

**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 CPC read with  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

The Hon. Attorney General

**Complainant**

**C.A Appeal No: CA 68/2008**

**Vs.**

1. Ginthota Polwatththe Don Janith  
Susantha Weerasooriya
2. Ilandariyage Piyadasa
3. Ilandariyage Chaminda  
Priyadarshana

High Court Hambanthota

**Accused**

Case No: HC 38/2004

**AND NOW BETWEEN**

Ginthota Polwatththe Don Janith  
Susantha Weerasooriya

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

**BEFORE** : Deepali Wijesundera J.

L.U Jayasuriya J.

**COUNSEL** : Faiz Musthapha P.C for the Accused-Appellant

Rohantha Abeysuriya S.D.S.G for the A.G

**ARGUED ON** : 31<sup>st</sup> January, 2017

**DECIDED ON** : 30<sup>th</sup> March, 2017

**L.U Jayasuriya J.**

The 1<sup>st</sup> Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Hambanthota under section 296 of the Penal Code for the murder of a person named Elipitiya Hewage Rathnasiri and after trial was convicted and sentenced to death.

The 2<sup>nd</sup> and the 3<sup>rd</sup> accused who were father and son had been acquitted.

This appeal is from the said conviction and sentence of the first Accused Appellant.

The brief was sent back to the High Court to take steps under section 280 of the Code of Criminal Procedure Act without any objection from the Appellant, and therefore the Appellant cannot say that he was convicted twice over which is a mere technicality.

The only eye witness to the incident, who was the mother of the deceased, Kumarawathie had cooked dinner on the day in question and when her son Ratnasiri went out to wash his hands was alleged to have been shot by the Appellant. Kumarawathie after hearing the report of a

gun has gone to the verandah to find that the Appellant fired the gun at the head of the deceased.

After the conclusion of the case for the prosecution the Appellant has stated in his evidence that on the day in question, he attended a function (where one of his nieces attained age) which was held about 20 miles away from his house. He has further stated that by the time he got home, it was around 1230-0100 in the night. He stated that although he heard a report of a gun from the direction of the deceased's house, he was prevented by his wife from going towards the said house. On the following day the Appellant has come to know that Ratnasiri was murdered.

Subsequently he has surrendered to Courts when the Police were looking for him.

The Appellant has called two other witnesses in support in his case.

Learned President's Counsel for the Appellant argued that the entire case for the prosecution rests on the evidence of Kumarawathie who was 82 years of age when the incident took place.

He further argued that it was a night shooting and a fleeting glimpse and the Turnbull Principles did not come to the mind of the trial Judge when he analyzed Kumarawathie's Evidence.

It was held in **Regina V. Turnbull and Another 1977 QB 224** that:

“First whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them

as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one or that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words.

Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

Turnbull Principles will not apply to the instant case as the Appellant was a known party and the deceased's house was illuminated in the night when the shooting took place.

Kumarawathie stated in her evidence that after firing the gun, the Appellant stared at her at a distance of about 2-3 feet and we are of the view that the witness had ample time and opportunity to identify the Appellant.

Moreover, the Police evidence shows that Kumarawathie's home was illuminated when they visited the scene of the crime in the night itself (vide page 207 and 223 of the brief).

We also find that the medical evidence too corroborates the evidence of the sole eye witness wherein the Judicial Medical Officer has testified that the deceased had received gunshot injuries to the head and to the back of the chest.

Therefore, we are not inclined to agree with the argument of the Learned Counsel for the Appellant and we reject the said ground.

The learned President's Counsel argued that there is no critical analysis of the evidence presented by the prosecution in the light of the omissions and contradictions.

When Kumarawathie was subjected to cross-examination, the entire statement made to the Police by her was marked and produced by the defence as "V2" which is technically illegal.

It was held in *Tennekoon Vs. Tennekoon* 78 NLR 13 that:

"Section 145 of the Evidence Ordinance requires that if it is intended to rely on a previous statement to contradict a witness, his attention must be called to those parts of the statement which are to be used for contradicting him. The witness must be afforded every opportunity to address his mind to the relevant portions of the statement to enable him to explain or reconcile his statement."

Now we deal with contradictions that were marked during the cross-examination of Kumarawathie which can be itemized as follows:

1. That the 2<sup>nd</sup> and 3<sup>rd</sup> accuseds were wearing sarongs.
2. That she saw somebody coming down a hillock.
3. That the Appellant was wearing a T-Shirt and a sarong.
4. That the Appellant was wearing a folded sarong.

The witness under cross-examination admitted that she did not state those statements to the Police in her first complaint when she was confronted with the same.

When we consider those contradictions, we find that those are not connected to the main incident.

Further the incident has taken place on 17.05.2002 and Kumarawathie has testified before the High Court on 05.01.2006 which is nearly about 4 years after the incident.

Hence it is natural for a witness to forget some irrelevant details which are not directly connected to the main incident. The omissions which were brought to the notice of the court when prosecution witness 1, Kusumadasa was testifying have not been established in terms of section 110(3) of the Code of Criminal Procedure Act and therefore, we do not intend to deal with them.

Therefore, the High Court Judge has correctly stated that there are no contradictions or omissions which do go to the root of the case.

For the reasons set out above, we decide to reject the afore-mentioned ground as-well.

The learned President's Counsel for the Appellant argued that the prosecution did not establish a particular motive on the part of the Appellant where as the 2<sup>nd</sup> and 3<sup>rd</sup> accused had a motive as the Appellant had chopped off the hand of the 2<sup>nd</sup> accused's Wife on a previous occasion referring to page 304 of the brief.

We hold that there is no burden cast upon the prosecution to prove the motive in criminal case as in some instances, the motive is only known to the accused.

The learned Counsel for the Appellant further argued that when prosecution witness 1, Kusumadasa arrived at the scene of the murder, Kumarawathie did not say a word about the assault and this item of evidence fails the test of promptitude.

We find that Kumarawathie has made the complaint about two hours after the incident and therefore, her evidence passes the above mentioned test. The Counsel for the Appellant argued that the learned High Court Judge has not held the scales evenly and referred to page 413 of the brief wherein the learned High Court Judge observed that as defence witness does not remember the date of birth of his daughter, the court would not rely upon the evidence of the defence witness.

Although the above finding is erroneous we hold that no prejudice has been caused to the Appellant on the same finding.

We find that the shooting incident took place around 7 o'clock in the night and the investigating officers have arrived at the scene two hours after the incident.

Hence the position taken up by the Appellant that he heard a report of a gun in the middle of the night is improbable and therefore we hold that the defence has not created a doubt on the case for the prosecution.

We observe that the learned High Court Judge has properly analyzed the evidence applying the several tests and has arrived at the correct conclusion.

For the foregoing reasons we affirm the judgment dated 19.06.2008 and dismiss the Appeal.

Appeal Dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Deepali Wijesundera J. :**

I Agree.

**JUDGE OF THE COURT OF APPEAL**