

**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.

Baraniwala Liyanage Sunil alias
Wasthuwa alias Diyalape Wasthuwa.

Accused- Appellant

C.A.Appeal No: CA 30/2009
High Court Matara.
Case No: HC 58/2004

Vs.

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

Complainant – Respondent

BEFORE : Deepali Wijesundera J.
L.U. Jayasuriya J.

COUNSEL : Indika Mallawarachchi for the Accused – Appellant
K. Waidyaratne SASG PC for the A.G

ARGUED ON : 13th October, 2016
DECIDED ON : 27th February 2017

L.U Jayasuriya J.

The Accused-Appellant along with another were indicted under section 296 read with section 32 of the Penal Code in the High Court of Matara and was convicted and sentenced to death on 11.03.2009.

This appeal has been filed against the said conviction and sentence.

The case for the prosecution is that on the day of the incident, the deceased has been shot by the Accused-Appellant and while going to hospital he has made a dying declaration to the wife to the effect that a man named Washuwa shot him and assaulted him.

The learned counsel for the accused appellant argued that the wife of the deceased, Siriyawathi did not know who Washuwa was when the incident took place. She has testified thus:

“දියලපේ වස්තුවා වෙඩි තිබ්බා කිව්වා තුවක්කු මීටෙන් ගහල”

The witness admitted in her evidence that she did not know as to who Washuwa was initially, but got to know the Appellant as Jayasena or Sirisena subsequently.

Witness Lionel has stated in his evidence that the deceased was present on the day in question at the funeral house of Dharme, and he saw the Accused-Appellant walking with a weapon. He has come to the funeral house and threatened the people who were playing cards there. This witness has identified the Accused-Appellant as Jayasena and has stated he was also known as Washuwa. This shows that the wife of the deceased has identified the accused appellant correctly.

Therefore, the dying declaration links the Accused-Appellant to the crime.

The learned counsel for the appellant further argues that the witnesses who identified the body before the Judicial Medical Officer were not called to give evidence and thereby the corpus has not been identified.

The learned Additional Solicitor General stated that there is evidence to say that the corpus was identified.

Judicial Medical Officer Dr. Gunawardena while testifying before the High Court has produced and marked the Postmortem Report as P13.

He has testified that the body was identified by the witnesses mentioned in the Postmortem Report before him, as Athapaththu Hewage Jinadasa. Although the counsel for the Accused-Appellant argued that the corpus has not been identified we find by the document marked P13 and the Judicial Medical Officer's evidence that the corpus had been properly identified. The defence has not disputed the identification of the corpus in the High Court.

It was held in **Sarwan Singh Vs. State of Punjab (2002) II AIR S.C. 3652:**

“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.”

The counsel for the Appellant argued that as the deceased was shot from behind, he would not have seen the assailant and that the learned High Court Judge has not addressed his mind to this fact. On a careful perusal of the dying declaration made to the wife of the deceased, it can be seen that the deceased had clearly seen him being assaulted with the rifle butt. Further, the Police evidence reveals that they have found pieces of a rifle butt at the scene of the crime.

The learned Additional Solicitor General submitted that there is no dispute regarding the deceased making the dying declaration and the dying declaration has not been challenged in the High Court'

The Appellant's Counsel further argued that witness Atapattu listed on the back of the indictment was not called by the prosecution and therefore section 114 (f) of the Evidence Ordinance operates against the prosecution.

The Accused- Appellant has assumed that " Atapattu would have played a pivotal role in the prosecution's case" . The Accused-Appellant had also assumed that "Atapattu" would also identify "Wasthuwa".

If a witness listed on the back of an indictment is not called to give evidence by the prosecution, Section 199(4) comes into play which provides:

"If shall be lawful for the court to call any witness not called by the prosecution in the interest of justice require but such witness should be tendered for cross examination by the prosecuting counsel and by the accused"

As the defence has not made an application under section 199(4) of the Criminal Procedure Code as provided for, to call such witness, the argument of the Counsel should fail.

From the evidence lead before the High Court, we find that it was the Accused-Appellant who came to the scene of the crime armed with a gun. From the evidence of the investigating officer we find that a light was burning and the funeral house was illuminated at the time of the incident. The learned High Court Judge has considered the evidence lead before him in detail.

The learned High Court Judge, whilst analyzing the dock statement has stated that a person who sustained injuries which required a surgery

travelling from Akuressa to Karapitiya – Galle without going to a nearby hospital is improbable. The learned High Court Judge has stated in the impugned judgment that the Accused-Appellant has not made any attempt to contact the Police and inform them as to what took place and as to how he sustained injuries.

This court is of the view that the learned High Court Judge has applied the several tests and has rejected the dock statement of the Appellant correctly.

We see no reason to interfere with the judgment.

For the afore-stated reasons, we decide to dismiss the appeal and affirm the conviction and sentence dated 11.02.2009.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J. :

I Agree.

JUDGE OF THE COURT OF APPEAL