

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

In the matter of a petition of appeal in
terms of section 331 (1) of the Code of
Criminal Procedure Act No 15 of 1979

High Court (Embilipitiya)

Case No: H.C.E.79/2007

C.A. Case No: 183/2012

Democratic Socialist Republic of Sri
Lanka

Complainant

Vs.

Singappulige Gunadasa alias Kaluwa
C/O K.H. Rohana, Debara Ara,
Uwa Kuda Oya,
Thanamalvila.

1st Accused

Singappulige Gunadasa alias Kaluwa
C/O K.H. Rohana, Debara Ara,
Uwa Kuda Oya,
Thanamalvila.

1st Accused Appellant

Vs.

Democratic Socialist Republic of Sri
Lanka.

Complainant Respondent

BEFORE

: H.N.J. PERERA, J

P.W.D.C. JAYATHILAKE, J

COUNSEL

: Indika Mallawarachchi for the Accused

Appellant.

Y. Kodagoda DSG for the

Respondent.

ARGUED ON

: 28.08.2014

DECIDED ON

: 05.11.2014

P.W.D.C. Jayathilake, J

On a Sinhala Hindu New year Day, namely, 14th April 2003, Somapala alias Danegala Lokka was in his compound after consuming alcohol. He had quarreled with a villager name Wasantha at about 5.30 in the evening. Danegala Lokka was a person who habitually quarrels with others after consuming liquor. While wasantha went home after the said incident Danegala Lokka kept waiting in the compound, after some time, a person called Kaluwa who was very well known to the members of Danegala Lokka's family, came there carrying a gun with a group of people. Kaluwa came near the fence and fired at Danegala Lokka. After being admitted to hospital Danegala Lokka died.

Singappulige Gunadasa alias Kaluwa, Jayasekara Kankanamge Karunadasa, Jayasekara Kankanamge Ajith Pushpa Kumara and Jayasekara Kankanamge Shantha Sarath Kumara the 1st to 4th accuseds respectively were indicted for the murder of Deegana Gamage Somapala alias Danegala Lokka under Sec. 296 of the Penal Code read with Sec.32. The 1st accused was convicted after trial and sentenced to death. This is an appeal from the said conviction and the sentence.

The main contention of the Counsel for the Accused Appellant is that the learned trial judge has disbelieved one of the eye witnesses and has accepted the evidence of the other eye witness to convict the accused. The evidence given by the witness in favour of the accused was disbelieved by the learned trial judge and rejected. When the two eye witnesses said to be in the vicinity at the time of the incident give contradictory evidence, it is inevitable that a doubt arises as to which has to be believed, the Counsel argues.

Mukthalatha, the wife of the deceased and Indika Pushpakumara the son of the deceased had been in the compound when the incident took place. Their evidence corroborates each other except on one point in it which causes a vast difference in the effect. According to the evidence of those two witnesses, Danegala Lokka was under the influence of liquor in the particular evening and had quarreled with a villager. After some time, a group of people including the four accused had come. The 1st accused was carrying a gun.

Then comes the controversial point, as to who fired. According to the wife it was the 2nd accused Kaikiriya and according to the son the 1st accused. Mukthalatha the wife of the deceased says, " Kaikiriya took the gun which was in Moda Kaluwa's hand and fired". "Kalumama came near the fence and placed a gun on the body and fired says Indika Pushpakumara", the son. He never speaks about Kaikiriya.

It is impossible to assume that the wife mentioned in her evidence like this by mistake, since both the 1st and the 2nd accused were the residents of the same village and known to her well. The opinion of this court is that she has given false evidence changing her position taken in her complaint made to the police and the evidence given in the non summary proceedings deliberately in order to get the 2nd accused involved in the incident. And also this court believes that she should not be believed as she has given contradictory evidence with regard to the weapons carried by the 2nd, 3rd and 4th accused. Therefore I reject the evidence of this witness as she is not a credible witness at all. Above is the analysis by the learned trial judge of the evidence given by Mukthalatha, the wife.

It is the defense itself that has shown the reasons for not believing in the evidence of Mukthalatha. There are four contradictions marked as 1V1, 2V2, 2V3 and 2V4 of evidence of Mukthalatha. 1V1 is a statement made to the police where she has stated "then fired with the gun which was with Modakaluwa". 2V2 is the denial of her evidence in the non summary proceedings which says that Kaikiriya had a club in his hand.

The learned trial judge has emphasized that this witness has said to the police in her statement made to the police two days after the incident that it was Modakaluwa who fired at her husband. He has further observed that this witness in her evidence given in the non summary proceedings has not mentioned the fact that it was

Kaikiriya who took the gun from Modakaluwa and fired. The trial judge has come to the conclusion that this witness has lost her reliability by stating to court that she had not told the police that Modakaluwa fired at her husband.

This is how the trial judge has evaluated the evidence of Indika Pushpakumara. While this witness had witnessed this incident at the age of ten years, he had given evidence at the age of seventeen. This witness has without any hesitation stated to court that his father was under the influence of liquor, any that he assaulted the person called Wasantha and also had an 'illankura' and a knife in his hand. Accordingly, he has given an unwavering evidence without any hesitation.

The appellant's counsel raises a point to refute Indika Pushpakumara's evidence that the deceased had been fired at not keeping the gun on the body, but at a distance of two feet from the deceased, according to the medical evidence.

The learned Senior State Counsel who supports the conviction submits that the gun recovered in investigations which is a production in this case is a locally manufactured one a country gun. The medical officer has described the differences of observations that can be made when firing is done with a standard gun and a country gun. Accordingly, the distance from which firing took place, nature of the burnt marks and the nature of wounds vary in accordance with the length of the barrel, the gun powder and pellets used. Therefore submissions of the learned

Senior State Counsel were that the medical evidence corroborates the evidence of Indika Pushpakumara when considering the evidence of J.M.O as a whole.

It is an accepted principle that the Court of Appeal will not overrule the decision of the court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanor if not for some valid reasons.

When the aforesaid reasons are taken into consideration, this court forms the opinion that this court has no necessity to interfere with the conclusion of the trial judge disbelieving the evidence of Mukthalatha, the wife of the deceased and acting upon the evidence of Indika Pushpakumara in convicting the Accused Appellant.

I, therefore, confirm the conviction and the sentence imposed on the 1st Accused Appellant by the trial court and dismisses the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J

I agree

JUDGE OF THE COURT OF APPEAL