

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

**In the matter of an appeal under
and in terms of Section 331 of the
Criminal Procedure Code Act No.
15 of 1979.**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No. 13/2012**

Vs,
Rathnayake Widanalage Nimal
Rathnayake

Accused

And Now Between

Rathnayake Widanalage Nimal
Rathnayake

Accused-Appellant

**High Court of Kegalle
Case No. 2637/2007**

Vs,
The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J**

**Counsel : Ranjith Meegaswatta Attorney-at-Law for the Accused-Appellant
Rohantha Abeysuriya SDSG for the Complainant-Respondent**

**Written Submissions : Accused-Appellant – 4th October 2017
Complainant-Respondent – 13th December 2017**

Argued on : 26th July 2018

Judgment on : 08th August 2018

Judgment

S. Thurairaja, PC. J

Honourable Attorney General preferred an indictment under Section 296 of the Penal Code against Rathnayake Widanalage Nimal Rathnayake (2nd Accused-Appellant, hereinafter sometimes referred to as the Appellant) and Hapuwita Badahelayalage Jepin Nona (the 1st Accused) for committing the Murder of Withanage Chandrarathna. The 1st accused had passed away in 2006 before the commencement of the trial and the trial proceeded against the 2nd Appellant and he was found guilty after the trial and convicted and sentenced to death. Being aggrieved with the said conviction the Appellant has appealed to the Court of Appeal and submitted four sets of grounds of appeal. Counsel for the Appellant at the stage of argument content the following grounds of appeal.

- I. Body was not properly identified according to the law.
- II. Item used to death was not identified.
- III. Credibility of the witnesses.
- IV. Witness No.2 has given evidence before Magistrate Court however he has not called before High Court to give evidence.
- V. Evidence given by the Doctor and evidence of 1st Accused are contradicted.
- VI. Learned Trial Judge has misdirected herself.

The Prosecution led the evidence of, Withanage Chaminda Sampath Withana (son of the deceased), Rajapaksege Mangalika Nayanakanthi Rajapakse (a neighbour of the deceased), Chief Inspector of Police Herath Mudiyansele Somapala, Police Constable Godawalage Sumanaweera and Judicial Medical Officer L.B.M. Alwis.

It will be appropriate to mention the facts of the case.

As per the Prosecution witnesses on 31st of January 1992, the deceased, his wife (the 1st Accused), son and three daughters were sleeps in their house which had two rooms. The deceased, his wife and one of their daughters were in one room and son

and Chamila Kumari (a daughter) and the other sister of them were in the other room. Around 12 mid-night Chaminda, the son of the deceased (1st Prosecution Witness- hereinafter sometimes referred to as PW1) and Chamila Kumari (a daughter of the deceased) while they were sleeping, they heard a loud cry which somebody was shouting “*ඔය අම්මෝ*”.

When they heard that shouting, immediately they went to the door-step of their father’s room of that house and he saw the person called “Ranji Mama” (2nd Accused-Appellant) hitting the deceased with an axe. However Chamila Kumari stated that, she saw Ranji Mama hold an axe with his hand, with the light of a kerosene lamp. Then Chaminda tried to enter the room, at which point the 2nd Accused walked out the room. Chamila Kumari stated to the Police that their mother (the 1st Accused) told them, “*අම්මා කිව්වා කියන්න එපා කියලා. කිවොත් එහ බොහො කිව්වා.*” (*don't shout and don't tell anyone if (you) do so not I will take poison*).

Immediately, after the incident, all children of the deceased were sent to their grandfather’s house, which was situated 50 yards away from their house, and they stated that they slept there and got up at about 6 a.m. Thereafter in the morning they were sent them to their relative’s house which was situated in Eheliyagoda where they heard that their father had passed away.

Bulathkohupitiya Police, received an information about missing of a person on or about 15th of February 1992. Then the investigation was commenced. During the investigation Police came to know and parts of the body of the deceased were recovered near a cave which was situated a kilometre away from the deceased’s house. PW1 gave evidence and identified his fathers’ partially burnt body and pieces of a bed sheet which was used at his house.

Considering the 1st ground of appeal is that the identification of the body of the deceased was not properly done according to the law.

The Defence contents that the evidence given by the PW1 in relating to the identification of the body is insufficient, as the said witness had only identified the body by the bed sheet in which the said body was wrapped and burned in. PW1 was able to identify the bed sheet with the colours and pattern which was used by his parents, hair of the head of deceased and parts of the legs (in page 42 and 43). In relation to whether the identification of the deceased by way of his hair, the JMO stated and confirmed that such identification could be made by a person who is closely related with the deceased and who is familiar with any characteristics or features of the deceased's physical appearance. As Justice Collin Thome stated in the case of **Jagathsena v. Bandaranayake [1984] 2 Sri L.R. 397-**

"Deportment and demeanour as the all important factor when it relates to the arriving of findings in regard to credibility even in a case where there were contradictions inter se in the evidence of the prosecution witness"

After carefully considering all facts, we are of the view that there is no merit in the 1st and 5th grounds of appeal.

The 2nd and 3rd grounds of appeal are that weapon used to commit death was not identified and the credibility of the witnesses.

PW1 stated that the murder weapon used in this case was an axe (ආයුධ). According to the evidence given by the PW1, he did not refer about any weapon at any time as anything other than an axe. This was evidenced and corroborated with the evidence given by the Chamila Kumari before the Learned Judge of the Magistrate Court in Case No.242/92 N.S.

Section 33 of the evidence Ordinance states that,

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or

cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:

Provided-

- (a) That the proceeding was between the same parties or their representatives in interest;
- (b) That the adverse party in the first proceeding had the right and opportunity to cross-examine;
- (c) That the question in issue were substantially the same in the first as in the second proceeding.

Further both the weapon and the body of the deceased were recovered under Section 27 of the Evidence Ordinance and were identified by the PW1, Chief Inspector of Police Herath Mudiyanseelage Somapala and Chamila Kumari before the Learned Judge of the Magistrate Court in the said Case No.242/92 N.S. Therefore, this ground of appeal also fails on its own merits. Therefore, the 2nd and 3rd grounds of appeal also fail on its own merits.

The 4th ground of appeal is that the witness No.2 has given evidence before Magistrate Court was not called before High Court to give evidence. In **Stephen and three others v. Republic of Queen [66 NLR 264]** held that,

"In a trial upon an indictment, the deposition made by a witness at the non-summary inquiry is not admissible in evidence after his death unless the original record of the non-summary proceedings is duly produced in evidence together with a certified copy of the deposition."

This case was followed by H.N.J. Perera J in **Rupersinghe Arachchige Upali Rupersinghe v. The Attorney General [CA 204/2012]**.

Considering the facts of this case, the evidence was led at the non-summary inquiry and submitted to the High Court under Section 33 of the Evidence Ordinance.

Therefore, the evidence given by Chamila Kumari before the Learned Judge of the Magistrate Court in the said Case No.242/92 N.S. is admissible under Section 33 of the evidence Ordinance.

The 6th ground of appeal urged by the Appellant is that Learned Trial Judge has misdirected herself. We carefully considered the judgment and we find that the Learned Trial Judge had carefully analysed the evidence before her and critically analysed the acceptability of the same. Thereupon she had come to her own conclusion. Considering the given circumstances we do not find there is any merit in this ground of appeal.

We carefully considered the grounds of appeal in the light of the evidence available before the trial court and the judgment and conclude that all grounds of appeal fails on its own merits.

Therefore, we dismiss the appeal and affirm the conviction.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL