

C.A.83/12

**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.

Pathirenehelage Indika Jayaratne  
Alias Thushara

**Accused-Appellant**

**C.A.Case No:-83/12**

**H.C.Kegalle Case No:-2658/07**

**V.**

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

**Respondent**

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

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

**Counsel:-Indika Mallawarachchi for the Accused-Appellant**

**Shanaka Wijesinghe D.S.G for the Respondent**

**Argued On:-23.09.2015**

**Written Submissions:-12.11.2015**

**Decided On:-18.11.2015**

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

The accused-appellant was indicted in the High Court of Kegalle for committing the murder of one Jemis Waduawala on the 04.01.2001 thereby committing an offence punishable under section 296 of the Penal Code. After trial the accused-appellant was convicted and sentenced to death on 24.07.2012. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

When this matter was taken up for argument before this court the learned Counsel for the accused-appellant confined his submissions in this appeal to a single ground of appeal. The only ground of appeal taken up at the argument stage by the Counsel for the accused-appellant was that the body of the deceased was not properly identified.

In this case Dr.Thusitha Wijemanna who performed the post mortem has specifically stated that one Sammy Karunaratne, the son of the deceased and the Son-in-Law Piyadasa iddamalgoda identified the body of the deceased before him. It is therefore very clear that the deceased body had been positively identified by the son of the deceased before Dr.Wijemanna. The said Post Mortem report has been marked by the prosecution at the trial as P1. No questions had been put to the Doctor regarding the identification of the body of the deceased by the defence at any stage of the trial. In fact the evidence given by the Doctor at the

trial to the effect that the deceased body was identified by his son and the Son-in-Law has not been challenged by the Counsel for the accused-appellant at any stage of trial. It is not a ground which has been taken in the Petition of Appeal of the accused-appellant either. It has been taken up for the first time in appeal at the stage of the argument.

The witness Samie Karunaratne has in his testimony clearly stated that his father was Jamis Waduawala and he died on 04.01.2001 on his way to the hospital. Further the Doctor had stated that the said son Samie Karunaratne and the deceased Son-in-Law identified the body of the deceased as that of Jamis Waduawala before him at the Post Mortem held at the Avissawella hospital. The defence had not challenged this position at the time witness gave evidence before the High Court.

In the Indian case of Himachal Pradesh V. Thakurdas (1983) 2 CRI LJ 1694 at page 1701 it was held that whenever a statement of fact made by a witness is not challenged in cross-examination it has to be concluded that the fact in question is not disputed.

In Sarwan Sing V. State of Punjab 2002 AIR Supreme Court 11 3652 at 3656 it was held that:-

“It is a rule of essential justice that whenever the opponent had declined to avail himself of the opportunity to cross examine the witness it must follow that the evidence tendered on that issue ought to be accepted.” (See also Bobby Mathew V. State of Karnataka 2004 Cri. L.J.2003, Edrick de Silva V. Chanradasa De Silva 70 N.L.R 169, Motilal V. State of Madya Pradesh (1990) Cri. L.J.Noc 125 MP.

For the reasons stated I hold that there is no justification in interfering with the judgment of the learned High Court Judge dated 24.07.2012. Accordingly I dismiss the appeal.

Appeal dismissed. Conviction and the sentence is affirmed.

**JUDGE OF THE COURT OF APPEAL**

**K.K.Wickremasinghe, J**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**