

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

**In the matter of an Appeal in terms of Section
331 (1) of the Code of Criminal Procedure Act
No 15 of 1979.**

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/55/2008

H/C Colombo case No.9694/1998

Munasingha Kankanamge Pradeep

ACCUSED

And,

Munasingha Kankanamge Pradeep

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

**Before: Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel: Saliya Peiris with Thanuka Nandasiri for the accused-appellant
Jayantha Jayasooriya PC, Senior Additional Solicitor General for the AG

Argued on: 08.10.2015

Written Submissions on: 03.12.2015, 18.12.2015

Judgment on: 27.05.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant was indicted before the High Court of Colombo for causing the death of one Don Dharmasena Ranaweera on 26.06.1995 an offence punishable under section 296 of the Penal Code.

The accused opted to be tried before the High Court Judge without a jury and the trial was commencing in the High Court of Colombo on 30th June 2000. At the conclusion of the said trial, the Learned High Court Judge had convicted the accused on 27.02.2008 and sentenced to death. Being dissatisfied with the said conviction and sentence the accused-appellant preferred the present appeal.

During the trial the prosecution had led the evidence of several important witnesses including the wife of the deceased who is an eye witness to the incident. Deceased in the case is the uncle of the accused-appellant. They were residents from Kirulapona and the accused-appellant was a police constable

attached to Colpetty Police Station during the time relevant to this case. The death of the deceased was due to a gunshot injury he received on that day.

The accused-appellant in his dock statement concedes that the gunshot injuries on the deceased were caused due to a discharge from the service fire arm issued to him. However, he claimed that the gun went off when deceased attempted to grab it from him.

In contrary, the prosecution version before the High Court was that, the accused-appellant had intentionally committed the said offence.

According to the evidence of the eye witness, Dona Chandrani Weerasinghe who is the wife of the deceased, accused-appellant, around 11.30 am on the same day had come with a person called Kithsiri to whom the police had advised to refrain from entering the land belonging to the deceased. Over this incident there was an argument between the accused-appellant and the witness and the deceased who intervened had tried to attack the accused-appellant with a flower pot, but the elder brother of the deceased intervened and did not allow the attack to take place. In the evening around 5.45 pm the deceased had come out from their house in order to go to a garage. At the said instance she saw the accused shoot at her husband whilst hiding behind a jack tree which was in their compound and thereafter pointed the gun at her, she had run due to fear.

The next witness the prosecution had relied upon is one Mallika Tennakoon who is a close friend of the deceased's family. She used to come to their house to look after their children and on the day in question when she was with the children inside a room, she heard a shooting and thereafter saw the deceased fallen and the accused-appellant near the jack tree. She had further seen the accused-appellant chasing behind Chandrani.

Witness Weerasingha Pathirana Somasiri who is a three-wheeler driver from Kirulapona was the next witness the prosecution had relied upon in this case. According to this witness, on the day in question around 5.30 pm when he was in his three-wheeler at the three-wheel park near the Bo tree, a

person in civil had got into his three-wheeler and went to Colpetty Police Station. Ten minutes later the said person came back in uniform with a gun. Thereafter they came back to a place at Robert Gunawardena Mawatha in Kirulapona. The person in uniform had then got down from the three-wheeler and stated that the hire will be paid later.

Witness had returned to the three-wheel park and minutes thereafter he heard a gunshot. During the trial this witness had identified the accused-appellant as the person who went in his three-wheeler, but the said identification can only be considered as a dock identification since the accused-appellant is not known to the witness.

It was admitted at the trial under section 420 of the Code of Criminal Procedure Act, that,

- a) The accused-appellant was RPC 12152 Pradeep attached to Colpetty Police Station
- b) The gun produced marked P-1 was the official weapon issued to the accused-appellant

According to the evidence of IP Senarathne OIC Administration at Colpetty Police Station, RPC 12152 Pradeep was attached to the Colpetty Police Station in June 1995 and on 25th June from 18.00 hours to 6.00 on the following day he was on guard duty at No. 115, 5th Lane. After 6.00 am on 26th the said RPC had handed over the weapon to the police properly. Again on 26th at 17.35 hours he had reported to work and he had been issued P-1 along with 30 rounds of ammunition by 30418 Bandara who was in charge of the armory. RPC Pradeep was directed by police to report to his duty No.115, 5th Lane.

According to this witness RPC Pradeep is not permitted to go home with his weapon once he reported to the station, issued a weapon and detailed duty. His visit to Kirulapona is totally an unauthorized visit.

Even though witness Somasiri's identification cannot be accepted, when all the other circumstances are taken together, along with the dock statement of the accused-appellant it is safe to conclude that the accused-appellant had used the three-wheeler of witness Somasiri to go to the police station and come back even though the accused-appellant had denied the said position. We see no reason for Somasiri to give false evidence before court.

During the argument the Learned Counsel for the accused-appellant had raised several grounds of appeal before this court. The main grounds of appeal raised by the counsel can be summarized as follows;

Whether the Learned High Court Judge has failed to fairly and properly analyze the contradiction marked as V3 and consider the reasonable doubt arising from the same in favour of the accused.

Whether the prosecution witness No 1 is a credible witness

The Learned High Court Judge has failed to fairly evaluate the dock statement of the accused-appellant.

Whether the Medical Evidence is conclusive to establish the alleged shooting is deliberate or accidental

During the cross examination of witness Dona Chandrani Weerasinghe the defence had produced a contradiction marked V-3 with regard to the fact whether she saw the firing or not.

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උ: ඔව්

ප්‍ර: තමුන් සාක්ෂි දෙමින් මහෙස්ත්‍රාත් අධිකරණයේ කිව්වාද වෙඩිතබනවා දැක්කේ නැහැ වෙඩි හඬ සමග මහත්තයා වැටෙනවා දැක්කා කියා කිව්වාද?

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(එම කොටස වී-3 ලෙස ලකුණුකරනවා)

Whilst referring to the said contradiction the Learned Counsel for the accused-appellant had argued that the Learned Trial Judge had failed to consider the importance of the said contradiction infavour of the accused-appellant.

According to the evidence the said witness, the accused-appellant had chased her away after the shooting and at the time of shooting the accused-appellant was hiding near a jack tree inside her compound. The place where the firing took place, is confirmed from the evidence of investigating officer Sub-Inspector Lakpriya Nirosh since he had recovered the empty cartridge near the jack tree. Witness Mallika Tennakoon had confirmed the fact that she saw the witness being chased by the accused-appellant.

The contradiction referred to above, referred to the fact that the witness did not see the shooting but saw only the deceased falling down after the shot was fired.

When the said contradiction is considered with the evidence referred to above, I see no merit in the argument raised by the counsel for the accused-appellant that the Learned Trial Judge has failed to fairly and properly analyze the contradiction V-3.

In addition to the contradiction marked V-3 two other contradictions and the one omission was also marked with regard to the evidence of witness Chandrani. Contradiction V-1 refers to a marriage between the deceased and another lady and V-2 refers to the evidence given at the Non Summary Inquiry where the witness had said that she could not identify the gun.

The omission is in relation to her evidence that the accused came chasing behind her pointing the gun at her.

When the evidence of witness Chandrani is taken as a whole along with the evidence I have referred to above specially the evidence of Mallika Tennakoon, we observe that none of those contradictions and the omission go to the root of the evidence of this witness.

In this regard we are mindful of the decision of *The Attorney General V. Mary Theresa SC Appeal 79/2008 SC minutes dated 06.05.2010* Thilakawardena J observed, "Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (*Vide, Boghi Bhai Hirji Bhai v. State of Gujarat, AIR 1993 SC 753*).

Witness should not be disbelieved on account of trifling discrepancies and omissions (*Vide, Dashiraj V. the State AIR (1964) Tri 54*) when contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining the matter (*Vide, State U.P. v. Anozthony AIR 1985 SC 48; Attorney General V. Visuvalingam 47 NLR 286*)

Whilst making a dock statement the accused-appellant had said that, he reported to Colpetty Police Station on the day in question evening for duty, changed the cloths and obtain the weapon in order to report to duty at no 119, 5th Lane Colpetty but, since he observed that he had forgotten to bring the pocket note book, after informing the duty officer with his verbal permission went back to Kirulapona in a three-wheeler he hired from Colpetty. The accused –appellant had taken up the position that the deceased had received the gunshot injury when the deceased tried to grab the weapon he had with him when he was returning from his house after collecting the pocket note book.

However as observed by this court, witness Weerasinghe Pathiranage Somasiri had given clear evidence with regard to the fact that the accused-appellant who hired his three-wheeler taxi had gone

to the police station from Kirulapana, kept him waiting near the police station for 10 minutes and thereafter returned to Robert Gunawardena Mawatha Kirulapana where the house of the accused-appellant was situated. If this evidence is believed, the accused-appellant had failed to explain the court as to why he kept the three-wheeler for 10 minutes near the police station unless he had an intention to come back home with the weapon.

It was further revealed from the evidence of IP Senarathne, that the officers are not permitted to go home with their weapon once the weapons are issued and if a person need to go home due to an urgency, he can only go home after obtaining permission after returning the weapon. The said position taken up by IP Senarathne had not been challenged by the defence at the trial.

The accused-appellant had referred to a struggle between him and the deceased when the deceased had tried to pull the gun. In his dock statement he had referred to the said incident as follows;

“මම සාක්කු සටහන් පොත අරගෙන ගෙදර දොර වසා අඩි 10ක්වත් වන්න ලැබෙන්නැහැ මගේ තුවක්කු බටෙන් යම්කිසි කෙනෙක් අදිනවා වගේ මාහට දැනුන බැවින් මා පසුපස හැරී බලන අවස්ථාවේදී මාගේ මියගිය මාමා අත්දෙකෙන්ම තුවක්කුව අදිමින් සිටියා ඒ අවස්ථාවේදී තමුසෙට පිස්සුද ඕයි මා රාජකාරි කටයුත්තක් කරන්නේ පිස්සු වැඩ කරන්න එපා කිව්වා නමුත් ඔහු තුවක්කුව අතඇරියේ නැහැ මම රාජකාරි ගිණිඅවිය අත්සතු කිරීමට බැඳී නොමැති බැවින් ඔහුගේ ග්‍රහණයෙන් මාවෙත නැවත ලබා ගැනීමට ප්‍රයත්නයක් දැරුවා ඒ අවස්ථාවේදී ඔහුගේ පැත්තේ තුවක්කු කටද මගේ පැත්තේ තුවක්කු බඳද තිබුණා තුවක්කුව මාගේ ග්‍රහණයට ගැනීමට ක්‍රියා කිරීමේදී තුවක්කුවේ කර පටිය ගැලවුණා ඒ අවස්ථාවේ මාහට දැනුණා තුවක්කුවේ සැහැල්ලු ගතියක් ඇතිවෙනවා ඒසමගම තුවක්කුව පත්තුවුණා...”

If this explanation given by the accused-appellant is accepted it is clear that the deceased was holding the weapon from both hands and pulling it from the accused-appellant. However according to the medical evidence led at the trial the entry wound was observed on the left abdominal area and the exit wound was found on the right abdominal area which indicated that the person who fired the gun had done it from the left side of the deceased person. The doctor had not observed blackening or tattooing which indicate a close range firing as well.

When considering the judgment of the Learned High Court Judge we observe that the Learned High Court Judge was mindful of all these issues and given due considerations, analyzed the said issue specially when rejecting the dock statement given by the accused-appellant and also acting on the medical evidence place before the court.

In addition to the above evidence, prosecution has relied upon the evidence of one Prasad Shaminda who said to have given a lift to the accused-appellant to go to Nihal Silva Mawatha on the day in question. According to him the accused-appellant who was in uniform with a weapon had come to his house around 5.00pm and wanted to give him a lift. They went to a shop in Nihal Silva Mawatha in the Bicycle belonging to the witness and on their way to Nihal Silva Mawatha, the accused-appellant told him that he shot his uncle.

The evidence of the said witness too was challenged by the defence during the trial but as observed by us the said evidence too was remained intact. Therefore we see no reason for the Learned Trial Judge to reject the above evidence when he is considering the evidence led at the trial before him.

The evidence led at the trial clearly indicated that the accused-appellant who had gone to Colpetty Police Station, had returned with his official weapon without any permission obtained from his superior officer to the compound of the deceased and had fired him with the official weapon. The said evidence does not indicate grounds for the consideration of any lesser culpability by the accused-appellant.

For the reasons discussed above, we see no merits in the grounds of Appeal raised by the Learned Counsel before this court. We therefore dismiss this appeal and affirm the conviction and the sentence imposed by the High Court Judge of Colombo.

PRESIDENT OF THE COURT OF APPEAL

H.C.J Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL