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

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

Complainant

CA 209/2015

Vs.

H.C. Negombo – HC:59/2004

Shamila Ishan Gunasinghe

Accused

AND NOW BETWEEN

Shamila Ishan Gunasinghe

Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: L. T. B. DEHIDENIYA J, PCA

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL:	**Accused – Appellant – Saliya Peiris with Rukshan Nanayakkara** **Complainant – Respondent – DSG Hiranjan Peiris**
ARGUED ON -	**06.06.2017**
WRITTEN SUBMISSIONS –	**Defendant – Appellant – 27.07.2017** **Complainant–Respondent – 27.09.2017**
DECIDED ON:	**30.10.2017**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Negambo for the offence of the murder of Kalupahana Messthriyalage Dilantha Kalum Silva under Section 296 of the Penal Code.

The Appellant pleaded not guilty to the said charge and the prosecution led the evidence of Dhanapala Bandaralage Sujith Kumara (PW1), Thalammaharage Suranga Fernando (PW3), IP Nandana Wijekumara Lawrence (PW4) and Dr. D.I.L. Rathnayake (PW5, JMO) and the evidence of the Court interpreter and concluded the case for the prosecution.

In brief the case for the prosecution was that on the date of the incident the Appellant and four others (Percy -PW2, Kikki, Shashi and Chooty) hired the three-wheeler of PW1 to paste posters in the area in support of a political

candidate. As they had run out of paste the 6 of them had stopped at Samudra Hotel in Handala Junction to prepare paste. PW1 had gone into the Samudra Hotel to have dinner whilst the Appellant and others had consumed liquor outside the said Hotel whilst the paste was prepared. PW1 had heard commotion from outside the Hotel and therefore had run out to see what the noise was about. PW1 had then seen the Appellant with a knife and he had got startled and decided to flee from the area. When he started his three-wheeler he states in evidence that he saw the Appellant stabbing the deceased on the chest. Thereafter, the Appellant and four others have forcibly got on to his three-wheeler and directed PW1 to drop them off at Elakanda.

After the conclusion of the prosecution's case the Appellant gave an unsworn statement from the dock denying all allegations levelled against him and stated that a person named Malaka who was never investigated by the police had committed the crime and pleaded that he be acquitted.

After the conclusion of the case the learned High Court Judge found the Appellant guilty of the offence of murder and sentenced him to death.

Being aggrieved by the said judgment the Appellant preferred the instant appeal on the grounds *inter alia* that;

a) PW1 is not a credible witness as he is an interested witness who was keen on his own freedom and whose statement is belated,
b) The identification of the Appellant made by PW3 is not credible since it was a dock identification
c) The learned High Court Judge has failed to correctly evaluate the burden of proof.

At the outset it is prudent to note that the conviction of the Appellant is mainly based on the testimony of PW1 and a dock identification of the Appellant by PW3. PW1 as mentioned above was the three wheel driver who was hired to paste posters as mentioned above. It is clear that it was PW1 who was first arrested in connection to the murder of the deceased on or about 26.09.2000.

As contended by the learned Counsel for the Appellant PW1 who was initially the main suspect in the Magistrate Court who was in remand custody for over one year was immediately enlarged on bail after he made a statement implying the Appellant in the murder of the deceased. PW1 has stated in evidence that he was not granted bail as the others were not arrested and it was only after a high ranking official of the Prisons Department advised him he decided to make a statement to the learned Magistrate. The learned Counsel for the Appellant contends that it is unsafe to act on the evidence of PW1 as his statement was made nearly 10 months after the incident and that he is not an independent witness and further that he was an interested witness since PW1 was in remand custody in connection to the death of the deceased.

The learned Deputy Solicitor General states in rebuttal that although PW1 has not given a clear reason as to why he did not immediately report the accused to the Police, as stated in evidence, PW1 feared his own safety and in view of this the learned High Court Judge has directed the OIC of the Wattala Police to provide him with security after he gave evidence. The learned DSG further submits that PW1 had decided to give a statement to the learned Magistrate since he was distressed as he had to languish in remand while the real offender was living freely outside.

In the case of Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Tilakawardane, J held *inter alia;*

> "Two critical tests before considering belated evidence as reliable evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

In the same case in the Court of Appeal (2010 (2) SLR 241) Sisira de Abrew, J held *inter alia;*

> "Because the witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of the belated witness."

Further, in the case of Udagam Vs. AG 2000 (2) SLR 103 relied by the learned Counsel for the Appellant it was held that;

> Evidence is infirm, unsafe and unreliable to act upon considering the following;
>
> > (i) the belated statement made to the Police with delay not explained with acceptable reasons.

Therefore, when considering the evidentiary value of the belated statement of PW1 made to the Magistrate ,what this Court must consider first are the reasons for the delay and secondly whether the reasons are justifiable.

It is clear that the reason for PW1's delay in implicating the Appellant was fear for his own safety. However, this reason has not been elaborated on by the prosecution. The fact that the learned High Court Judge has directed the Police to provide police protection to PW1, in my view, serves no real purpose since such protection was provided to the witness after his testimony. Any person who sought to intimidate PW1 may have done so before his testimony since after PW1's statement to the Magistrate the nature of his evidence was clear. No such intimidation and / or a threat of intimidation was placed on record by the prosecution before the evidence of PW1 was led and as such this Court is of the view that the reasons given by PW1 for the belated statement to the Magistrate is not justifiable.

In the aforementioned case Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Tilakawardane, J further held that;

> "when considering the belated evidence or a belated statement, one cannot neglect the basis for such delay which transpired in the evidence."

In the instant Appeal no such evidence has transpired for this Court to consider and as such this Court finds that the evidence of PW1 implicating the Appellant is of low evidentiary value.

The second ground of Appeal urged by the learned Counsel for the Appellant is that the identification of the Appellant made by PW3 is not credible since it was an identification of the Appellant who was in the dock.

What transpired in the evidence of PW3, who was the brother-in-law of the deceased and also the virtual complainant, was that he had seen the Appellant

and several others (4 – 5 persons) attacking the deceased. PW3 had witnessed a fair skinned person wearing a blue shirt pulling a knife from the deceased who threatened him with the knife stating that 'You will also be stabbed, take him (the deceased) away.'

This Court notes as a serious lapse on the part of the prosecution that no identification parade was conducted to identify beyond reasonable doubt that it was the Appellant who was carrying the knife as aforementioned. The lapse is further highlighted where PW3, as stated in evidence, had described two persons to the police and as such a specific identification of the Appellant was vital to establish that it was the Appellant who caused the death of the deceased. It was further revealed that PW3 was intoxicated at the time of incident.

As submitted by both parties E.R.S.R. Coomaraswamy in his work the Law of Evidence, volume 1, has discussed the evidentiary value of a dock identification. He states;

> "The consensus of opinion in England is that dock identification of the accused for the first time in Court is undesirable and usually unfair, and that it should be avoided, if possible, but this does not mean that the conviction would be set aside, the Courts discretion in the matter being recognised in appropriate circumstances."

E.R.S.R. Coomaraswamy further quotes the unreported case of Gunaratne Banda Vs. The Republic S.C. 132 – 136/76 – H.C. Kegalle 79/75 – S.C.M of 2nd March 1978 in which case Wijesundara J held that, 'The other witnesses identified the accused for the first time at the trial in the dock. Again it has been repeatedly said even in the recent past by this Court, in more cases than one that

this type of evidence is worthless and, if I may add, no useful purpose will be served in leading such evidence'.

The learned Counsel for the Appellant submits the principles discussed in the case of R vs. Turnbull & others (1976) 3 All E. R. 549, Cr. Ap. Reports 132 in which case it was held;

> "Whenever the case of an accused person depend 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 in reliance on the correctness of the identification"

It was held in the case of Keerthi Bandara V. the Attorney General 2000 (2) SLR 245 that "Turnbull Rules' apply, wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken".

As submitted by the learned Counsel for the Appellant in the case of I.O.W. Wasantha & three others Vs. the Attorney General (C.A. 179/2006) Ranjith Silva J had held that;

> "On the issue of identification evidence, the judge must give accurate directions regarding the identification evidence and direct the jury that they must be satisfied beyond reasonable doubt that the Accused were correctly identified and give the benefit of any doubt to the accused. If no identification parade was held and the accused was a stranger, the judge must caution the jury that the identification may become a mere dock

> identification and must direct the jury that the omission to hold an identification parade may be an important omission for the purpose of identification."

In the instant case it seems that the learned High Court Judge has found the Appellant guilty of the murder of the deceased mainly on the evidence of PW1 and PW3's dock identification and therefore this Court finds that this evidence is not sufficient to establish the case for the prosecution beyond reasonable doubt.

In relation to the third ground of Appeal urged by the learned Counsel for the Appellant regarding the burden of proof it was held in the case of Nandana Vs. Attorney-General 2008 (1) SLR 51by Sisira de Abrew J that;

> "Imposing a burden on the accused to prove his innocence is totally foreign to the accepted fundamental principles of our Criminal Law as to the presumption of evidence.
>
> "The mis-statements of law by the trial Judge would tantamount to a denial of a fundamental right of any accused as enshrined in Art 13(5) of the Constitution - a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned and could necessarily vitiate the conviction."

Another serious lapse on the part of the prosecution is noted in the instant Appeal that been, the absence of PW2's evidence. Upon a perusal of the Court record it is clear that PW2 was periodically present in Court. PW2 one Peter Kurerage Percy Cooray was one of the individuals who accompanied the

Appellant in PW1's three-wheeler to paste posters. PW2 who was also arrested in connection to the death of the deceased (as stated by PW4) would have been the best witness to corroborate the narration of the prosecution which led to the death of the deceased. However, it is unfortunate that the prosecution for whatever reason has failed to lead the evidence of PW2 who this Court finds to be a material witness in this case.

The learned Trial Judge has also observed that the investigating officers have conducted the investigation into the death of the deceased in a lackadaisical manner. This further indicates that the weakness in the prosecution's case the benefit of which must be for the Appellant.

Taking into consideration all these infirmities and the other matters referred to above, we set aside the conviction and the sentence of death imposed on the Accused-Appellant and acquit him. Accordingly the Appeal is allowed.

Appeal Allowed.

Judge of the Court of Appeal

L. T. B. DEHIDENIYA J, PCA

I Agree.

Judge of the Court of Appeal