

45/2013

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

In the matter of an appeal against the
Order of the High Court under section
331 of the Code of Criminal Procedure
Act No.15 of 1979 as amended.

Korale Gedera Piyathissa,
Kethewatte, Hingula.

Accused-Appellant

C.A.Case No:-45/2013

H.C.Kegalle Case No:-2737/07

V.

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

Respondent

Before:-H.N.J.Perera, J. &

P.W.D.C.Jayathileke, J.

**Counsel:-Anil Silva P.C with Niranjana Jayasinghe for the Accused-
Appellant**

Thusith Mudalige S.S.C. for the Respondent

Argued On:-27.01.2015/29.01.2015

Written Submissions:-20.03.2015/21.05.2015

Decided On:-08.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Kegalle for committing the murder of one Kapila Priyantha Padmakumara on 12.02.2003 thereby committing an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code. After trial the accused-appellant was convicted and sentenced to death on 05.06.2013. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The prosecution has led evidence of three eye witnesses who are said to have seen the incident. The facts pertaining to this case and the background to the incident may be set out briefly as follows.

Gayani Rupika the younger sister of the deceased was a resident of the house where the incident had taken place. The said house is situated at Hingula by the side of the Kandy-Colombo road. The said house is situated about two to three feet from the main road. On the day of the incident at about 1.30 p.m in the afternoon the deceased was in the compound expecting the arrival of a three wheeler to go home. At this time a van came from the direction of Mawanella and stopped in front of the house. There had been five persons inside the van and three of them had got off the vehicle. All of them were wearing black gowns worn by Muslim women and their faces were also covered. By this time her elder brother had gone inside the house to feed the baby. One of the three persons who had got down from the van had shouted "he is the person, shoot him, shoot him". The deceased who was in the compound

ran and jumped down the embankment. At that time two of the three persons gave a chase after the deceased.

By then the elder brother who was having meals inside the house had opened the door and come out whereupon one of the persons who had arrived in the van had shouted "he is the person, shoot him". Then one of them had shot at the elder brother and the witness had identified the said person who shot at the brother as the accused-appellant. She was able to identify the accused-appellant as he was shooting the elder brother the mask he was wearing came out as a result of the gun hitting it and it fell on to the ground. According to witness Gayani the person who first shot the deceased also shot the elder brother Wimalasena.

According to this witness she was able to identify the person who first shot the deceased and thereafter her brother Wimalasena as a result of the face cover which the accused-appellant was wearing had fallen to the ground.

Witness Wimalasena the elder brother of Gayani had stated in evidence that he heard a gunshot and has come out of the house and seen a white van parked by the side of the road and three persons in the compound and two of them carried guns. They were wearing the dresses worn by Muslim women and their faces were covered with black colored nets. As he came out of the house he saw his brother the deceased run from behind the house towards the stream. Then another shot was fired but was not sure as to who fired the shot as there were two persons with guns. According to this witness his brother had jumped in to the stream and he noticed that the black colored net which was covering the face of the accused-appellant was removed. He was clearly able to identify the accused-appellant who shouted saying "shoot the other person too". The witness at this stage is said to have inquired from the accused-

appellant as to what wrong he has done. Just then the other person had fired at him and it struck the wall.

The other witness the wife of the witness Wimalasena, Sudu Menike too had been in the compound looking at the Mango tree from which branches were been cut. She had seen a white coloured van and there were two persons inside the van. She has also seen three persons clad in the dress of Muslim women in the compound. She had identified the accused-appellant when his cap fell down.

When one analyze the evidence given by these three witnesses some common factors have been revealed by them. The perpetrators had come in a white colored van. Some of them had been dressed in black colored gowns the Muslim women wear. They had their faces covered in black nets. The deceased had been in the compound and had run towards the stream when they fired at him. They have also fired at the witness Wimalasena when he came out from the house. Thereafter they gave a chase after the deceased who ran towards the stream and fired at him.

According to all three witnesses they were able to identify the accused appellant who came to their compound dressed like a Muslim woman and covering his face because the net he was wearing to cover his identity came out as a result of the gun he was carrying accidentally hitting his face. It is very clear from the evidence given by these witnesses that the perpetrators clearly wanted to hide their identity from the witnesses. The witnesses identified only one person and that is the accused-appellant. The three witnesses were able to identify the accused-appellant because the net he was wearing to cover his face came out suddenly. According to witness Gayani it fell down and the accused-appellant immediately wore it back. That would have not taken even a minute. It is not the position of the said witness that the accused-

appellant thereafter stayed or remained without covering his face throughout the incident.

According to the said witness Gayani the accused-appellant had been wearing a mask and it fell on to the ground when the accused-appellant was shooting the elder brother Wimalasena. It is her position that the accused-appellant put it on immediately.

But witness Wimalasena contradicts this position by saying that he saw the accused-appellant near the stream with another person when the deceased was shot at and that the accused-appellant's face was not covered. By that time the face cover or the black net the accused-appellant was wearing to cover his face was not to be seen.

According to Sudumenike , the wife of witness Wimalasena her husband has not come out of the house as the perpetrators had fired at him when he opened the door She has further stated that the witness Wimalasena had pulled the sister inside the house and closed the door. Witness Sudumenike had further stated that the accused-appellant was wearing a hat to cover his face but she was able to see the bearded face of the accused-appellant as the hat fell on to the ground. It is to be noted that according to witness Gayani the accused-appellant had his face covered with a black net. And further she does not state that the accused-appellant was wearing a cap at the time of the incident.

Counsel for the accused-appellant at the trial has marked several omissions and contradictions made by the prosecution witnesses in their statements to the police.

The witness Sudu Menike had stated in her evidence that she was able to identify the accused-appellant as a result of the cap he was wearing coming off, and that she was able to see the bearded face of the accused-appellant. According to other witnesses the three persons who came into

the compound was covering their faces with black colored nets. No other witness had mentioned above the beard the accused-appellant had or about the hat he was wearing at the time. Later she refers to the said hat as the covering the accused-appellant had to hide his face. This witness also had stated that she saw the accused-appellant inside the van and he was in the other corner of the van. According to her statement made by her just one hour after the incident she had seen the accused-appellant immediately when the van arrived and he was seen inside the van. She has stated that she clearly recognized the accused-appellant inside the van and referred to him as piyatissa. This clearly gives the impression that the accused-appellant did not have anything to cover his face when he was seen by this witness inside the van for the first time. This clearly is contradictory to the position she has taken whilst giving evidence in court.

- According to witness Gayani Rupika the three persons who entered the compound was wearing black gowns worn by Muslim women and their faces were all covered. According to her the accused-appellant had been wearing a mask to cover his face or to hide his identity but it came off as he was firing a shot at the deceased. She had stated that the mask the accused-appellant was wearing came off as a result of the gun hitting the face cover as he shot her elder brother. It is her evidence that the accused-appellant shot the deceased as well as her brother Wimalasena.

The learned trial Judge has in her judgment stated that even though the defense drew the attention of court to several contradictions and omissions, these contradictions are not that important as they have not gone to the root of the case.

This court is of the view that the several contradictions and omissions marked by the defense in this case are of importance. The main issue in this case is whether the said witnesses were able to identify the accused-

appellant as one of the persons who arrived in the van and shot at the deceased and the other witness. There is no doubt that all three persons who came into the compound were wearing dresses Muslim women wear covering the whole body and also they were covering their faces with masks or black nets. The witnesses who gave evidence in this case were not able to identify the other persons who came to their compound on that day. Except the witness Sudumenike who has said that the accused-appellant was wearing a hat, and the two other eye witnesses who gave evidence in this case had stated that they were able to identify the accused-appellant as the black net or mask he was wearing to cover his face came off accidentally. And the witness Gayani had stated that the said net fell on to the ground and the accused-appellant immediately picked it up and covered his face up again.

Therefore the fact that the black covering or the net, the accused-appellant had to hide his face came off and the witnesses were able to clearly identify the accused-appellant is an important fact which goes to the root of this case. It is to be noted that this witness Gayani had not stated to the police that she was able to identify the accused-appellant as the net he was wearing to hide his face fell to the ground. The court will have to carefully analyze the evidence of the said witness and decide whether the court could believe and act on the evidence given by the said witness with regard to this fact. Therefore the contradictions and omissions with regard to how they were able to identify the accused-appellant under such circumstances are very material and important to determine whether the prosecution had proved the identity of the accused-appellant beyond reasonable doubt.

The trial judge has stated in her judgment that the prosecution was able to lead evidence to show that there was political rivalry between the two parties. There is always the possibility of the prosecution witnesses falsely implicating the accused-appellant in this case. The witnesses were

not able to identify the other two who had come into their compound wearing black gowns and black nets. But they were able to identify the accused-appellant because the net he was wearing came off accidentally. Under the said circumstances one has to carefully consider whether the said witness Gayani had sufficient time to identify the accused-appellant. There are important contradictions and omissions in the statements they have made immediately after the incident to the police regarding the identity of the accused appellant in this case. This court observe that the trial Judge appears to have misdirected herself regarding the infirmities relating to the identification of the accused-appellant by these witnesses. It is the duty of the trial Judge to deal with them and decide whether such infirmities go to the root of the case. The learned trial Judge should have considered the entirety of the evidence that has been led before her and carefully consider whether the contradictions and omissions marked were material and whether it was safe to act on the identification of the accused-appellant by the said witnesses.

The function of an appellate court in dealing with a judgment mainly on the facts from a court which saw and heard witnesses has been specified as follows by Macdonnell C.J. in the King V. Guneratne 14 Ceylon Law Recorder 174:-

"I have to apply these tests, as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact:

- (1) Was the verdict of the Judge unreasonably against the weight of the Evidence,
- (2) Was there misdirection either on the law or the evidence,
- (3) Has the court of trial drawn the wrong inferences from the matters In evidence.

Similarly Wijewardene, J stated In *Martin Fernando V. Inspector of police Minuwangoda* 46 N.L.R 210, that;

“An appellate court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically” although “the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight.” Where” a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt.”

There is yet another matter to be mentioned. The trial had proceeded day to day basis. It should be commended as it is the best way to proceed to trial before a High Court on a criminal trial.

On 30.05.2013 the prosecution had closed its case at around 1.45 p.m. The court had called for the defence and had explained to the accused-appellant about his rights of giving evidence and calling for witnesses on behalf of the defence. At that stage the Counsel for the accused-appellant had moved for a date to call evidence for the defence. The court had rejected the said application stating that the case had been taken for trial on day to day basis and the time was around 1.45.p.m. Thereafter the accused-appellant had given evidence under oath and after the conclusion of the accused-appellant’s evidence the Counsel had made yet another application to adjourn the trial for another day to call a witness to give evidence on behalf of the accused-appellant. The prosecution had objected to the said application and the learned trial Judge had proceeded to reject the said application of the Counsel for the accused-appellant. Thereby compelling the Counsel for the accused to close the case for the defence. At a glance it can be seen that some injustice had been caused to the accused-appellant who was facing a charge for capital punishment. The prosecution had led evidence on

three consecutive days until 2.45 on the 3rd day. The accused-appellant is entitled to have a fair trial. And in our view the application made on behalf of the accused-appellant should have been allowed.

For these reasons I am of the view that the verdict of the trial Judge is unreasonably against the weight of the evidence and that it is not safe to convict the accused-appellant on the available evidence in this case. Therefore I set aside the conviction and sentence of the learned High Court Judge of Kegalle dated 05.06.2013 and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL