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

In the matter of an appeal in terms of the Section 331 of the Code of Criminal Procedure Act No: 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal Number: CA 119/2012

High Court of Embilipitiya: 13/2010

Democratic Socialist Republic of Sri Lanka

Vs

Vidanagamage Nalin Suranga alias Nalin

Accused

And Now Between

Vidanagamage Nalin Suranga alias Nalin

Accused-Appellant

Vs

Hon: Attorney General
Attorney General's Department
Colombo 12

Respondent

Before: L.T.B. Dehideniya J (P/CA)
K.K Wickramasinghe J

Counsel: Saliya Peris with Thanuka Nandasiri for the Accused Appellant

Madawa Thennakoon SSC for the Respondent

Argued on : 18.05.2017

Written Submissions: 03.07.2017

Decided on: 20.10.2017

L.T.B.Dehideniya J. (P/CA)

The Accuse Appellant was indicted before the High Court of Embilipitiya on a charge of murder. The Charge is that on or about the 2nd of March 2002 together with another unknown person committed the murder of one Wickramawithana Punchi Appuhamy, an offence punishable under Section 296 of the Penal Code read with section 32 of the Penal Code.

After trial without jury, the learned High Court Judge convicted the Appellant and sentenced him to death. Being aggrieved by the said judgment the Appellant tendered this appeal.

The Appellant does not contest any procedural step taken place in the trial. The appeal is solely based on the facts of the case.

P.W. 1 Seetha Nandani is the only eye witness to the incident. In her testimony she said that the deceased was her uncle and as a habit she visits their family, who were living next door, every evening. On the date of the incident she was seated on a bench with the decease and a person called Raja in the evening and two persons came in a motor cycle. They stopped the motor cycle about 10 feet away and came close to them and shown a piece of paper and asked for person. At that moment the witness got up and started going towards the house. Then she heard a gunshot and looked at them and saw that her uncle was falling down. She has started shouting and the person came with the piece of paper chased behind her and she ran in to

the house. She had seen that the other person was carrying a weapon like a gun. Thereafter they went towards Embilipitiya in the motor cycle. Her uncle was admitted to the Embilipitiya hospital but succumbed to the injuries.

This witness indentified the Appellant as the person who came with the piece of paper at the identification parade.

The Appellant challenge the identification parade on two grounds, i.e. that the Appellant was shown to the witness at the Embilipitiya police station and his photographs were taken from his house and shown them to the witness. Further the learned Counsel for the Appellant submitted that the identification parade was held after one and half years after the incident and the Court cannot rely on such an identification parade.

The appellant was arrested at Dehiattakandiya by the Dehiattakandiya police on suspicion of some other incident and was remanded. He was produced before the Magistrate Court of Embilipitiya from the remand custody for the parade. The Embilipitiya police did not have any opportunity to show the Appellant to any witness at the police station after taking him into custody because he was not taken into custody by the Embilipitiya police and he was not kept in that police station.

One allegation made by the Appellant is that he was asked to come to the police station in 2002 and shown to the witness Seetha Malini and asked whether he is the person but she has not identified him at that stage. This position was not suggested to the witness while she was giving evidence.

The learned Counsel alleged that the inquiring officer was not called to give evidence and the Appellant did not have the opportunity to suggest it to the inquiring officer. This argument cannot be accepted because this could have been suggested to the witness Seetha Malini. Without

suggesting it to the prosecution witness, leading that evidence though the defence witness reduces the evidentiary value.

Taking the photographs in to the custody by the police officers and showing it to the witness was suggested and it was denied. The Appellant in his evidence stated that while he was in remand custody the police officers have taken the photographs in to their custody and he has come to know about it from his mother. The Accused is personally unaware of the fact that the photographs were taken in to custody. When this was suggested to the prosecution witness it was denied. Therefore the defense should have called the mother to establish the fact that the photographs were taken in to custody. Unless the fact that the photographs were taken in to custody is established, the allegation that they were shown to the witness cannot sustain.

The witness was very specific on the identification. While answering the cross examination, the witness said that she can identify the Appellant even now because she was so frightened and she can remember the face of the Appellant. The two persons have come close to them and the time was about 5.40 in the evening where the light is more than enough to identify a person. There is no suggestion that the light was not enough to identify a person.

The Counsel argued that the witness had identified the Appellant only as a person like the one who came. The learned High Court Judge has correctly analyzed this answer and had come to the conclusion that the witness gave that answer because of the question put forward by the Court. The witness categorically stated that the Appellant is the person came with the piece of paper.

The Counsel's argument is that it is unsafe to convict the Appellant where the prosecution case is depending on the identification when the

correctness is challenged. He submitted several authorities in this regard. In the instant case the identification established beyond reasonable doubt. The learned High Court Judge expressed the view that memory powers of the different persons are not equal and some persons may be able to remember things for longer periods than others. I do not see any reason to differ from this opinion.

The learned Counsel for the Appellant has marked 4 contradictions in the witness Seetha Malani's evidence. V3 and V4 are in relation to extraneous matters. That is whether the deceased had any other cases and whether he was detained in the Boossa Camp. The contradiction marked V2 is on the issue of wearing helmets. The witness said in Court that the two persons were not wearing helmets but only wearing caps. When the witness questioned in detail, she said that one was having his helmet in his hand. At the non summary inquiry the witness has stated that both of them were wearing helmets. The learned High Court Judge has analyzed this evidence. He is of the opinion that the witness had not stated in the non summary inquiry that the two persons were wearing helmets when they approached the deceased. There is no contradiction in this evidence. They (the perpetrators) may have worn helmets when they reached the crime scene but when they approached the deceased they were not wearing helmets, but only caps.

The contradiction marked V1 is about the place where the witness was seated. Her evidence is that she along with the deceased and Raja were seated on a bench at that time. But she has stated to the police that she was under the arch and the deceased with his wife and Raja were seated on the bench. The learned Counsel for the Appellant argue that this contradiction diminish the credibility of the witness. What matters in this case is not where the witness was seated but how the incident occurred and whether she saw the incident. The witness was very precise in giving evidence as to what

had happened. She has seen that the Appellant approaching the deceased. Suddenly a gunshot was fired and when she looked she had seen that her uncle felling.

The witness's stand is that the appellant with the other person came to the deceased and the gunshot was fired. This was corroborated by the JMO. His opinion is that the gunshot was fired in close range and from higher position aiming downwards. The deceased was seated and the perpetrator was standing when the gunshot was fired. The doctor's evidence corroborates the PW 1's evidence as to how the gunshot was fired.

Unless the contradictions are very material to the case and goes into the root of the case a mere contradiction will not attack the credibility of the witness. It has been held by F.N.D.Jayasuriya, J in the case of *Best Footwear (Pvt) Ltd., And Two Others V. Aboosally, Former Minister Of Labour & Vocational Training And Others [1997]1 Sri L R 137* that;

> *In evaluating the evidence of a witness a court or tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance ... Before arriving at an adverse finding in regard to testimonial trustworthiness the Judge must carefully give his mind to the contradictions marked and consider whether they are material or not and the witness should be given an opportunity of explaining those contradictions that matter ... Witnesses should not be disbelieved on account of trivial discrepancies and omissions and the Court should look at the entirety*

and totality of the material placed before it in ascertaining whether the contradiction is weighty or is trivial.

In the instant case the contradiction marked V1 does not shake the credibility of the witness.

The learned Counsel for the Appellant further submits that the prosecution has failed to call the inquiring officer to give evidence. His contention is that the officer who was called is not the chief inquiring officer. The retired police officer Fernando was called as witness and he did the preliminary investigations, the officers who recorded the statements were also called as witness. The Appellant was arrested on suspicion of another case by another police station and was produced for this case through the prison. Under these circumstances the chief investigation officer is the retired officer Fernando. Therefore the argument that the chief inquiring officer was not called, fails.

I see no reason to interfere with the findings of the learned High Court Judge.

I affirm the conviction and the sentence.

Appeal dismissed.

President Court of Appeal

K.K.Wickramasinghe J.

I agree.

Judge of the Court of Appeal