

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

In the matter of an Appeal
against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979.

Werahera Appuhamylage
Nirmala Piyatissa,
Bogambara Prison,
Kandy.

Accused-Appellant

C. A. No. : 134/ 13
H. C. Anuradhapura Case No. : 154/ 11

V.

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

Respondent

BEFORE : **H. N. J. Perera, J. &**
K. K. Wickramasinghe, J.

COUNSEL : M. Sharon Seresinhe for the Accused-
Appellant.
Chethiya Goonesekera DSG, for the
Attorney General.

ARGUED ON : 02nd of December 2015

DECIDED ON : 08th of February 2016

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the ‘appellant’), Werahera Appuhamylage Nirmala Piyatissa was indicted at the High Court of Anuradhapura for having committed the death of Chandrakumarage Samanthajith Nayanapriya on or about 16th September 2005, thereby committing an offence punishable under s.296 of the Penal Code. After conclusion of the Trial the Learned High Court Judge had convicted the Appellant for committing murder of the deceased and sentenced to death on 17th September 2013.

The indictment had been served to the appellant on 19th January 2012. The Appellant had opted for a non- Jury on the same day. Therefore the trial commenced before the Learned High Court Judge of Anuradhapura on 2nd November 2012.

At the trial Prosecution led evidence of several witnesses (Pw1, Pw2, Pw3, Pw5, Pw 15, Pw 11, Pw 9) and the case for the prosecution had concluded on 5th Aug 2013.

Thereafter the appellant had made a dock statement denying all the charges. In his dock statement he stated that, he was not involved in this incident and that he was maliciously implicated by the Pw1. He further stated that according to the evidence of 2nd and 3rd witnesses, they had not seen the Appellant's pistol.

The first witness in this case who is Chaminda Ekanayake (Pw1) was a three wheeler driver and his three wheeler was parked in the old bus stand in Anuradhapura. Samanthajith Nayanapriya, the deceased also parked his three wheeler in the same location. The Appellant namely Nirmala Piyatissa, also parked his three wheeler at the same location. According to the Pw1, on the day of the incident he came to the three wheeler park around 9 am. After a while the deceased came there. Pw1 was inside a telephone booth behind the three wheeler park trying to take a call. The deceased came near him and started joking by putting his hand inside Pw1's trouser pocket trying to take some money. Then the Appellant is alleged to have come from behind and shot him with a pistol. At first Pw1 did not take any notice and thought he was joking when the deceased fell down. Thereafter the Pw1 realized that the deceased was shot by a real pistol as there was blood on the deceased's body.

The Grounds for Appeal urged by the Learned Counsel for the Accused Appellant are as follows:

- a) The Learned High Court Judge has not properly evaluated the evidence of all the witnesses when giving his Judgement
- b) The Government Analyst's Report was not considered when giving the Judgment.

The Learned Counsel for the Appellant argued that the Learned High Court Judge has only considered the evidence of Pw1, Chaminda. The Pw2 and Pw3 had not seen the incident, but they were in close proximity to the place of the incident. They had seen

the Appellant coming and going from the scene. He further argued, that Pw1's conduct is questionable, either he is lying or that he is a reasonably prudent man. However according to the evidence led by the Prosecution at the time of the shooting the accused was only 4-5 feet away from him (vide page 35) Therefore he had clearly seen him. The Learned Counsel for the Accused Appellant argued that as stated before Pw1 made up a story as it was to be a joke therefore his conduct is questionable. However according to the Pw1, for a moment he had thought that the Appellant used a toy gun since there was a toy shop close by. It had taken a few minutes for the witness to realize that deceased was shot by a real gun as there was blood on the deceased body and he had heard a loud noise. After been shot, the deceased had fallen down in front of him. He further stated that the Appellant shot at the deceased while, the deceased and he was having a chat and the deceased was facing him. The Prosecution Witness has stated that he did not have any animosity towards the Appellant (vide page 52). We cannot just assume that Pw1 was maliciously implicating the Appellant. The Prosecution Witness has stated that he had seen the Appellant only in Courts several years after the incident, and he had identified the revolver which the Appellant had used to shoot the deceased.

According to Pw2, (Udaya Nimal), he had seen the Appellant on the day of the incident at the trishaw stand and seen the accused walking towards the telephone booth. He had heard the sound of gun shots and had seen the deceased fallen. He had seen Pw1 at the scene of crime where the deceased had fallen. After the shooting incident the Appellant had run away from the scene towards the market from the left side of his trishaw. However when Pw2 was cross examined he admitted that when the Appellant came to the three wheeler park he had nothing in his hand (Vide pg. 63, 64, 65). Therefore the Learned Counsel for the Accused Appellant argued that if the Appellant had a revolver in his hand, he would have seen it, and if he carried a bag he could have concealed the revolver in that, but according to the witness he was not carrying a bag. Therefore this causes a great doubt in the Prosecution case. Thus, he argued that the Appellant is not the person who brought a revolver and shot Samantha.

However the Learned High Court Judge has taken the view that, after the incident the Pw2 had seen the Appellant walking towards the Kada Peliya (vide pg. 60). All witnesses knew the Appellant and the deceased as all of them worked together for several years. Pw2 had seen the Appellant on the day of the incident at the trishaw stand and had seen the appellant walking towards the telephone booth. After he heard the sound of the gunshots, Pw2 had seen the Appellant running away from the scene towards the market from the left side direction of his trishaw. Thus, if the

Appellant was not connected to the death of the deceased why did he walk away when one of his friends were shot to death. Furthermore Pw2 stated that he had seen the Appellant only in Courts several years after the incident. Thus, the Learned High Court Judge was in question as to why the Appellant who had been working with them as a three-wheeler driver for about one year suddenly left after the incident.

Under cross examinations Pw2 stated that he didn't see anything in the Appellant's hands when he came towards him. He further stated that he heard 4 sounds after the Appellant went towards the back. The Learned Counsel for the Accused Appellant has pointed out a doubt, that when Pw2 was cross examined he admitted that, when the Appellant came to the three wheeler park he had nothing in his hand. (vide page 63, 64, 65). However the Learned High Court Judge had taken the view that the fact that Pw2 had not seen a revolver in the hands of the Appellant does not create a reasonable doubt and therefore it does not go to the root of the case. The Pw2 has never mentioned that he didn't see the revolver in the hands of the Appellant after the incident, what he had admitted was that when the Appellant came to the three wheeler park he had nothing in his hand. (vide page 63,64,65).

The Learned Counsel for the Accused Appellant argued that, the Learned High Court Judge has not considered the evidence of the 2nd and 3rd witnesses. So that his conclusion is based entirely on the evidence of Pw1.

Another ground of Appeal based on the credibility of the prosecution was that, the 3rd Witness (Janaka Chandrasiri) had not seen the incident. He had only seen the deceased fallen. The Learned Counsel for the Accused Appellant argued that the Learned High Court Judge came to a conclusion that after the shooting incident, the Appellant took the three wheeler and left the scene, though there was no evidence to that effect. According to the Learned Counsel for the Respondent, Pw3 was also a three wheeler driver. He had been inside his trishaw when the incident took place. Then he had checked what had happened since he had heard a loud noise and when he rushed towards that direction he had seen some one fallen near the telephone booth. He has also stated that he knew the Appellant for about one year before the incident. The Learned High Court Judge has confirmed the fact that the Appellant was present at the three wheeler park at the time of the incident by the evidence given by Pw3. Also, when Pw3 rushed towards the direction where he heard loud noises he had seen someone fallen near the telephone booth. However when he reached that place the Appellant was not present near the telephone booth. This

confirms the fact that as soon as the incident, the Appellant has left the place. (vide page 131)

Even if the Learned Counsel for the Accused Appellant argued that the Judge had come to a conclusion that after the shooting, the Appellant took the three wheeler and left the scene, what is important is not, how he left the scene, but why he left, when one of his friends were shot to death. Therefore the argument brought forward by the Learned Counsel for the Accused Appellant does not go to the root of the case. When considering the evidence of the above mentioned lay witnesses, the rule set out in the case of **Siripala Vs AG (CA99/2005)** has to be born in mind. His lordship Justice Abrew, observed that *"I state here that there is no rule in Criminal Law of Evidence that what was seen by one witness should be necessarily seen by other witness. I must state here that what one may see may not be seen by others"*. This view is supported by the decision in the case of **Bhuginbhai Vs State of Gujarat (AIR 1983 SC 753)** whereas the Indian Supreme Court held that *"by and or large a witness cannot be expected to possess a photographic memory and recall the details of an incident. It is not as if a video tape is replayed on the mental screen. The power of observation differs from person to person what one may notice another may not"*.

The next argument brought forward by the Learned Counsel for the Accused Appellant was that Pw1 in his evidence states that it is the Appellant who took him inside a three wheeler after the shooting incident. Therefore it causes a great doubt in the Prosecution case (Vide Pg.37). Thus, the Learned Counsel for the Accused Appellant argued that Pw1's evidence is not credible. However, the Learned Counsel for the Accused Appellant has only been able to mark only one contradiction about the time difference of half an hour and it cannot be considered as a vital contradiction, because Pw1 has stated that he cannot remember. It is stated in **Wickremasuriya V Dodalina** by Hon. Justice FND Jayasuriya in Case No **CA 172/84**. It was held that *"if the contradiction is not of that character the court ought to accept the evidence of witnesses whose evidence is otherwise cogent having regard to the test of probability and having regard to his demeanor and department manifest by witnesses. Trivial contradictions which do not touch the core of a party's case should not be given much significance."*

The Learned Counsel for the Accused Appellant argued that the weapon used in the shooting was not a pistol as contended by Pw1 because if it was a revolver it could not be concealed in a trouser pocket. Furthermore he stated that Chaminda (Pw1) first stated that it was a toy pistol in his evidence and subsequently he stated it was a

revolver. The Learned High Court Judge has taken the view that, the Pw1 has been able to identify that the pistol was a revolver and it was the type of pistol **that the Appellant was carrying**. The Judge has stated that, it is difficult to expect a witness to remember all features of a pistol in that kind of a shooting incident. However the witness has identified the revolver (P2). It is evident that Pw1 is a truthful witness.

The Learned Counsel for the Accused Appellant argued that it is highly improbable that one three wheeler driver midst of all three wheeler drivers could commit such crime and escape from a crowded place in broad day light and even if he committed the offence he could not have taken the weapon being seen by others. He further stated that he could have been apprehended easily, and the weapon was not found at the scene. Therefore the Learned Counsel for the Accused Appellant argued that the test of Probability fails.

He further argued that the medical report too causes some doubts in the Prosecution case. He stated that Pw1's, evidence was that the deceased was facing him, when the shooting took place (vide page.34). If that was his position, the assailant has to shoot the deceased from behind or from the side of the deceased. He further stated that the Appellant cannot shoot standing in front of the deceased. According to the medical report, shots were entered through the Chest, Heart, Lungs, and Brain (vide page 83) therefore the entry wounds were in the front of the body. However the Learned Counsel for the Accused Appellant argued that it is highly improbable, because deceased was turning his back to the Appellant. Therefore it creates a reasonable doubt, since it is not possible for the Appellant to shoot the deceased from the front. The Pw15, Dr. D.L. Widyaratne JMO who held the post mortem of the deceased had observed 8 external injuries. Injury No.1 was an entry wound by a bullet and No 2 was an exit wound. Furthermore he discovered 4 bullets had entered the body of the deceased. The cause of death was due to gunshot injuries caused to the head and the chest of the deceased. The Learned Counsel for the Accused Appellant argued that the entry wounds were in front of the body. This creates a reasonable doubt as it is not possible for the Appellant to shoot the deceased from the front, since he was turning his back to the Accused and was standing in front of Pw1. One cannot say at what point the first entry had taken place. The injured will never stay like a statue when receiving injuries. Certainly he would have been moving. Therefore there cannot be a hard and fast rule to come to a conclusion about entry wounds. The only conclusion which can be drawn is that the deceased had received injuries by the weapon used by the Appellant which is seen by witness no.1. Therefore medical evidence amply demonstrates the version of Pw1.

According to the Government Analyst's report the weapon marked in Court was a revolver. A bullet was found in the left hand middle section and was marked P2 by the Government Analyst (Vide pg. 138). The Learned Counsel for the Accused Appellant argued that since the Government Analyst was unable to say whether this bullet was fired by the particular revolver as it was damaged. Thus, it creates a reasonable doubt. Furthermore the revolver produced in Court was not recovered from the possession of the Appellant. It was a section 27 recovery. Therefore it should not be treated as an admission that the accused used this particular gun to commit this offence. Furthermore he stated that according to the Government Analyst's Report, the weapon found is not compatible with the bullet. Therefore the Learned Counsel for the Accused Appellant argued that it creates a reasonable doubt as to whether this revolver was linked to the incident. According to the Inspector of Police M. S. K. Wickramarachchi, upon receiving information, that a person wanted in connection with a murder is said to have been near the General Hospital, Kurunegala, he had gone to the hospital and had arrested the suspect on 23rd May 2008 upon information given by a private informant. Accordingly after recording his statement a revolver presumed to have been used to commit the offence had been recovered on being shown the place by the Accused. The said portion which assisted the Police to recover the gun had been marked. Furthermore a part in which "the house of Amarasiri alias Sudu Aiya where the revolver had been kept can be shown" had been marked under section 27. As a result of the Appellant's statement the revolver was discovered on 23rd May 2008 from Amarasiri's House. Even if the Learned Counsel for the Accused Appellant argued that the revolver marked in Courts was a section 27 recovery therefore it should not be treated as an admission that the Appellant used this particular gun to commit this offence, Pw1, (Vide page 28) who is the main eye witness in this case had seen the incident as the shooting by the Appellant had taken place 2ft away. He identified the gun which the Appellant had used to shot the deceased. Therefore there is no room to bring up false evidence to maliciously implicate him to an incident in which he was not involved. After the incident he left Anuradhapura and he was hiding for 3 years until the day he was being arrested by M. S. K. Wickramarachchi, Inspector of Police in Kurunegala. The Knowledge of the Appellant with regarding the place where the revolver was hidden needs to be taken in to consideration here. However the Appellant has not explained as to whether the revolver belongs to someone or how he got a revolver. Therefore, the revolver which was seen by the Pw1 Chaminda at the time of the incident is the same revolver which was recovered after 3 years as a result of a statement by the Appellant. This can be accepted without any doubt. Learned High Court Judge had considered the fact that there is no valid reason as to why the Appellant left Anuradhapura after the said incident, therefore the Courts can come to a conclusion

that the Appellant left Anuradhapura soon after the incident and he was hiding from the Police. After analysing all the evidence, there is overwhelming evidence of his guilt and there are no contradictions or omissions in the evidence of the Prosecution witnesses. Only one contradiction was marked by the defense, however it is not a vital contradiction.

After the Prosecution case was closed, when the Learned High Court Judge called for the Defence. The Appellant opted to give a dock statement. In his dock statement he stated that he was not involved in this incident and that he was maliciously implicated by the 1st witness. Further he stated that other witnesses who gave evidence had not seen him carrying a gun in his hand. Pw2 had seen the Appellant on the day of the incident at the trishaw stand and seen the appellant walking towards the telephone Booth.

According to the evidence of K.P.L. Withanage (OIC) had observed a tritel telephone booth at the Bus stand 4 feet away from the scene. This confirms the fact that the incident took place near the telephone booth. Pw2 had also heard the sound of gunshots and had seen the deceased fallen. He also had seen that soon after the shooting incident, the Appellant running away from the scene towards the market, from the left side of his trishaw. Furthermore Pw1, has given evidence that he saw the shooting incident since he was only 4 to 5 ft. away from him. Therefore he had clearly seen the Appellant. All the witnesses, deceased and the Appellant were friends. There is no reason for the eye witnesses to give false evidence against the Appellant.

In this present case the Appellant had merely given a dock statement denying the offence and claimed that Pw1 was maliciously implicating the Appellant. The evidence given by Witness No.1 was subject to severe cross examination and it was given under oath, whereas, the statement of the Appellant, denying the offence was given without an oath. In the case of **The Queen Vs. Kularatne and Two Others 1967 (71) NLR 529**, it was held that *"when an unsworn statement is made by the Appellant from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the Accused had deliberately refrained from giving sworn testimony."* Although the Appellant's counsel tries to discredit the testimony of the prosecution witness, the evidence in this case has been carefully scrutinised by the Trial Judge himself who had the full advantage of observing all the witnesses in this case before him.

In the Supreme Court Case of **Alwis Vs. Piyasena Feranando 1993 (1) SLLR 119 at 122**, Hon. G.P.S De Silva CJ stated as follows: *"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."* Thus the acceptance of evidence by the Trial Judge cannot be easily faulted.

When considering the contradictions pointed out, by the Counsel for the Appellant we have to consider whether these contradictions are material or not. These prosecution witnesses are lay witnesses and they were giving evidence in the High Court after 7 years. Therefore one cannot give evidence as if he was televising the incident. All these witnesses are human beings. As Judges we must consider all these aspects. Further we must see whether these contradictions go to the root of the charge.

In the case of **Samaraweera Vs AG (CA 64/87 Decided on May 7, 1990)** it was held that *".....The maxim falsus in uno falsus in omnibus could not be applied in such circumstances. Furthermore all falsehood is not deliberate. Errors of memory, faulty observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim..... The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The Jury or Judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the truth."* Therefore the Dock Statement of the Appellant is not sufficient to create a reasonable doubt in the Prosecution Case.

Intention of the Appellant to kill the deceased is proved by the number of shots fired and distance. Considering all above it is evident that there are no contradictions that goes to the root of the case and there is clear evidence that the Appellant shot the deceased at a close proximity.

In the case of **King Vs. Musthapha Lebbe 44 N.L.R. 505** the Court of Appeal held that *"The court of criminal Appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand"*.

On the above mentioned careful evaluation, analysis and consideration of the evidence it is evident that the offence of murder has been proved beyond reasonable doubt against the Appellant. The Learned High Court Judge had carefully considered all evidence led before him analysed the said evidence and had convicted the Appellant.

Considering above we affirm the Conviction and the sentence of the Appellant.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

- 1) **Siripala Vs. AG (CA99/2005)**
- 2) **Bhoginbhai Vs. State of Gujarat (AIR 1983 SC 753)**
- 3) **Wickremasuriya Vs. Dodalina CA 172/84**
- 4) **Queen Vs. Kularatne and Two Others 1967 (71) NLR 529**
- 5) **Alwis Vs. Piyasena Fernando 1993 (1) SLLR 119 at 122**
- 6) **Samaraweera Vs. AG (CA 64/87 Decided on May 7, 1990)**
- 7) **King Vs. Musthapha Lebbe 44 N.L.R. 505**