

168-170/2012

**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.1 of 1979 as amended.

(1)Marakkala Manage Chandana Jagath

Kumara alias Mahathun

(2)Henda Vitharanage Ranil Priyanga

alias Pepol Beya

(3)Henda Vitharanage Tiran Bharatha

**C.A. Case No:- 168-170/2012**

**H.C. Matara Case No:-110/08**

**V.**

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

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

**K.K.Wickremasinghe, J.**

**Counsel:-Anil Silva P.C. with Nandana Perera for the 1<sup>st</sup> Accused**

**Appellant**

**Rienzi Arasakularatne P.C for the 2<sup>nd</sup> Accused-Appellant**

Upul Kumarapperuma with Kaushalya Perera and Heshani

K.Jayasuriya for the 3<sup>rd</sup> Accused-Appellant

Sarath Jayamanne P.C. A.S.G. for the Respondent

**Argued On:-**25.02.2015/12.03.2015/20.03.2015

**Written Submissions:-**12.05.2015/05.06.2015/09.06.2015/15.07.2015

**Decided On:-**14.10.2015

**H.N.J.Perera, J.**

The accused-appellants were indicted in the High Court of Matara for committing the murder of one Wickrema Kalutota Hewage Amerasena at Devinuwara on 22<sup>nd</sup> September 1999 an offence punishable under section 196 of the Penal Code read with section 32 of the Penal Code. After trial the accused-appellants were convicted and sentenced to death on 30.05.2012. Being aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court.

The key witness or the only eye witness produced by the prosecution to establish the charge against the accused-appellants was J.H. Kanthi, the wife of the deceased, who inter alia testified that on the day in question she and her husband the deceased went to the Bank of Ceylon branch at Devinuwara to finalize a loan application and to obtain cash. They had their four year old child with them. After attending to preliminary matters they were waiting in the bank until the officials finalized the said application. Then they saw the 1<sup>st</sup> accused-appellant inside the Bank and had stated "wellata bahinna panam hathark hamba wei" to which the deceased responded by saying "oyala ithin gahawi api ithin guti kanawa"

As there was delay in obtaining cash, the witness Kanthi had asked the deceased to go back home with the child. She testified to the effect that she came out of the Bank. The deceased after wearing the helmet, kept the child on the motor cycle and got on to the motor cycle. The witness

Kanthi saw the three accused-appellants running together from the three wheeler park towards the motor cycle. The 1<sup>st</sup> accused-appellant was armed with a gun and all the accused were running towards the motor cycle. Witness Kanthi saw the deceased staring at the accused-appellants. As if realizing the potential danger the deceased at this stage took the child out from the motor cycle kept him on the floor. The deceased also got out of the motor cycle even without removing the helmet. The witness states that she saw the 1<sup>st</sup> accused-appellant coming close to the deceased and shooting the deceased with a small gun about one foot and after the deceased fell down, the 2<sup>nd</sup> accused-appellant kicking him on the chest and the 3<sup>rd</sup> accused-appellant uttering the words "wede hari." Thereafter all three accused ran away towards the three wheeler park.

According to witness Kanthi after seeing the gruesome shooting she screamed and pleaded for a vehicle as no one came closer to the place of the incident. The witness said that the shot was directly aimed and fired on the head of the deceased and that there was blood splash on her child and she initially thought that even the son had received gunshot injuries. After some time, others came and helped her to take the deceased to the Matara Hospital. After admission to Matara Hospita the deceased succumbed to injuries and she made a prompt complaint to Dondra police station.

It was submitted on behalf of the accused-appellants that in order to convict any of the accused-appellants for the charge preferred against them, witness Kanthi should be believed by court as a truthful witness. The said witness being the only eye witness it is imperative that court should accept Kanthi as a truthful witness. It was submitted by the Learned President's Counsel for the accused-appellants that Kanthi cannot be accepted as a truthful witness as her evidence is contradicted by the evidence of Siripala Vidanage , the Security Officer of the Bank.

The defence witness Siripala Vithange who was a security guard at the Bank of Ceylon branch on the relevant day claimed that he was inside the Bank when he heard a gunshot and after hearing the sound he got up and looked at the entrance in front of the Bank. Then he claims that he has seen a lady raising cries saying "budu ammo". The lady had pleaded to bring a vehicle.

This piece of evidence clearly support the evidence given by Kanthi stating that she raised cries and pleaded someone to bring a vehicle to take her husband to Hospital. The said witness Kanthi has stated that no one came close to the place of the incident and after some time with the help of others she was able to take her husband to the hospital. It is highly unlikely that any other woman would have screamed and shouted and sought the assistance of the public to take the deceased to hospital. He had said that he came to know from others that it was the husband of the witness Kanthi that has been shot dead. He has said that he did not know the woman who shouted. He has said that the said witness Kanthi ran out of the Bank as he closed the door. And that it was another woman who had raised cries and had sought help. In my opinion the evidence given by the witness Vithanage does not create a doubt about the evidence given by the witness Kanthi. In fact there is a doubt created as to whether the said witness Vithanage had clearly seen the witness leaving the bank with the child and husband. Further, when the witness Kanthi gave evidence, the defence never raised a single question whether any other woman had shouted and pleaded for a vehicle before the witness reached the place of the shooting. Further not a single question has been put to her regarding her purported running out of the Bank when security guard tried to close the Bank.

The learned trial Judge has analyzed and considered the evidence given by the said witness Vithanage. And he has opted to believe and accept the evidence given by the witness Kanthi in this case.

The learned Counsel for the accused-appellant also had referred to the fact that Kanthi's assertion that prior to the shooting there was an altercation between the 1<sup>st</sup> accused-appellant and the deceased inside the Bank is also contradicted by the said witness Vithanage. The evidence led in this case clearly indicate that there was no such altercation as suggested by the defence but only a cross talk. There was no such a big argument between the 1<sup>st</sup> accused-appellant and the deceased as suggested by the defence as would have directed the attention of others who was inside the bank at that time.

V1 to V4 contradictions marked by the defence is only with regard to her statement that she had seen the accused-appellant running towards the three wheel park after the incident and getting into a van thereafter. In court she has stated that she saw the three accused-appellants after the shooting going towards the three wheeler park and they may have gone in a vehicle that was parked there.

The witness Kanthi has stated that the incident took place in front of the Bank. She states that she saw the three accused-appellants coming from the direction of the three wheel park and that the 1<sup>st</sup> accused-appellant had a gun in his hand. She knew the accused-appellant very well. She had the opportunity and ability to witness the incident. Before the incident she saw the 1<sup>st</sup> accused-appellant inside the Bank. She did not see any weapons in the hands of the other two. It was the 1<sup>st</sup> accused-appellant who shot her husband. The argument put forward by the Counsel for the defence that Kanthi was not a credible witness is untenable. We hold that there was ample material before the learned trial Judge to hold that Kanthi was a very trust worthy, reliable and credible witness and we find that the learned trial Judge cannot be faulted for his conclusions and for his decision to on that evidence. There was other material, before the learned trial Judge that could not have missed, such as medical evidence, the evidence of N.Wimalasiri and the evidence of the police officers, that

would justify the conclusion that all three accused-appellants were acting in furtherance of a common intention.

The evidence of Wimalasiri is that on this day at about 9.45 and 10 a.m he had parked his three wheeler in the three wheeler park and he heard a sound of fire crackers and thereafter the 1<sup>st</sup> and 2<sup>nd</sup> accused-appellants got into his vehicle and he was asked to drive the three wheeler towards Matara. The 1<sup>st</sup> accused-appellant had a gun one foot long with him. Witness Wimalasiri has stated that he did not examine the gun the 1<sup>st</sup> accused carried but said that he got scared. Therefore after the accused-appellants had got down he drove towards the police station to inform the same and was stopped by two constables near the bridge. The witness had clearly said that the 1<sup>st</sup> accused-appellant carried a gun and he was scared. No questions had been put to the witness to verify the type of gun which the 1<sup>st</sup> accused-appellant carried on that day. The said witness is also from Dondra area and he should have known the difference between a 'fishing gun' and other guns. Not a single question or suggestion has been put to the said witness by the defence to establish the fact that the witness Wimalasiri saw only a 'fishing gun'.

The Judicial Medical Officer Dr. Pathmathilaka also testifies to the fact the effect that the distance between the deceased and the gun would have been 4-5 feet. It was the position of the witness Kanthi that the 1<sup>st</sup> accused-appellant came very close to the deceased and pointed the gun towards the head of the deceased and shot. The medical evidence clearly corroborate the testimony given by the said witness Kanthi. Dr. had observed only one injury over the dead body. It was on the fore head. Therefore I find that the learned trial Judge has come to a correct conclusion that the medical evidence does corroborate the evidence of the said witness Kanthi.

It was further submitted that the evidence of ASP Upali Sarath Kumara does not in any way establish that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused-appellants

absconded after the incident for he has not made any notes with regard to his going to houses of any of the accused-appellants. It is to be noted that the 1<sup>st</sup> accused-appellant has admitted in his evidence that on the day of the incident in the evening he heard that they are being looked for by the police in connection with the murder of the deceased and he went into hiding with the 2<sup>nd</sup> accused-appellant and surrendered to court through a lawyer arranged by his mother.

Further the prosecution had marked three contradictions relating to his not going to Matara on the day of the incident in a three wheeler and hearing about a murder committed in the town while he was with the 2<sup>nd</sup> accused-appellant in the beach. The 1<sup>st</sup> accused's position was that he did not tell the truth to the police based on advice he received and the truth is what he is testifying to under oath. In my opinion the learned trial Judge had quite correctly rejected the evidence of the 1<sup>st</sup> accused-appellant on the basis that he cannot be believed and not a credible witness. The learned trial Judge had also considered the evidence given by the 2<sup>nd</sup> and 3<sup>rd</sup> accused-appellants and had rejected the said evidence giving cogent reasons for doing so.

.In *Sumanasena V. Attorney General* [1999] Sri.L.R 137 it was held that:-

“Evidence must not be counted but weighed and the evidence of a single witness if cogent and impressive could be acted upon by a court of law.”

The trial Judge has come to such a favourable finding in favour of the witness Kanthi as regards her testimonial trustworthiness and credibility. He has had the benefit of the demeanour and deportment of this witness who was subjected to a very long and protracted cross-examination. The learned trial Judge has also very clearly stated that the evidence of the said witness is supported by the evidence adduced at the trial emanating from other witnesses.

I cannot agree with the submission made by the Counsel for the accused-appellants that the learned trial Judge had rejected the defense version without a proper analysis of the same. The learned trial Judge had carefully evaluated the evidence of the prosecution as well as the evidence led on behalf of the accused-appellants. The learned trial judge had directed his mind to the contradiction and omissions pointed out by the defence and had very clearly held that they do not go to the root of the matter. In the case of State of U.P V. M.K Anthony 1984 2 SC J 236 it was held that where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

In Mohamed Niyas Naufer & others V. Attorney General SC Appeal 01/2006 decided on 08.12.2006 Shirani Thilakawardene, J. held that:-

“When faced with contradictions in a witness testimonial, the court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness. It was further held that, too great a significance cannot be attached to minor discrepancies, or contradictions as by and large a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident.”

It was further held in that case that:-

“Therefore court should disregard discrepancies and contradictions, which do not go to the root of the matter and shake the credibility and coherence of the testimonial as a whole. The mere presence of such contradictions therefore, does not have the effect of militating against the overall testimonial creditworthiness of the witness, particularly if the said contradictions are explicable by the witness. What is important is whether the witness is telling the truth on the material matters concerned with the event.”



A court of appeal will not lightly disturb the findings of a trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

The Privy Council in *Fradd V. Brown & Company Ltd.*, 20 N.L.R 282 held as follows:-

“It is rare that a decision of a Judge so express, so explicit upon a point of fact purely is over ruled by a Court of Appeal, because the Courts of Appeals recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these. A Court of Appeal will over rule a Judge of first instance.”

In conclusion, for reasons stated above I hold that the accused-appellants had failed to satisfy this court on any ground urged on their behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused-appellants and affirm the conviction and sentence dated 30.05.2012 of the Learned High Court Judge of Matara.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**k.k.Wickremasinghe,J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**