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

In the matter of an Appeal under Section 331 of the Criminal Procedure Act. No 15 of the 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

V.

Court of Appeal Case No.
CA /HCC 25/2019

High Court of Colombo
Case No.HC 1372/03

1. Solanga Arachchige Rupasinghe Alias Nandana
2. Thonnagamage Sarath Wijesinghe Alias Suuda
3. Madurapperuma Arachchige Ajith Alias Hitchcha

Accused

And Now Between

Solanga Arachchige Rupasinghe Alias Nandana

Accused-Appellant

V.

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

Complainant-Respondent

BEFORE	:	**K. Priyantha Fernando, J. (P/CA)** **Sampath B. Abayakoon, J.**
COUNSEL	:	Palitha Fernando, PC with Niranjan Jayasinghe for the Accused - Appellant. Sudharshana De Silva, DSG for the Respondent.
ARGUED ON	:	27.07.2021
WRITTEN SUBMISSIONS FILED ON:		09.09.2019 by the Accused Appellant. 04.10.2019 by the Respondent.
JUDGMENT ON	:	16.09.2021

K. Priyantha Fernando, J. (P/CA)

1. The 1st accused appellant (hereinafter referred to as appellant) was indicted in the High Court of Colombo with two other accused on one count of Murder. The 2nd accused died pending trial, and the 3rd accused had been acquitted after trial by the learned High Court Judge. The appellant was convicted and sentenced to death. Appellant being aggrieved by the said conviction preferred this appeal on the following grounds;

    1) The inquiry led for the purpose of applying depositions of the PW1 at the High Court in terms of section 33 of the Evidence Ordinance is bad in law.

    2) There are infirmities in the Judgment by the learned Trial Judge.

Facts in brief.

2. As per the evidence of the eye witness *G.A.Duleeka Iranga* (PW3) who has testified for the prosecution in the High Court, he had gone to the house of the deceased who was his friend, at about 7pm. He had been talking with deceased, sister and the brother-in-law of the deceased. At about 10pm he had gone to the 3rd accused's sisters house that was about 10 to 15 meters away from the house of the deceased. After spending about 15 minutes there, he had been coming back towards the deceased's house. He had seen the 3rd accused quarreling with the wife. Then the deceased had come and told them not to quarrel. The 2nd accused who is the brother-in-law of the 3rd accused had come and assaulted the deceased. Witness and the 3rd accused had tried to prevent the assault but failed. Then the appellant who is a relative of the 3rd accused had come. PW3 had known the appellant by name as *Nandana* as the appellant used to come to the 3rd accused's house. The appellant who came running had fired a shot on the forehead of the deceased with a small weapon. Distance between the appellant and the deceased when the deceased was shot had been about 6 feet. Witness had got a three-wheeler down and had taken the deceased to hospital with the brother-in-law of the deceased. He had got to know at the hospital that the deceased had died.

3. Although in the written submissions two grounds of appeal were discussed, at the hearing the learned President's Counsel for the appellant pursued only the 2nd ground of appeal.

4. The learned President's Counsel for the appellant submitted that according to the eye witness PW3, the distance between the appellant and the deceased when the deceased was shot by the appellant was about 6 feet. According to the doctor (PW6) who conducted the autopsy on the body of the deceased, the gunshot injury had been on the forehead. She also has observed burn marks near the eyebrows. PW6 has opined that generally such burn marks appear when the shooting occurs from a close range, like inches. It is the contention of the learned President's Counsel that if the shooting took place within a range of about 6 feet as the eye witness PW3 testified, such burn marks could not have been caused. When the evidence was taken holistically, especially when the appellant has denied any involvement in the incident, the evidence of the identity of the assailant by the PW3 cannot be relied upon, learned President's Counsel submitted.

5. PW 3 has given clear consistent evidence as to how the shooting took place. There is no issue about the light at the place of the incident that night. As submitted by the learned DSG for the respondent there had been sufficient light for the PW3 to identify the appellant. According to the police officer (PW7) who inspected the crime scene the same night has observed street lamp on. His unchallenged evidence was that apart from the light that was emanating from the street lamp, that there was moon light as it was about two days after the full moon *poya* day.

6. It was the unchallenged evidence of the PW3 that he knew the appellant before. He has been about 20 years of age when the incident took place and he has testified in court 16 years after the incident. On the identity of the appellant his evidence has been consistent. There was no evidence that he had any reason to falsely implicate the appellant. When he said that the shooting took place within a range of about 6 feet it is clear that it is close range. The evidence of the doctor that the burn marks generally appear when shooting happens within a distance of inches, therefore, will not affect the credibility of the evidence PW3 that he identified the appellant as the person who shot the deceased.

7. The Indian Supreme Court in ***State of Uttar Pradesh V. M.K Anthony [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499*** held;

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general*

tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

This was referred to and followed in case of ***Oliver Dayananda Kalansuriya V. Republic of Sri Lanka CA 28/2009 (13.02.2013).***

8. The evidence of PW3 read as a whole appears to have ring of truth and could be acted upon.

9. The learned President's counsel submitted that the learned High Court Judge erred when he said at page 34 of his judgment (page 283 of the brief), that the evidence of PW 3 was corroborated by the evidence of PW1. Evidence of PW1 that was given in the non-summary inquiry has been adopted in terms of section 33 of the Evidence Ordinance. PW 1 has testified as to how the shooting incident took place, but has not identified the person who shot. The learned Trial Judge in his judgment in the same page 34 when narrating the evidence of PW1 has said that the PW1 has identified the appellant. (එම ස්ථානයේ 2 සහ 3 විත්තිකරුවන් සිටි බවත්, එසේ සිටින විට 1 වෙනි විත්තිකරු පැමිණ වෙඩි තැබූ බවත්,)That part of the narration of evidence by the learned High Court Judge is clearly wrong as the PW1 has not identified the appellant. However, at the same page the learned High Court Judge has rightly said that the PW1 has not identified the appellant. (3 වෙනි විත්තිකරු මිය ගිය පුද්ගලයාව රැගෙන යාමට උත්සහ කිරීමේදී අඩි 2 ½ක් පමණ දුරින් සිටි පුද්ගලයෙකු වෙඩි තැබූ බවත්, ඔහුව දන්නේ නැති බවත් ඔහුගේ අතේ පිස්තෝලයක් තිබූ බවත්, වෙඩි තැබීමෙන් අනතුරුව විත්තිකරු දිව ගිය බවත්…)

10. Hence, the PW3 's evidence is corroborated by the evidence of PW1 only on the incident, but not on the identity of the appellant.

11. Now I will turn to consider whether the evidence of PW3 alone is sufficient to find the appellant guilty as charged. It is settled law that the evidence of a single solitary witness if cogent and impressive can be acted upon. Section 134 of the Evidence Ordinance provides that no particular number of witnesses shall in any case be required for the proof of any fact.

12. In case of ***Sumanasena V. Attorney General CA 61/97 [09.02.1999],*** it was held;

> *"In our law of evidence, the salutary principle is enunciated that evidence must not be counted, but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law."*

13. In case of ***Wijepala V. Attorney General SC Appeal 104/99 [03.10.2000]*** the Supreme Court held;

> *"...Section 134 of the Evidence Ordinance lays down a specific rule that no particular number of witnesses shall in any case be required for the proof of any fact, thus attaching more importance to the quality of evidence rather than the quantity. The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial. ..."*

14. As I have said before, the evidence of the PW3 is cogent, consistent and impressive, can therefore be acted upon. There are no circumstances of suspicion in his testimony. Hence, I find that the ground of appeal urged by the appellant is devoid of merit.

15. Appeal is dismissed. Conviction and the sentence on the appellant by the High Court is affirmed.

PRESIDENT OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL