed.

18) During the cross-examination of Siriyawathie, it had been elicited from her that in her statement made to the police and in the statement made during the conduct of the Inquest into the death of the deceased, she did not reveal the utterance purportedly made by the deceased while he was being taken to the hospital in a three-wheeler. It had been suggested to her that she did not reveal such purported utterance to the police since the deceased did not make such an utterance (2nd Dying Declaration) while being taken to the hospital. However, Siriyawathie has insisted that the deceased did make such an utterance to her. Be that as it may, given the said omissions, the learned Judge of the High Court had advisedly decided, in abundance of caution, not to act upon the second Dying Declaration purported to have been made by the deceased. I have noted that he had done so, notwithstanding corroboration of the contents of the Dying Declaration, which emanates from the JMO's postmortem examination findings.

19) The Appellant, who made a Dock Statement, had denied that he shot the deceased. He also said that he had no animosity towards the deceased. He admitted having attended the funeral. According to him, while he was at the funeral house, suddenly, a loud noise was heard, and the entire area was covered with smoke. Those present, including himself, had fled. When he approached his village, he had noted that a finger on one of his arms had been injured. Therefore, he had admitted himself to the Karapitiya Hospital. He has not explained why he did not go to the nearest hospital, that being the Akuressa Hospital. At the hospital, he had been operated on. He has also alleged that Lionel had an animosity towards him.

- 20) The learned Judge of the High Court has for reasons recorded in his Judgment rejected the entirety of the Dock Statement made by the Appellant. Learned Counsel for the Appellant did not impugn the reasoning contained in the Judgment of the High Court based upon which the contents of the Dock Statement were rejected by the learned Judge. I too find myself in complete agreement with the reasoning given in that regard by the learned Judge of the High Court.
- 21) It is necessary to mention that contemporary views of this Court pertaining to the assessment of credibility and testimonial trustworthiness of a Dock Statement, its judicial evaluation and the impact it generates to the overall case, are contained in a Judgment I had the occasion to deliver in *M.M.K. Dissanayake v. Commission to Investigate Allegations of Bribery or Corruption* (SC Appeal 160/2017, SC Minutes of 21st November 2023) and in the Judgment of Justice Kumuduni Wickremasinghe in *Preethi Anton v. Attorney General* (SC Appeal 3/2024, SC Minutes of 17th March 2026). These views reflect contemporary reasoning that has resulted in hardly any evidential weight (if at all), being assigned to the contents of a Dying Declaration, unless the dock statement is replete with discernible truth verifiable through independent means, coupled with an acceptable justification being provided for not opting to give evidence under oath. Learned Counsel for the Appellant did not claim that the Dock Statement made by the Appellant gave rise to a reasonable doubt regarding the case for the prosecution. Thus, any further consideration of the Dock Statement made by the Appellant would not be necessary.
- 22) According to Defence witness Ranjith, on the day of the incident, he too had participated in playing cards at the funeral house. He had been seated close to the deceased. Suddenly, he had heard a gunshot. Those present including himself had run away. As a result, he too had sustained an injury on his leg. Therefore, first he had been taken to the police station and thereafter to the Matara hospital. He had not seen the person who fired the shot. Nor had he seen the direction from which the shot was fired. On the day of the incident, he had not seen the Appellant. According to Ranjith, at the time of the incident, Lionel was not present at the location where cards were being played. However, he had been at the funeral house. Learned Counsel for the Appellant did not rely on Ranjith's testimony, even for the limited purpose of raising a reasonable doubt regarding the case for the Prosecution.

Has the Dying Declaration been judicially evaluated according to law?

- 23) Learned Counsel for the Appellant drew the attention of this Court to the propositions of law contained in several judgments of superior courts of this country and of India, and submitted that a 'Dying Declaration' should be judicially evaluated in the manner contained in those judgments.
- 24) She invited this Court to consider the circumstances under which the identification of the Appellant had purportedly been made by the deceased. In particular, she drew the attention of this Court to the following factors, (a) that a large number of persons were said to have been present at the scene and the fact that a large number of persons had been standing surrounding those who were seated playing cards, (b) that the Appellant was said to have been standing far away, (c) that the assailant had fired his gun from a distance and that the large number of persons who were present had run amok, and (d) that the location of the injuries found on the deceased indicates that he had been shot from behind. Learned Counsel for the Appellant alleged that neither the learned Judge of the High Court, nor the learned Justice of the Court of Appeal had applied their minds to these factors, which makes the deceased having allegedly seen the Appellant firing at him, highly improbable.
- 25) Learned Counsel also drew the attention of Court to the fact that, though the deceased is purported to have said that he was hit by the butt end of a firearm, there was no corresponding blunt injury on the body of the deceased.
- 26) Learned Counsel further contended that the Prosecution had failed to elicit evidence from the Judicial Medical Officer as to whether the deceased was, at the time he is alleged to have made the Dying Declaration relied upon by both the Prosecution and the learned Judge of the High Court, in a fit physical and mental condition to make such a statement. She submitted that the learned Judge of the High Court had failed to take such important factors into consideration.
- 27) In those circumstances, learned Counsel submitted that, *"... the trial court ought to have subjected the said evidence to a rigorous scrutiny so as to exclude the possibility of mistaken identity, as the identification of the Appellant was made under difficult and traumatic circumstances, and not by a mere eyewitness, but by an injured victim who had been shot from behind"*.

28) Learned Counsel for the Appellant submitted that the learned Judge of the High Court had failed to consider (a) the inherent weaknesses in the Dying Declaration; (b) guidelines contained in judicial precedent relating to the evaluation of a Dying Declaration; and (c) whether the deceased had the opportunity to identify the Appellant beyond reasonable doubt. Therefore, learned Counsel for the Appellant submitted that since the learned Judge of the High Court had failed to properly judicially analyse the Dying Declaration said to have been made by the deceased to his wife Siriyawathie, that item of evidence used to find the Appellant 'guilty', must be rejected by this Court.

29) In response, learned Additional Solicitor General submitted that, in the Court of Appeal, the ground on which the Appellant challenged the judicial evaluation of the Dying Declaration by the Judge of the High Court, was on the footing that Siriyawathie had not known that "*Wasthuwa*" ("වස්තුචා") was a reference to the Appellant. Learned ASG submitted that such absence of knowledge regarding the identity of the assailant referred to in the Dying Declaration did not affect its admissibility and probative value. He submitted that what was necessary was for the person referred to as being the assailant ["*Diyalape Wasthuwa*" ("දියලාපේ වස්තුචා")] to be proven by the Prosecution to be an unequivocal reference to the Accused (present Appellant), which requirement the Court of Appeal had considered and satisfied itself.

30) Learned ASG insisted that Siriyawathie was a credible witness whose testimony is trustworthy. He drew the attention of this Court to the fact that Siriyawathie's testimony regarding the first Dying Declaration made to her by the deceased had not been impugned by marking even a single contradiction or highlighting an omission.

31) In addition to referring to several judgments, learned ASG quoted from the Judgment of the Supreme Court of India in *Tapinder Singh vs. State of Punjab* [1970 AIR 1566] and invited this Court to follow the principles contained therein pertaining to the judicial evaluation of the Dying Declaration made by the deceased to Siriyawathie.

Applicable law, analysis and conclusions

32) Under section 32 of the Evidence Ordinance (hereinafter sometimes referred to as the 'Ordinance') in certain cases, a statement written or verbal, of relevant facts,

made by a person (i) who has died subsequent to the making of the statement, or (ii) who cannot be found, or (iii) who has become incapable of giving evidence, or (iv) whose attendance cannot be secured without an amount of delay or expense which under the circumstances of the case appears to the court to be unreasonable, is relevant. While there are several situations captured under the eight (8) sub-sections of section 32 of the Ordinance where such a statement is relevant, one such category that becomes applicable particularly in criminal cases is referred to as a '**Dying Declaration**'. The relevancy and admissibility of such a statement is governed by section 32(1) of the Ordinance.

33) Section 32(1) of the Ordinance (together with the part of section 32 which is common to all its sub-sections), reads as follows:

Statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts, when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

34) It would be seen that based on the circumstances associated with the making of the statement, two categories of Dying Declarations are referred to in section 32(1).

They are, statements as to –

- i. the cause of death; and
- ii. any of the circumstances of the transaction which resulted in his death.

35) It would thus be seen that, the two statements said to have been made by the deceased in this case (of which the second statement had not been relied upon by the learned trial Judge) falls within the first of the above-mentioned two categories, as such statement had been made following the commencement of the operational cause of death of the deceased, that cause being Jinadasa having sustained a gunshot injury. According to Dr. Wijegunawardena, the cause of the deceased's death was due to Jinadasa having sustained a gunshot injury. The deceased had made the two statements in issue, after he was shot at. Thus, the Dying Declarations of the deceased in this matter deposed to by Siriyawathie falls within the first of these two categories, namely, the cause of his death, which in the circumstances is referable to the cause of the injuries sustained by Jinadasa.

36) The two statements [(i) *"Said, Diyalape Wasthuwa Shot. Hit with the handle of the gun."* ("දියලපේ වස්තුවා වෙඩි තිබ්බා කියුවා. තුවක්කු මීටෙන් ගහලා."), and (ii) *"Said, when I asked for some water to drink, his brother Wasthuwa poured acid."* ("බොන්න වතුර විකක් ඉල්ලුවාම, වස්තුවා කියන එයාගේ අයිසා ඇසිඩ් වත්කලා කියුවා.")] can be said to be 'Dying Declarations' in the true sense of that term, as the statements had been made during the process of 'dying'. [That the Dying Declarations in issue fall within the ambit of the first limb of section 32(1) (*"as to the cause of his death"*), relieves the Court from considering the somewhat opaque and contentious issues that can arise for consideration regarding the exact meaning of the second category of Dying Declarations (*"as to any of the circumstances of the transaction which resulted in his death"*) and determining whether a particular statement of a deceased person falls within its scope.]

37) The key submission of learned Counsel for the Appellant was that the Dying Declaration relied upon by the learned Judge of the High Court [*"Said, Diyalape Wasthuwa Shot. Hit with the handle of the gun."* ("දියලපේ වස්තුවා වෙඩි තිබ්බා කියුවා. තුවක්කු මීටෙන් ගහලා.")] was not subjected to judicial scrutiny, though the law requires the trial judge to have done so. I shall now consider that submission.

38) A Dying Declaration which comes within the scope of statements captured in section 32(1) is 'admissible' in judicial proceedings and is treated as 'relevant evidence' notwithstanding it being contrary to the principles contained in section 60 of the Evidence Ordinance. Section 60 requires that oral evidence must in all cases whatever, be **direct**; that is to say –

- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;
- (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;
- (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;
- (d) if it refers to any opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Section 60 is founded upon the 'Best Evidence' principle, which is aimed at ensuring the integrity (safety) of evidence (also referred to as 'judicial evidence')

used in the administration of justice. Section 60 is the most prominent feature of Sri Lanka's Law of Evidence which portrays the exclusion of the admissibility of hearsay, unless specifically provided for by statutory provisions. That principle provides a safety mechanism aimed at excluding material (oral and documentary) that would be inherently unreliable / unsafe, and permitting the admission only of evidence which is testified to by a witness to a fact who is present in Court and therefore his credibility and testimonial trustworthiness can be tested. The same principle is insisted upon with regard to documentary evidence. In view of the provisions contained in section 60, it must be appreciated that a Dying Declaration is a statement which is admitted as evidence in judicial proceedings, as an exception to the norm (which is contained in section 60), which ensures the rejection of hearsay from judicial proceedings. Therefore, though the contents of a Dying Declaration are hearsay, such contents are in view of section 32(1), both relevant and admissible.

39) The recognized scope of a Dying Declaration under English common law (which is the primary source Sri Lanka's law of evidence) used to be narrower than under the Evidence Ordinance of Sri Lanka. It was limited to statements made by a person as to the cause of his death made while such person was going through the actual process of dying, and thus, made in expectation of death. Therefore, Dying Declarations are sometimes referred to as '*Death-bed utterances*'. Thus, such statements received in evidence were limited to the first out of the two categories of statements of dead persons, contained in section 32(1) of the Evidence Ordinance; thus being 'Dying Declarations' in the literal sense of the term. The origin of the rule in English common law permitting the admission of Dying Declarations, which forms an exception to the rule against hearsay evidence, is traceable to the Judgment of Lord Mansfield in *Wright v. Littler* [(1761) 3 Burr 1244]. Presently in the United Kingdom, the admission of a Dying Declaration is governed by sections 116 and 118 of the Criminal Justice Act of 2003 of that country and is no longer limited to statements made in the actual expectation of death.

40) In his monumental work on '*The Law of Evidence*' with special reference to the Law of Sri Lanka [Volume I, page 460], E.R.S.R. Coomaraswamy citing '*Hoffmann & Zeffertt*' has expressed the view that "*The rule of inclusion is based on necessity and an ostensible guarantee of truth, though no general principle underlying these categories can be found*". There can easily be cases where, if a Dying Declaration is excluded, it would altogether remove or significantly reduce the possibility of reaching a

finding against the 'guilty' assailant, resulting in him leaving the criminal justice system scot-free, causing thereby a frustration of the objectives of criminal justice and considerable harm being caused to public interest.

- 41) Be that as it may, the inherent weakness in a Dying Declaration cannot be overlooked. That being, though the contents of the Dying Declaration would contain facts that can be perceived (observed and gathered) from human sensory receptors such as the eyes, ears, skin and the tongue, the person who perceived the relevant stimuli is not present in court to testify and for examination as a witness. Naturally, he cannot be brought before court, since he is dead. Thus, the party whose interests are adversely affected by the admission of such item of evidence is prejudiced, since he has no opportunity to subject the declarant of the Dying Declaration (the deceased) to cross-examination, with the view to impugning his credibility and testimonial trustworthiness. Furthermore, the absence of the declarant enables the witness before Court (who deposes to the deceased having made a Dying Declaration to him) being in a position to even fabricate that the deceased made a statement to him, and narrating its purported contents. Notwithstanding such risks, not only in Sri Lanka, but in almost all other national jurisdictions within the common law world, Dying Declarations (also referred to as 'Dying Depositions', particularly where the statement has been made to someone authorized by law to receive and record such statement) are treated as admissible and relevant in judicial proceedings.
- 42) The principle underlying the admissibility of Dying Declarations is embodied in the legal maxim "*Nemo Moriturus Praesumitur Mentire*" which translates to "*a man will not meet his Maker with a lie in his mouth*". In **R. v. Woodcock** [(1789) 1 Leach 500], the Court has explained that such declarations are admitted on the basis that they are made in extremity, when the declarant is at the point of death and every hope of this world is gone, thereby silencing all motives for falsehood and creating an obligation to speak the truth, equivalent to that imposed by an oath administered in a court of justice. This rationale has been consistently recognised in subsequent judicial precedent, including in Indian cases such as, **P.V. Radhakrishna v. State of Karnataka** [2003 AIR 2859] and **Sharda v. State of Rajasthan** [2010 AIR 408].

43) Distinguished Emeritus Professor of Law Dr. M. Sornarajah, in an article published in the **Colombo Law Review** (1978, page 102) on the topic “*The Value of Dying Declarations*” has commented as follows:

“The early theory of the common law was that great weight should be attached to a statement made by a victim of an assault who is in settled expectation of death on the religious assumption that such a person would be reluctant to die with a lie on his lips. ...

But the religious theory on the sanctity the law at one time attached to dying declarations was contested in later times. It was pointed out that the declarant may have made a false statement through motives of revenge or simply to ward off a persistent questioner while in a state of agony. Furthermore, the semi-conscious state of a dying man may have made his powers of observation weak and hence the possibility of mistakes in the identity of the assailant or omission of important facts would have been great. Moreover, since the truth of the statement could not be tested by cross-examination, a trend then emerged to treat dying declarations with a certain amount of suspicion.

These two conflicting trends are to be found in the case law of Sri Lanka and are reflected in the recent decisions ...”

The learned Professor has thereafter considered a string of judgments including *Alisandiri v. King* [(1937) A.C. 220], *R. v. Asirvadan Nadar* [(1950) 51 NLR 322], *R. v. Justinapala* [(1964) 66 NLR 409], *R. v. Vincent Fernando* [(1963) 65 NLR 271], *Weerappen v. The State* [(1971) 76 NLR 109], *Somasunderam v. Queen* [(1971) 76 NLR 10], and *Palaniyandy v. The State* [(1972) 76 NLR 145] in order to highlight the pendulum like swing in judicial thinking ranging between (a) a robust and straightforward acceptance of the contents of a Dying Declaration and willingness to act upon its contents even without any supporting evidence, to (b) treating a Dying Declaration with caution and being reluctant to act upon the contents unless there is corroboration. In fact, while learned Additional Solicitor General invited this Court to adopt the first of these two approaches, learned Counsel for the Appellant invited Court to adopt the latter approach. Such opposing points of view have necessitated this Court to consider the matter in detail and set down this Court’s own views. I too have observed that among distinguished Justices of this country, there has been some degree of divergence of opinion regarding the manner in which a Dying Declaration should be judicially evaluated and

regarding the probative value and evidential weight that should be attached to such an item of evidence.

44) Therefore, I have considered the views of superior courts of this country reflected in a string of Judgments, including the Judgments in *The King v. Asiriwadan Nadar* [51 NLR 322], *The Queen v. Vincent Fernando* [65 NLR 265], *Justinapala v. The Queen* [66 NLR 409], *Weerappan v. The Queen* [76 NLR 109], *Dharmawansa Silva and Another v. The Republic of Sri Lanka* [(1981) 2 Sri L.R. 439 (CA)], *Ranasinghe v. Attorney-General* [(2007) 1 Sri L.R. 218 (CA)], and *Athaudage Premadasa v. Honourable Attorney-General* [CA Appeal No. 17/2017, CA Minutes of 4th April 2018]. Furthermore, since section 32(1) of the Evidence Ordinance of this country is identically worded to the corresponding section contained in the Evidence Act of India, and since there are other parallels between the systems of criminal justice of the two countries and socio-cultural and behavioural similarities, I have deemed it useful to consider several seminal judgments of the Supreme Court of India. They are, *Khushal Rao v. State of Bombay* [1958 AIR 22], *Smt. Paniben v. State of Gujarat* [1992 AIR 1817], *Harbans Singh v. State of Punjab* [1962 AIR 439] and *The State of Himachal Pradesh v. Chaman Law* [Criminal Appeal No. 430/2018, SC Minutes of 15th January 2026].

45) Founded upon a consideration of the provisions of the Evidence Ordinance and associated principles relating to judicial evidence contained in the Law of Evidence, guided by the principles of law contained in judgments of superior courts of this country cited above, and aided by a consideration of the afore-stated judgments of the Supreme Court of India, I have formulated the following principles. It is my view that these principles should guide a judge called upon to judicially evaluate a Dying Declaration. [These same principles should aid a judge of the High Court who may have to address members of a Jury before whom a trial has been conducted.]

- i. The reception of a Dying Declaration as judicial evidence should necessarily conform with section 32(1) of the Evidence Ordinance. That is a matter to be determined by the trial Judge at the stage when testimony relating to the Dying Declaration is sought to be presented by the party seeking to rely on its contents. The learned Judge before whom the trial is being conducted should ensure that only contents of the declaration made by the deceased

which comes within the scope of either or both the limbs of section 32(1) is admitted in evidence.

- ii. The reception of a Dying Declaration should be viewed and appreciated as an exception to the rule against hearsay recognized by the Law of Evidence of this country, and must be viewed as an exception to section 60 which is founded upon the 'Best Evidence' principle.
- iii. The need to judicially evaluate a Dying Declaration arises only if the witness who deposes to a Dying Declaration having been made to him, is determined by Court to be a credible witness whose testimony is trustworthy. If not, the evidence relating to the Dying Declaration should be rejected in its totality. Whether the deponent of the Dying Declaration could have, notwithstanding his having sustained injury, made a statement (competence to speak) is a factor that is related to the credibility of the witness. Medical evidence in support of the witness, that the deceased would have had the ability to speak at the relevant point of time, notwithstanding being injured, would be a factor to be taken into consideration in that regard, but need not be conclusive proof.
- iv. In comparison with a witness who testifies to *facts in issue* and *relevant facts* in conformity with section 60 of the Evidence Ordinance, a statement purported to have been made by a person who subsequently became deceased and therefore is not available at the trial, pertaining to matters that come within the ambit of one out of the two limbs of section 32(1), must be viewed as amounting to comparatively inferior evidence. That is due to the absence of maker of the declaration before the trial court, resulting in (a) he not being required to take an oath or affirmation, (b) such person not being subjected to cross-examination, and (c) the court not being able to observe that person's demeanor and deportment.
- v. In view of a Dying Declaration being inconsistent with the principle contained in section 60 of the Evidence Ordinance, a trial judge should approach the contents of such a declaration with a degree of caution.
- vi. In view of the foregoing, a trial judge should engage in careful judicial scrutiny of testimonies and evidence relating to a purported Dying Declaration.
- vii. Though the statement purported to have been made by a deponent who later became deceased, could not be subjected to cross-examination, depending on the other evidence and circumstances of the case, it may be possible at least to some extent, through other means, assess and determine

the credibility of the deponent (deceased) and testimonial trustworthiness of the contents of the statement made by such deponent.

- viii. While the availability of corroboration of the contents of the Dying Declaration is not a prerequisite for the acceptance of such a declaration and acting upon it, should corroboration be available, that should enable the trial court to readily act upon the contents of the Dying Declaration.
- ix. On a consideration of the totality of evidence of a particular case, it may be possible to rely on the contents of a Dying Declaration to arrive at a finding on proof (as defined in section 3 of the Ordinance) of a *fact in issue* or a *relevant fact* of such case.
- x. The probative value and the evidential weight to be attached to a Dying Declaration must be determined only upon a consideration of the totality of the evidence (including Defence evidence) and other factors such as inferences that may be drawn and presumptions arising in the case.

46) The judicial scrutiny / evaluation and the appreciation of a Dying Declaration should generally entail the following three-tiered approach, during which the learned Judge should apply the afore-stated ten (10) principles. The three sequential tiers of such judicial consideration of evidence relating to a Dying Declaration should take a path of logical legal reasoning based on answers being found to the following questions:

1st - Is the witness to whom the Dying Declaration was made, a credible (an honest and trustworthy) witness, and can testimonial trustworthiness (reliability of the testimony provided) be attributed to his testimony?

2nd - Are the contents of the Dying Declaration a truthful account of what happened? In other words, can credibility and testimonial trustworthiness be attributed to the utterance (declaration) made by the deceased to the witness? Are the contents of the Dying Declaration a truthful account of the facts contained therein?

3rd - What should be the probative value and evidential weight to be attached to the contents of the Dying Declaration and what findings and conclusions (direct, inferential, presumptive) can be reached from the contents of the Dying Declaration?

- 47) The need to judicially consider the 2nd tier arises only if following a consideration of the 1st tier, the Court concludes that the witness to whom the Dying Declaration was made to (in this matter Siriyawathie) is determined by Court to be a credible witness, to whose testimony testimonial trustworthiness can be attached. If the witness lacks credibility, or her testimony is found to be devoid of testimonial trustworthiness, the matter ends there, and further consideration of the Dying Declaration would not be required. In other words, consideration of the Dying Declaration ends at the 1st tier.
- 48) Similarly, the need to judicially consider the 3rd tier arises only if the contents of the Dying Declaration are found to contain a truthful account of what had happened. If the court were to conclude that the contents of the Dying Declaration are not truthful or a reasonable doubt arises regarding its contents, the matter ends. No judicial findings can be founded upon the contents of such a doubtful Dying Declaration. If the person who testifies regarding the Dying Declaration passes scrutiny under the 1st tier, and the contents of the declaration passes the 2nd tier of judicial scrutiny as well, then the Dying Declaration must be treated as an item of probative evidence. However, that would be subject to the application of the ten (10) principles enunciated by me earlier.
- 49) It is at that stage that the 3rd tier of judicial scrutiny should take place, based upon which certain direct, inferential and presumptive evidential conclusions may be reached. The degree of evidential weight to be attached to the Dying Declaration and to what extent such a Dying Declaration would help the Prosecution to discharge its overall burden of proving the case beyond reasonable doubt, is a matter that would require further consideration, including a consideration of the other items of evidence available and attendant circumstances.
- 50) It must be appreciated that the approach to be taken by a trial judge to judicially scrutinize and evaluate a Dying Declaration, would to a great extent depend upon the position the Defence has taken with regard to that item of evidence. Furthermore, the need to go to that extent arises only if the evidence of the witness to whom the Dying Declaration had been made to is *prima facie* acceptable to be an *ex-facie* credible witness who has provided testimony which is evidently trustworthy. The position of the Defence regarding the testimony pertaining to the Dying Deposition and the contents of such deposition is likely to be contained in the (a) cross-examination of the witness who testified regarding the Dying

Declaration, (b) Defence evidence, and (c) submissions of the learned Counsel for the Accused.

Judicial evaluation of the Dying Declaration made to Siriyawathie

51) **1st tier of scrutiny** - It is Siriyawathie who had provided the first information regarding the incident to the police (which in fact takes the manifestation of a 'complaint' made by her to the Akuressa Police Station) as soon as it was reasonably possible, and no contradictions have been marked or omissions have been brought to the attention of the High Court regarding the afore-stated first Dying Declaration. Thus, she satisfies the tests of spontaneity and consistency. Her version of events appears to be probable and the learned trial Judge does not appear to have noted any adverse aspects of demeanor or deportment when she testified. Thus, it can be said that an *ex-facie* examination of the testimony given by witness Siriyawathie reveals *prima facie* that she is a credible witness, whose testimony is trustworthy.

52) During the cross-examination of Siriyawathie, it has not been suggested to her that her testimony regarding the making of the Dying Declaration to her by the deceased, is false. Nor has it been suggested to her by learned Counsel for the Accused, that the deceased did not tell her that "*Said, Diyalapee Wasthuwa Shot. Hit with the handle of the gun.*" ("දියලපේ වස්තුචා වෙඩි තිබ්බා කියුවා. තුවක්කු මීටෙන් ගහලා."). In fact, learned Counsel for the Appellant rightly conceded that in those circumstances, she is not in a position to impugn the testimony given by Siriyawathie. Thus, in this matter, there was no need for either the learned Judge of the High Court or the learned Justices of the Court of Appeal to have applied the 1st tier of judicial scrutiny to the evidence relating to the Dying Declaration. They could have directly proceeded to the 2nd tier of judicial scrutiny.

53) Furthermore, the purported weakness in the case of the Prosecution arising from the fact that the learned State Counsel had failed to elicit from the JMO, as to whether a person who had suffered injuries such as those found on the deceased could have spoken and made a Dying Declaration, is of no significance due to the following reasons: Indeed, the learned State Counsel should have probed into the competence on the part of the deceased to have made a statement after sustaining a gun-shot injury. However, the Prosecutor's failure to examine the JMO in that regard does not bring any adverse consequence to the case of the Prosecution,

since given the nature of the cross-examination, subjecting the Dying Declaration to the 1st tier of judicial scrutiny was not necessary.

54) However, I wish to note that, as regards the second Dying Declaration purported to have been made by the deceased to Siriyawathie [*"Said, when I asked for some water to drink, his brother Wasthuwa poured acid"* (*"බොන්න වතුර විකක් ඉල්ලුවාම, වස්තුවා කියන එයාගේ අයියා ඇසිටි වත්කලා කියුවා."*)] which implicated the 2nd Accused (that he poured acid on the deceased), the learned Judge of the High Court had in abundance of caution decided not to act upon the testimony provided by Siriyawathie. That was on the footing that in her statement to the police, as well as in the deposition made to the learned Magistrate who conducted the Inquest into the death of the deceased, she had not revealed that the deceased had in a second Dying Declaration implicated the 2nd Accused in respect of having poured acid on him. It is thus quite evident that, the learned Judge of the High Court was well-aware of the 1st tier of scrutiny referred to earlier by me, which necessitates assessment of credibility and testimonial trustworthiness of the witness who testifies regarding the deceased having made a Dying Declaration to such witness.

55) **2nd tier of scrutiny** - The next issue regarding the first Dying Declaration, is whether the deceased revealed the truth in the Dying Declaration made by him to Siriyawathie. Such scrutiny must be carried out in the backdrop of the maker of the statement being not available for assessment of credibility and testimonial trustworthiness through cross-examination.

56) When determining testimonial trustworthiness of a Dying Declaration, a host of factors must be taken into consideration, which would tend to support or adversely affect the contents of the declaration. As pointed out by the learned ASG, when the Appellant shouted demanding that no one leaves the scene, and he did so armed with a gun. It is to be expected that those present at the scene would have looked around to see who made such an utterance. Thereby, it is natural that the attention of those who had gathered at the scene of the crime (including the deceased) would have been drawn to the direction from which the shouting emanated and then seen the Appellant. In fact, that is how Lionel had seen the Appellant. It is after hearing what the Appellant said and seeing a gun being held by him and it being aimed at them, that the crowd who were present at the "*Buuru Pitiya*" (*"බුරු පිටිය"*) ostensibly in fear for their lives, had run helter-skelter. Thus,

it can be reasonably inferred that the deceased had means of having at the outset seen the Appellant.

57) As pointed out by learned Counsel for the Appellant, it is a fact that the deceased had been shot from his rear. That is evident from the presence of a gun-shot entry wound on the deceased's posterior chest region. Thus, at the exact moment the assailant shot the deceased, it would not have been possible for the deceased to have seen the assailant shooting at him, as he had turned his back towards the assailant any may have started to run away from him. However, it appears that the deceased had the opportunity of (a) seeing the Appellant armed with a gun, and aiming it at the crowd, (b) hearing the utterance made by the assailant, (c) hearing the gun being fired, and (d) feeling the pain emanating from the wound, following the deceased having sustained the injury. Soon thereafter, the assailant had come close to the deceased, and hit him with the butt end of the firearm. CI NERANJAN found wooden pieces of a firearm (ostensibly from the handle of the gun) on the mat on which patches of blood were found. That corroborates the testimony of Siriyawathie, regarding the place where the deceased was found by her, lying on a pool of blood. Thus, the deceased did in fact have means (a factual basis) to conclude that it was the Appellant who shot him and tell Siriyawathie that *"Diyalape Wasthuwa Shot. Hit with the handle of the gun."* ("දියලපේ වස්තුචා වෙඩි තිබ්බා. තුවක්කු මීටෙන් ගහලා."). [The term 'Said' ("කියුවා") which is found in Siriyawathie's narration of the Dying Declaration, in this instance has been omitted by me. I have done so as that is a reference by Siriyawathie to the deceased having told her (*'he told me'*). Thus, it is not a part of the Dying Declaration made to Siriyawathie by the deceased, though she has understandably used that term in order to give context to what the deceased told her.]

58) Learned Counsel for the Appellant also submitted that even if the Dying Declaration is accepted as being reliable, it does not implicate the Appellant, as Siriyawathie had testified that she did not know who 'Wasthuwa' ('වස්තුචා') was. However, in my view, as pointed out by the learned ASG, the contents of the Dying Declaration must be unequivocally treated as a reference to the Appellant as having been the assailant. That is because, though Siriyawathie did not know who 'Wasthuwa' was, Lionel, who saw the Appellant at the scene of the crime armed with a gun, has testified that the Appellant is known as 'Diyalape Wasthuwa' ('දියලපේ වස්තුචා'). 'Diyalape' is the area in Akuressa from which 'Wasthuwa' comes, and thus he is called 'Diyalape Wasthuwa'. In other words, he has been described

by the deceased as 'Wasthuwa' from 'Diyalape' area. Furthermore, Siriyawathie at a subsequent point of her testimony has confirmed that she later got to know that 'Diyalape Wasthuwa' was a reference to the Accused. Therefore, I have no hesitation in concluding that both the learned Judge of the High Court and the learned Justices of the Court of Appeal were correct in concluding that the Dying Declaration is referable to the Appellant as having been the perpetrator of the crime, who shot the deceased.

59) In the light of the criticisms made by learned Counsel for the Appellant that the learned Judge of the High Court had failed to judicially evaluate the Dying Declaration said to have been made by the deceased to Siriyawathie, I carefully read through the entire Judgment of the High Court. It is a fact that the learned Judge has in his Judgment summarized the testimony given by Siriyawathie and subjected her testimony to judicial evaluation. That evaluation in my view would suffice for the 1st tier of judicial evaluation, which I have previously referred to. However, apart from the sentence "*P.W. 1's evidence relates to a dying declaration*" ("පැ. සා. 1 ගේ සාක්ෂිය මරණාසන්න ප්‍රකාශයක් සම්බන්ධයෙනි."), the Judgment of the High Court does not contain any judicial evaluation or analysis of the Dying Declaration said to have been made by the deceased to Siriyawathie. Thus, it is a fact that the said Judgment in fact does not reflect that the learned Judge of the High Court had engaged in the 2nd and 3rd tiers of judicial evaluation of the Dying Declaration made by the deceased to Siriyawathie.

60) For the purpose of considering whether the Court of Appeal had adequately evaluated the Dying Declaration, I gave similar attention to the Judgment of that Court. According to that Judgment, learned Counsel who appeared for the Accused – Appellant before that Court had submitted that, since Siriyawathie had conceded that she did not know who "*Diyalape*" ("දියලපේ") was, the Dying Declaration should not be treated as an item of evidence against the Appellant. Due to that submission, the learned Justice of the Court of Appeal had linked Siriyawathie's evidence with that of Lionel (who identified the Appellant both by name as well as by his *alias*) and has concluded that the contents of the Dying Declaration is in fact referable to the Appellant. I find that to be a correct conclusion.

61) Scrutiny of the Judgment of the Court of Appeal also reveals that, learned Counsel for the Appellant had argued that, since the deceased had been shot from behind,

he could not have seen the assailant. Having considered the evidence, the learned Justice of the Court of Appeal had concluded that according to the Dying Declaration made by the deceased to Siriyawathie, it is clear that the deceased had seen the assailant, as he was assaulted on his head with the butt end of the rifle. That aspect of the Dying Declaration is corroborated by the fact that, the police investigator had found wooden pieces of the handle of the rifle on the mat on which there were patches of blood.

62) However, I must hasten to add that the impugned Judgment of the Court of Appeal does not contain a proper judicial evaluation (by the application of the three tiers of scrutiny) of the evidence relating to the Dying Declaration, in the manner I have illustrated in this Judgment. The learned Justice of the Court of Appeal has not considered whether the learned Judge of the High Court had engaged in a proper judicial evaluation of the evidence relating to the Dying Declaration. To that extent, the Judgment of the Court of Appeal is flawed.

63) Given the foregoing and the principles governing the judicial evaluation of a Dying Declaration which I have explained in the preceding paragraphs, I wish to observe the following regarding the 1st Dying Declaration made by the deceased to Siriyawathie:

- i. The Dying Declaration comes within the 1st limb of section 32(1) of the Evidence Ordinance.
- ii. The Dying Declaration does not contain the 'best evidence' pertaining to the matters contained in the said declaration, and therefore in comparison with the testimony of an eye-witness (had there been one pertaining to the matters immediately preceding the shooting) the contents of the Dying Declaration are inferior in quality.
- iii. Due to the reasons contained in the preceding paragraphs, Siriyawathie is a credible witness whose testimony is trustworthy.
- iv. Certain parts of the 1st Dying Declaration made by the deceased to Siriyawathie have been corroborated by the Prosecution through the testimony provided by Lionel and through circumstantial evidence, such as the location of blood patches on a mat, and wooden pieces of the butt of a firearm found nearby.
- v. That the deceased had seen the Appellant shooting at him, is founded upon a reasonable assumption arrived at by him, given the attendant circumstances. That is a probable and reasonable assumption.

- vi. In the circumstances of this case, the credibility of the deceased and the testimonial trustworthiness of the contents of the 1st Dying Declaration remain un-assailed.

64) In view of the foregoing, I conclude that a high probative value and evidential weight can be attached to the 1st Dying Declaration made by the deceased to Siriyawathie.

Has testimony relating to an item of circumstantial evidence been treated erroneously by the Judge of the High Court as ‘eye-witness testimony’ regarding the facts in issue?

65) Learned Counsel for the Appellant submitted that the learned Judge of the High Court had at line 7 of page 24 of the Judgment, erroneously treated the testimony given by Lionel, as ‘eye-witness testimony’, whereas, his evidence should have been treated only as testimony relating to items of circumstantial evidence.

66) Learned ASG submitted that, there was no error in the evaluation of the evidence by the learned Judge of the High Court. He submitted that the error referred to by learned Counsel for the Appellant cannot be treated as a misdirection, as it did not contribute towards the final conclusion reached by the learned Judge.

67) In the light of the accusation made by learned Counsel for the Appellant and the response of the learned ASG, I have given careful consideration to the relevant portion of the Judgment, which appears at line 7 of page 24 of the Judgment.

68) The sentence to which learned Counsel for the Appellant took objection to, reads as follows:

“මෙම අවස්ථාවේදී පැ.සා. 3 ලයනල් පවසා සිටින්නේ එලෙස පැමිණ වෙඩි තැබුවේ 1 වන මුද්දින බව වන අතර චිත්තියේ සාක්ෂිකරු වන රණවක ආරච්චිගේ රනජිත් නැමැත්තා පවසා සිටින්නේ එසේ පැමිණියේ කවුරුන්දැයි නොදන්න බවය.”

“At this time, what P.W. 3 says is that, the person who came in that manner and shot was the 1st accused, whereas, according to Defence witness Ranawaka Aarachchige Ranjith, he does not know who came.”

[Emphasis added by me.]

69) It is indeed a fact that, it is not the position of Lionel, that he saw the Appellant shooting. According to him, he had (a) seen the Appellant having come close to the scene of the crime armed with a gun, (b) heard the utterance made by the

Appellant and the Appellant aiming the gun towards the crowd, (c) run some distance away from the scene, and (d) after the passage of some time, heard the sound of a gunshot from the direction of where people had been playing cards. Thus, according to Lionel, he has not seen the Appellant firing the gun. In fact, he had not seen anyone shooting at the crowd. In view of the evidence available, that the Appellant fired his gun, is only inferential, and there is no direct evidence in that regard. Thus, it is apparent that the learned Judge of the High Court had erred in the formulation of the sentence quoted above.

70) In view of that error made by the learned Judge of the High Court, it is necessary to consider whether in fact he had treated Lionel as an eye-witness to the *facts in issue*, as opposed to treating him as an eye-witness to certain items of circumstantial evidence which amounts to *relevant facts*, such as the arrival of the Appellant at the scene immediately prior to the shooting, his being armed with a gun, and the utterance made by him. In this regard, I wish to note the following:

- a) At pages 6 & 7 of the Judgement, when summarizing the testimony given by Lionel, the learned Judge has not stated that Lionel testified that he saw the Appellant shooting.
- b) At pages 7 & 8 of the Judgment, when evaluating the testimony given by Lionel, the learned Judge has not stated that Lionel testified that he was an eye-witness to the shooting.
- c) At pages 22 & 23 of the Judgment, when narrating the conclusions reached by the learned Judge, he has not stated that Lionel had seen the shooting.

71) Thus, in my view, it is clear that, the sentence quoted by the learned Counsel for the Appellant (appearing at line 7 of page 24) of the Judgment of the High Court which refers to Lionel having purportedly seen the shooting, was a mistake made by the learned Judge of the High Court; an error that had crept into the Judgment of the High Court. Furthermore, from the references contained in the preceding paragraph of this Judgment, it is clear to me that, the conviction of the Appellant was not founded upon that error. It is very clear that the learned Judge of the High Court had not proceeded on the footing that Lionel had seen the Appellant shooting.

72) In my view, a genuine mistake in a Judgment does not require reversal, unless it had a substantial and injurious effect on the verdict, or otherwise occasioned a miscarriage of justice.

73) In view of the foregoing, I do not accept the proposition of the learned Counsel for the Appellant that the sentence quoted contained in the Judgment of the High Court amounts to a misdirection on the evidence, which has the consequence of causing a miscarriage of justice.

74) My brother Justice Janak De Silva in *R.A.K. Nishantha Perera v. Honourable Attorney General* [SC Appeal 122/2020, SC Minutes of 7th October 2024] has observed that “I do not think that a judgment must be set aside for every conceivable error in it. It may in fact be a herculean task to find a judgment which is absolutely free from any error.” In *Kiri Mahaththaya and Another v. The Hon. Attorney-General* [(2020) 1 Sri L.R. 10, paragraph 41], Justice Buwaneka Aluwihare has so aptly commented that, “we must caution against attaching too great a meaning to a mistake, lest we provide a person with a free ticket out of a conviction which the evidence fully warrant”.

75) I shall conclude this part of the Judgment by reminding the legal fraternity the obvious; that Judges are also human beings; and though they perform the divine task of judging other human beings and at times imposing sanctions on them, in the performance of that duty, they too can err. No Judge is infallible. Therefore, the error contained in the impugned Judgment of the High Court should not surprise anyone, the Judge should certainly not be condemned or frowned upon, and the matter must be put to rest, without any consequence flowing from it.

Has the absence of an explanation of the injuries found on the Appellant, caused a miscarriage of justice?

76) Learned Counsel for the Appellant drew the attention of this Court to the testimony provided by SI Jayawardena, wherein he had stated that he went to the Karapitiya hospital in Galle on 10th September 1994, and interviewed and recorded the statement of the Appellant. According to SI Jayawardena, at that time, the Appellant had been a resident patient at ward 10 of that hospital, and was receiving treatment. During the examination-in-chief by learned State Counsel, SI Jayawardena had explained that he observed the following:

Question: When recording his statement, did it transpire to you as to why the 1st accused was hospitalized?

Answer: Yes.

Question: *Due to what reason?*

Answer: *Due to a gunshot.*

Question: *Were there injuries?*

Answer: *The wrist of the righthand was bandaged. Four fingers could be seen.
The left ring finger was broken.*

SI Jayawardena had not been cross-examined by the learned Defence Counsel.

77) Learned Counsel for the Appellant submitted that, the existence of such injuries on the Appellant has not been explained by the Prosecution, and it points to the direction that the shooting at the scene of the crime had been committed not by the Appellant, but by someone else. She submitted that, if not, there was no reason for the Appellant to have sustained a firearm injury. She submitted that the Appellant having sustained a gunshot injury cuts-across the case theory of the prosecution, that it was the Appellant who shot the deceased. She further submitted that, to say the least, the existence of a firearm injury on the body of the Appellant, and it being unexplained by the Prosecution, has given rise to a 'reasonable doubt' regarding the case for the Prosecution, the benefit of which must accrue to the Appellant. Learned Counsel for the Appellant submitted that on this ground alone the Appeal should be allowed.

78) While the learned ASG did not offer any explanation for the injuries sustained by the Appellant, it is possible that his views on the argument raised by learned Counsel for the Appellant was conspicuous by his silence.

79) During the trial, neither party had presented evidence of a Judicial Medical Officer or of any other Medical Officer who may have examined the Appellant while he was at the Karapitiya Hospital. Furthermore, the evidence led during the trial does not contain any explanation as to how the Appellant had sustained a firearm injury, particularly if he was the shooter. The Judgement of the High Court did not contain any observation, comment or finding regarding this aspect of the case. Nor does the Judgment of the Court of Appeal.

80) It is necessary to place on record that the purported factual basis of the afore-stated submission made by learned Counsel for the Appellant, shocked the conscience of this Court. Under such circumstances, given the distinct possibility that a third

party may have shot at the crowd resulting in both the deceased and the Appellant having suffered gunshot injuries, and the possibility that the Attorney-General had indicted the wrong person, this Court was compelled in the interests of justice to consider material beyond the scope of the trial proceedings. Doing so is generally not a common occurrence in appellate proceedings. That is because judicial scrutiny during an Appellate hearing must ordinarily be confined to the record of the trial proceedings.

81) Nevertheless, this Court as well as the Court of Appeal does possess inherent jurisdiction to, in appropriate instances, in the interests of justice (*'ex debito iustitiae'*), examine and consider extraneous material (*'materia extranea'*) which is relevant for the purpose of examining and determining whether a miscarriage of justice (*'injustitia'*) or a travesty of justice (*'travestia iustitiae'*) had occurred. There should be no interpretation to a statutory provision or a practice related procedural bar, that should stand in the way of a Court of law ascertaining the truth, and acting upon such truth. Search for the truth, its identification and arriving at a judicial finding founded upon the truth, are in fact the paramount duties of a Judge.

82) Furthermore, particularly in common law jurisdictions where criminal trials are primarily founded upon an adversarial procedural environment, there is the distinct possibility of both the Prosecution and the Defence submitting to court only evidence which they believe is in their interest and is beneficial to the respective parties. An over-zealous Prosecutor may disregard his quasi-judicial role and seek to 'somehow' secure a conviction. A Defence Counsel may neglect his primary role of being an officer of Court who is required to assist in the administration of justice, and seek to 'somehow' secure the acquittal of the accused. Furthermore, one or both of them may not possess the requisite degree of competence and may be novices in the legal profession. In such an environment, there is the distinct possibility of the truth falling in-between the case for the Prosecution and the case for the Defence. Thus, towards the objective of ascertaining the truth and in the interests of justice, a Court of law may either acting upon the application made by a party (*'ad instantiam partis'*) or on its own motion (*'sua sponte'* or *'ex mero motu'*), call for and examine extraneous material which is relevant to the case. That in fact, is the paramount duty of a Court of law, and that is how in some cases justice can be delivered.

83) Of course, such extraneous material should not be treated as 'judicial evidence', if such material has not been admitted in evidence and formally tested during the trial. Furthermore, I must emphasize that consideration of extraneous material should not be the norm, and must be the rarest exception, resorted to particularly in situations where the material within the case record gives rise to a serious doubt that a miscarriage of justice may have occurred. This case in my view is one such exceptional instance, which justifies this Court considering certain extraneous material, to which I shall now advert to.

84) A thorough screening of the original trial record of the High Court (which was called for by this Court and examined) as opposed to the 'Appeal brief' made available to both the Justices and the Counsel before this Court, revealed the contents of the Magistrate's Court Non-Summary Inquiry proceedings. Such proceedings contained the following information:

According to Medico-Legal Report (MLR) dated 8th October 1996 bearing No. 187/94, Resident House Officer Dr. A.Y. Mohideen had on 14th September 1994 at Ward No. 10 of the Karapitiya Hospital examined B.L. Sunil (the Appellant). When interviewed, the Appellant had revealed the following to Dr. Mohideen:

"Was holding his homemade gun by the muzzle end when it went off, at Imbulgoda Akuressa on 8.9.94 at about 10.00 p.m."

[I have reproduced verbatim what had been recorded by Dr. Mohideen using indirect speech.]

The doctor had observed in the patient examined by him (the Appellant) a large open wound in the right hand where the thumb was. There was complete privation of the right thumb. Those injuries had been classified by Dr. Mohideen as 'grievous injuries' and nomenclated as a 'firearm injury'.

85) It would be noted that the difference between the prosecution's narrative and the Appellant's own version (narrated to Dr. Mohideen who examined him) is between intentional shooting and accidental firing. Both at the instance of the Appellant, and not a third party. Thus, the explanation for the injury found on the Appellant is evident. He himself has explained to Dr. Mohideen, as to how he sustained the gunshot injury as a result of handling or using his firearm. The

available material clearly supports the view of the prosecutorial authority – the Attorney-General (Respondent), that the Appellant was not another victim of a shot fired by a third party using a firearm. Apart from what has been stated by the Appellant to Dr. Mohideen, there is no evidence that the gun went-off accidentally. The Appellant has not even said so in his Dock Statement. Thus, the Appellant was in fact the shooter, and the firing of the gun was intentional.

86) Thus, I see no merit in the allegation presented to this Court by learned Counsel for the Appellant that the unexplained injury on the Appellant gives rise to a basis to allege the occurrence of a miscarriage of justice on the premise that the Attorney-General had indicted the wrong individual, and that the Appellant was another victim of the crime committed by a third party.

87) As to why the learned State Counsel who conducted the Prosecution did not present such evidence in terms of the law (in order to provide the much-required explanation for the injuries found on the Appellant), is a troublesome issue, the answer to which would only be known by such prosecuting counsel. As to why the learned Judge of the High Court did not call for and consider such evidence (though he is entitled and under the circumstances of this case required to do so) is equally or even more worrying.

Answers to the questions of law

88) In view of the foregoing reasoning and conclusions reached by me, I answer the questions of law in respect of which *Special Leave to Appeal* was granted, in the following manner:

- i. The impugned Judgment of the High Court contains a non-direction which in the circumstances amounts to a misdirection pertaining to the judicial evaluation of the Dying Declaration made by the deceased and acted upon by the learned Judge. Their Lordships of the Court of Appeal have erred in concluding that the Dying Declaration had been judicially evaluated in a correct manner by the learned Judge of the High Court.
- ii. Their Lordships of the Court of Appeal have not erred by failing to consider the alleged purported critical factual misdirection on the part of the learned trial Judge in having identified a portion of testimony pertaining to an item of circumstantial evidence as amounting to eye-witness testimony

pertaining to *facts in issue*. The learned High Court Judge had made an error in having identified the relevant item of evidence as eye-witness testimony pertaining to the shooting incident. However, such error did not have a consequential impact on the finding reached by the learned Judge of the High Court. Thus, the Justice of the Court of Appeal have not been in error.

- iii. Though the learned Judge of the High Court and the Justices of the Court of Appeal had failed to consider that the Prosecution had not explained the injuries sustained by the Accused – Appellant at or about the time of the incident, the available extraneous material considered by this Court found in the original trial record, has revealed that the existence of the injuries found on the Accused – Appellant does not give rise to an inference that he was not the person responsible for shooting at the deceased. Thus, the absence of such explanation does not give rise to a consequential impact pertaining to the outcome of both the trial and the first Appeal.

Consequential impact of the non-direction amounting to a misdirection pertaining to the judicial evaluation of the Dying Declaration

89) Given the finding reached by this Court pertaining to the first question of law, wherein I have reached the conclusion that the impugned Judgments of the High Court and the Court of Appeal contain a non-direction amounting to a misdirection pertaining to the judicial evaluation of the Dying Declaration made by the deceased to Siriyawathie, it is necessary for this Court to probe further and determine the consequential and resultant impact of such misdirection.

90) Article 138 of the Constitution states as follows:

*“(1) The **Court of Appeal** shall have and exercise subject to the provisions of the Constitution or of any law, an **appellate jurisdiction** for the **correction of all errors in fact or in law** which shall be **committed by the High Court**, in the exercise of its appellate or **original jurisdiction** or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

[Emphasis added by me.]

91) In *Kiri Mahaththaya and Another v. Hon. Attorney-General* [supra] Justice Buwaneka Aluwihare has observed that, if relief is to be obtained in an Appeal, "a party must satisfy the threshold requirement laid down in the proviso to Article 138(1)". His Lordship has expressed the view that, "the proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice."

92) In *Honourable Attorney General v. C.S.L. Gurusinghe*, [SC Appeal 139/2019 and two other Appeals, SC Minutes of 5th April 2024] my brother Justice Mahinda Samayawardhena, having quoted extensively from the above judgment of Justice Aluwihare, has expressed agreement with his view regarding the applicability of the proviso to Article 138 of the Constitution.

93) In *P.L. Chaminda v. Honourable Attorney-General*, [SC Appeal 97/2012, SC Minutes of 13th September 2023] Justice Buwaneka Aluwihare having referred to the proviso to Article 138 of the Constitution, has expressed the following view:

"In view of the constitutional provision referred to, which is in mandatory terms, the duty cast on the Court of Appeal would be to consider the appeal within the scope of the proviso and, this court in turn, would be required to consider whether the Court of Appeal and/or the High Court were in error in coming to the conclusions, notwithstanding that the Accused had satisfied that his substantial rights have been prejudiced or the error or defect relied on by the Accused had occasioned a failure of justice. "

Further, having considered sections 334(1) and 436 of the Code of Criminal Procedure Act, No. 15 of 1979, Justice Aluwihare has proceeded to comment in the following manner:

"The legal effect of these two provisions which are applicable to criminal appeals, in my opinion, would be that, in order to succeed in his appeal, it is not sufficient for an accused to merely impress upon court that the issue raised might be decided

in favour of the Accused. The accused must also satisfy court that a substantial miscarriage of justice has in fact occurred or that the decision had occasioned a failure of justice."

94) It would thus be seen that, the mere finding of an error of law or fact by the Court of Appeal in a Judgment of the High Court should not *per se* give rise to the reversal or varying of such Judgment of the High Court. Following the identification of such an error (which would include a misdirection or a misapplication of the law, a failure to judicially evaluate evidence according to law or the failure to arrive at a correct and judicious finding), the Court of Appeal must proceed to consider the consequential impact (if any) arising out of such error or failure. It must determine whether such error had resulted in causing prejudice to the substantial rights of the parties or occasioned a failure of justice. What 'prejudice to the substantial rights of the parties or occasioned a failure of justice' means, is whether a **miscarriage of justice** has occurred. Simply put, had such error not occurred, would the final decision have been in the opposite direction or been substantially different. If a miscarriage of justice has not occurred, the Court of Appeal has no jurisdiction to set aside or vary the impugned Judgment of the High Court.

95) In **M.M.K. Dissanayake v. Commission to Investigate Allegations of Bribery or Corruption** (*supra*), I had the occasion to observe that, "The governing objective of the administration of criminal justice is to facilitate the conviction and imposition of punishment on persons who have committed offences, and in case due to a failure in the system, a person who has not committed an offence has been accused of having committed an offence, to facilitate his acquittal. Indeed, these two objectives are to be achieved while upholding the rule of law and the salient features expected from any civilised criminal justice system which would include a fair and lawful trial. Interpretation of provisions of the law relating to criminal justice as well as an appreciation of evidence must necessarily be in consonance with achieving the afore-stated objectives of criminal justice, which objectives are necessarily in public and national interest. Failure to do so would frustrate the very objectives of the criminal justice system, and would render a situation where the people will lose faith in the criminal justice system and make the society unsafe. It is necessary for judges who are called upon to administer criminal justice to keep this in mind." Thus, whether in a given situation, a miscarriage of justice has occurred or not, must be determined while paying due regard to the afore-stated governing objectives of criminal justice.

96) Article 127(1) of the Constitution describes the appellate jurisdiction of the Supreme Court in the following manner:

*“The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the **correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance**, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.”*

[Emphasis added by me.]

97) In *Sivathasan v. Honourable Attorney General* [(2021) 2 Sri. L. R. 290, page 331] I had the opportunity to expound on the appellate jurisdiction of the Supreme Court in the following manner:

*“In terms of article 118 of the Constitution, the Supreme Court is the highest and final superior Court of record, and shall, subject to the provisions of the Constitution, exercise inter-alia final appellate jurisdiction. As regard its final appellate jurisdiction, in terms of Article 127(1) of the Constitution, the Supreme Court has been conferred with the jurisdiction to correct all errors in fact or in law which had been committed by the Court of Appeal. In terms of Article 127(2) of the Constitution, in the exercise of that final appellate jurisdiction, the Supreme Court may affirm, reverse or vary any order, judgment, or sentence of the Court of Appeal, and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require. **In a criminal appeal to the Supreme Court, while answering the questions of law in respect of which special leave to appeal or leave to appeal (as the case may be) had been granted, the primary function of this Court is to determine whether in the backdrop of the grounds of appeal urged before the Court of Appeal, the afore-stated functions of the Court of Appeal which sat in appeal against the judgment of the High Court, had been performed in a lawful and correct manner. Additionally, this Court has the overarching duty to consider whether (a) the failure if any on the part of the Court of Appeal performing its appellate function had occasioned a miscarriage of justice, and (b) in any event, for cogent reasons to be enumerated, the finding of the trial court, should be allowed to stand.**”*

[Emphasis added by me.]

- 98) Thus, it must be noted that, Article 127 of the Constitution does not require the Supreme Court to set-aside a Judgment of the Court of Appeal or that of the High Court, merely upon the identification of an error in the Judgment of such Court.
- 99) Furthermore, though the proviso to Article 138 of the Constitution is not found in any of the Articles from 118 to 136 of the Constitution (which Articles relate to the multifaceted jurisdiction conferred on the Supreme Court), it is my view that the same principle of not setting aside, reversing or varying a Judgment of a lower Court unless such Judgment has occasioned prejudice to the substantial rights of the parties or a failure of justice, must necessarily apply to instances where the Supreme Court is called upon to exercise its Appellate jurisdiction conferred on it by Article 127 of the Constitution. That is because, when exercising its appellate jurisdiction in respect of a Judgment pronounced by the Court of Appeal, the Supreme Court must also apply the same standard of appellate review, as that required by the Constitution to be applied by the Court of Appeal. Thus, that the Supreme Court shall not set-aside, reverse or vary a Judgment of the Court of Appeal on account of any error, defect or irregularity, unless it has prejudiced the substantial rights of the parties or occasioned a failure of justice, must be read into Article 127(2) of the Constitution.
- 100) In my view, *Kiri Mahaththaya and Another v. The Hon. Attorney-General (supra)*, *Honourable Attorney General v. C.S.L. Gurusinghe (supra)*, *P.L. Chaminda v. Honourable Attorney-General (supra)*, and *R.A.K. Nishantha Perera v. Honourable Attorney General (Supra)* have been founded upon that principle.
- 101) Therefore, I shall now focus my attention on whether the non-direction amounting to a misdirection reflected in both the Judgment of the High Court and the Judgment of the Court of Appeal pertaining to the absence of a proper judicial evaluation of the Dying Declaration, has occasioned a miscarriage of justice. This would necessitate me to revert back to the evidence of the case, albeit briefly.
- 102) The incontrovertible evidence of the case for the Prosecution can be itemized in the following manner:
- i. On the night of 8th September, 1994, at the location of the residence of Somaratne, the deceased along with Ranjith and a large number of persons were engaged in playing cards, ostensibly associated with an illegal gaming activity. Those playing cards were seated on mats placed under a tent.

- ii. Lionel was present at the scene. A large number of people were gathered around those who were playing cards.
- iii. At around 10.00 p.m., the Appellant arrived at that location from an adjacent hilly area. He was armed with a gun.
- iv. The Appellant demanded that not even a single person should run away and insisted that they should remain seated.
- v. The Appellant aimed the gun towards the crowd.
- vi. Immediately, most of those gathered including Lionel immediately ran away from the scene of the crime.
- vii. A person fired a shot at the crowd.**
- viii. The sound of a gunshot emanated from the location where people had been gathered.
- ix. As a result of that gun-shot, the deceased sustained a gun-shot wound on the posterior side of his chest, and he fell on the ground on top of a mat that had been placed under the tent.
- x. Ranjith who was present also sustained an injury. However, he did not see the shooter. Nor did he see Lionel present.
- xi. Soon after the incident, Siriyawathie arrived at the scene. The Appellant made a Dying Declaration to Siriyawathie [*"Said, Diyalape Wasthuwa Shot. Hit with the handle of the gun."* ("දියලපේ වස්තුවා වෙඩි තිබ්බා කියුවා. තුවක්කු මීටෙන් ගහලා.")]. The deceased implicated the Appellant for having shot at him and for having hit his face with the butt of the firearm.
- xii. The deceased was initially taken by Siriyawathie and two others to the closest hospital, that being the Akuressa Hospital. Hospital authorities had thereafter transferred him to the Matara Hospital.
- xiii. The deceased died at the Matara Hospital, as a result of necessarily fatal internal injuries which corresponded to the external gun-shot injury.
- xiv. On 10th September 1994, the Appellant was found receiving treatment at the Karapitiya Hospital in Galle, with a firearm injury.
- xv. There is no evidence of the Appellant having been shot by another person.
- xvi. The Appellant did not go to the nearest hospital (that being the Akuressa Hospital) to receive treatment and had instead gone to Galle and sought treatment from the Karapitiya Hospital. He has not (in his Dock Statement) explained as to why he did not seek treatment from the Akuressa Hospital.

[Item 'No. vii' has been highlighted to show the absence of direct evidence regarding the *fact in issue*.]

103) As previously noted, the learned Judge of the High Court has considered the contents of the Dock Statement made by the Appellant, and for reasons rightfully stated, rejected it. Learned Counsel for the Appellant did not challenge such reasoning. Thus, considering the contents of the dock statement is not necessary.

104) Judicial conclusions pertaining to disputed facts need not be based only on evidence presented. According to principles of the Law of Evidence (most of which have been codified and are found in the Evidence Ordinance), in addition to direct items of evidence pertaining to *facts in issue* and *relevant facts*, a court of law is empowered to arrive at certain inferences and apply certain presumptions as to how certain facts may have occurred. Furthermore, there are certain other facts which need not be proved, such as matters the Court may take judicial notice of.

105) On a combination of the evidence presented and those other principles of law available to reach conclusions, it is my considered opinion that, the evidence of this case unequivocally points to the irresistible and necessary conclusion that, **it was the Appellant who shot the deceased**. As to whether or not it was intentional shooting or the gun went off accidentally, is not a matter in respect of which there is evidence. Nor is it a possibility that needs to be probed into, as that hypothesis does not arise out of the evidence or the submissions made by learned counsel for the Appellant. The cogency of the evidence presented by the Prosecution and the absence of acceptable evidence presented on behalf of the Appellant, in this case, gives rise to the finding that **the Prosecution had proven its case beyond reasonable doubt**. In such circumstances, it is my view that **the misdirection pertaining to the Dying Declaration has not given rise to a miscarriage of justice**. Therefore, I see no justification to set-aside or vary either the Judgment of the High Court or the Judgment of the Court of Appeal, as **no miscarriage of justice**.

Conclusion and outcome of the Appeal

106) In view of the foregoing, I conclude that the evidence led at the trial amply justifies the conclusion that the Appellant is 'guilty' of having committed the murder of Athapattu Hewage Jinadasa.

107) Therefore, **I dismiss this Appeal**.

Observation

108) Particularly given the criticisms made by learned Counsel for the Appellant regarding the contents of both the Judgment of the High Court and the Judgment of the Court of Appeal, it is necessary for me to make the following observations:

The writing of a Judgment (particularly of a trial court – in this instance the High Court), need not be an occasion for the trial judge to illustrate his detailed knowledge and understanding of the applicable law.

A Judgment which follows the hearing of a criminal case, is where the learned trial Judge is required to –

- a) narrate the charges and highlight the applicable constituent ingredients of such offences,
- b) state the admissions that were recorded,
- c) present a narrative of the testimonies provided by the witnesses,
- d) describe the conclusions reached founded upon the assessment of credibility of the respective witnesses and testimonial trustworthiness to be attached to testimony provided by witnesses,
- e) describe the evidence in the case with the reference to testimonies provided by witnesses,
- f) state the findings of court relating to issues relating to admissibility and relevancy of impugned items of evidence,
- g) attribute to the evidence accepted by him, necessary evidential weight and probative value,
- h) list findings of fact,
- i) provide a brief and lucid exposition of the applicable law (including the burden of proof both with regard to items of evidence relied upon by the two parties, and the burden of proof relating to the overall case), particularly where the applicable law has been debated,
- j) provide a narration of the manner in which the applicable law is applied to the evidence, and
- k) state, and where necessary, explain the findings reached, including in particular his opinion on whether the Prosecution has proved its case beyond reasonable doubt, or in the alternative, whether the Defence has

been successful in raising a reasonable doubt regarding the case for the Prosecution.

While the foregoing need not necessarily be treated as a mandatory template of a Judgment, it would be prudent for Judges of trial Courts exercising criminal jurisdiction to follow it. It is important to note that this structure does not necessarily require the learned Judge of the trial court to state in detail his knowledge and understanding of the applicable law. What is important is for the learned trial Judge to make it evident to the Court that may in the future be called upon to exercise appellate jurisdiction in respect of his Judgment, that he, acting independently, impartially and neutrally, with due diligence and in good faith, reached objective findings on the evidence, applied the law correctly, and reached correct conclusions. The same principle applies *mutatis mutandis* to Judgments of the Court of Appeal, as well. I must emphasize that a Judgment of a Court of First Instance need not be a detailed essay on the applicable law.

109) Particularly given the impetus on Judges to conclude the hearing of cases expeditiously (expeditious disposal of cases), it is likely that Judges particularly of Courts of First Instance no longer have adequate time which they would otherwise wish to have, for the preparation of comprehensive Judgments. Invariably, due to the pressure of time, Judgments have become (as it is seen in this matter) concise. In my view, that ground reality must be appreciated by Justices of the two superior Courts called upon to exercise appellate jurisdiction. Though a Judgment of a Court that exercised original jurisdiction may be brief, what is important is for the appellate Court to satisfy itself that justice had been administered according to law, founded upon –

- i. a trial conducted substantially according to procedure prescribed by law,
- ii. a trial in which the substantial rights of the accused including the right to a *fair trial* has been respected,
- iii. receipt of evidence substantially in accordance with principles pertaining to relevancy and admissibility,
- iv. an objective assessment of the credibility of witnesses, testimonial trustworthiness of testimony provided by witnesses and apportioning of correct probative value and evidential weight to testimonies,
- v. a correct appreciation and application of the law, and
- vi. a judicious finding based on the evidence and other principles recognized by law.

Should there have been a failure to do so or some other error had crept into the Judgment, the superior Court exercising appellate jurisdiction is required by law to consider and determine whether such failure or error had occasioned a miscarriage of justice resulting in material prejudice being caused to the Appellant. Appellate review is not an exercise aimed at 'finding fault' or 'pin-pointing a defect' and making use of such fault or defect to allow the Appeal. Unless the impugned outcome of the case had occasioned injustice manifesting itself in the form of a miscarriage of justice, in my view, an Appeal should not be allowed.

110) I wish to place on record my appreciation to the learned Counsel for the Appellant and the learned Additional Solicitor General for the assistance they rendered towards the determination of this Appeal.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court