

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

In the matter of an appeal made
under Section 331 of the Code of
Criminal Procedure act No. 15 of
1979.

The Democratic Socialist Republic
of Sri Lanka.

CA 246/2014
HC Kuliypitiya 150/2009

Complainant

V.

Walpola Aarachchilage Nimal

Accused

And Now Between

Walpola Aarachchilage Nimal

Accused-Appellant

V.

The Honourable Attorney General
Attorney General's Department
Colombo 12

Respondent

Before A.L.Shiran Gooneratne, J
K.Priyantha Fernando, J

Counsel Tenny Fernando for the Accused-Appellant.
Suharshi Herath ,SSC for the Respondent.

Argued on 27.02.2019

Written submissions

Filed on 07.11.2016-Accused-Appellant
04.08.2017-Respondent

Judgment on 04.04.2019

K. PRIYANTHA FERNANDO, J.

01.The Accused Appellant (Appellant) was indicted in the High Court of Kurunegala on two counts of murder punishable under section 296 of the Penal Code. On count No.1 and 2, he was alleged to have committed murder

of Marasinghe Arachchilage Chandraratne alias Ratne and Wijesinghe Arachchilage Shelton Wijesinghe respectively.

02. After trial the learned High Court Judge convicted the Appellant on both counts and sentenced the Appellant to death. Being aggrieved by the said conviction the Appellant had filed the instant appeal on the following grounds.

Grounds of appeal

1. The learned High Court Judge misdirected himself that the solitary eye witness is wholly reliable witness that can be relied upon to convict the Accused Appellant without corroboration.
2. Learned High Court Judge failed to judicially evaluate the conflicting evidence with regard to the belated statement of the solitary eye witness which cast a reasonable doubt on the prosecution case.
3. Learned High Court Judge misdirected himself by reconcile the *interse* contradictions in the prosecution case which clearly cast a doubt with regard to creditworthiness of the solitary eye witness and by proceeding to convict the Accused Appellant.

03. We carefully considered the grounds of appeal with the evidence adduced at the trial, the judgment of the learned Trial Judge, written submissions filed by the Counsel and the oral submissions made by the Counsel for both Appellant and the Respondent at the hearing of this appeal.

04. Case for the prosecution is based on the evidence of the sole eye witness Seelawathie (P.W.1). Her evidence was as follows:

She had been living in a hut with her son Suresh (P.W.2). Suresh had been building a house near the hut they were living. Two deceased had been helping Suresh to make bricks. On the day of the incident the Accused also had come to help in filling the foundation.

In the afternoon Suresh had gone out. At about 5.30 p.m. Seelawathie had been on the bed inside the hut sewing when she saw the Accused stabbing the two deceased and running away. She had screamed and the neighbours had come. Later Police had come and taken the injured (two deceased persons) to hospital. She had said that although she went to the Police Station, they refused to record her statement as the injured were still not taken to hospital.

05. As all three grounds of appeal are based upon the credibility and testimonial trustworthiness of the sole eye witness Seelawathie, they will be discussed together.

06. The contention of the Counsel for the Appellant is that, on the basis of the inconsistencies in the evidence of Seelawathie, her evidence cannot be relied upon. It was also submitted that she had given the statement after two days of the incident and the delay is not explained to the satisfaction of the Court.

07. Counsel for the Respondent submitted that, if at all there is a delay in recording the statement of Seelawathie, it is on the part of the Police. Counsel also submitted that the Medical officer who conducted the post mortems on the bodies of the deceased persons corroborated the evidence of Seelawathie as he also had observed a stab injury on each of the

deceased as testified by Seelawathie. It is the contention of the Counsel that the evidence of witness Seelawathie could be relied upon.

08. Court can safely convict an Accused on the evidence of a sole eye witness if the Court finds the sole eye witness wholly reliable. Superior Courts have observed that evidence of the sole eye witness needs to be subjected to deeper scrutiny. If the conduct of the solitary eye witness is highly unnatural and his or her presence at the crime scene is doubtful, it is unsafe to record a conviction based on the testimony of such a solitary eye witness. (*Gaital V. State 1988 CrLJ960, Wijepala V. AG [2001] 1S.L.R. 46, Bindar Sing V. State of Rajasthan 1984 CRLJ 178; Raj 285(DB), Sumanasena V. AG [1999] 3S.L.R. 137*)

In case of *Wijepala V. AG [2001] 1S.L.R. page 46, at page 57, Ismail J. said;*

“ ... Evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances with suspicion in the testimony of such witness, then corroboration may be necessary.”

09. On perusal of the evidence of the witness Seelawathie, we find that she had not been consistent in her testimony. In her evidence in chief she had said that she had not known the Accused before and that she saw him for the first time on the day of the incident. However, the evidence of Suresh (son of Seelawathie) revealed that the Accused had been known to him for about 7 years and Accused had also been living in their house 2 to 3 months prior to the incident.

10. Seelawathie in her evidence in chief said that when the Accused ran, she screamed and then the neighbours came. In cross examination she said that although she screamed no one came to the scene. She confirmed that until she left the house, no one came. However, she had told the Police in her statement that neighbours Dinesh, Somasiri, Ranjith, and Rosalin came to

her house when she screamed. None of those people said to have come were made witnesses nor given statements to Police.

11. The evidence of the Police officer Herath who went to the scene at 10.30 pm was that, although he made inquiries as to whether there were eye witnesses, nobody came forward. The person who was at home had gone to make a call. Although the statement of Suresh had been recorded the same night, evidence did not reveal that he knew that his mother Seelawathie had seen the incident. Police officer Ratnayake has visited the crime scene around 1.30 am (same night). Police have failed to record the statement of Seelawathie even at that time. Even on the report filed by the Police in the Magistrates' Court the following day, on 18.01.2017, Police had not revealed any eye witnesses to the crime. Seelawathie had made the statement to Police only on 19.01.2017, two days after the incident. Even on the 18.01.2017 when the Magistrate visited the crime scene Seelawathie had not come forward as a witness who saw the incident. She also had failed to explain the delay in making her statement for two days when she had ample opportunity to come forward when the Police came to her house at 1.30 on the same night and also when the Magistrate visited the scene of crime the following day.

12. Delay in making the statement to the Police would affect the credibility of the witness. However, if the witness explains the delay to the satisfaction of the Court, his evidence can be relied upon. The explanation has to be plausible. (*Perera V. Attorney General CA107/2011, Sumanasena V. Attorney General [1999] 3 S.L.R. 137,*)

13. In the above premise, we are of the view that the evidence of the sole eye witness Seelawathie cannot be relied upon. There are no other circumstances that would enable the Court to come to an inescapable inference of Appellants' guilt. Therefore, we find that the conviction of the

Appellant could not be sustained and should be set aside. Hence, the Appellant is acquitted of the charges.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL