

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

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

Democratic Socialist Republic of Sri
Lanka

**Court of Appeal Case No.
CA/HCC/0220/2019**

Complainant

**High Court of Kurunegala
Case No. HC/140/2013**

V.

Rajapaksha Durayalage Nishantha
Wijesiri

Accused

AND NOW BETWEEN

Rajapaksha Durayalage Nishantha
Wijesiri

Accused – Appellant

V.

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

Complainant–Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**
WICKUM A. KALUARACHCHI, J.

COUNSEL : Jagath Nanayakkara for the Accused –
Appellant.
Anoopa de Silva, Senior State Counsel for the
Respondent.

ARGUED ON : 03.03.2022

WRITTEN SUBMISSIONS

FILED ON : 04.05.2021 by the Accused – Appellant.
01.06.2021 by the Respondent.

JUDGMENT ON : 04.05.2022

K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as the appellant) was indicted in the High Court of *Kurunegala* on one count of attempted murder, punishable in terms of Section 44(a) of the Fire Arms Ordinance to be read with Section 300 of the Penal Code. Upon conviction after trial, the learned High Court Judge sentenced the appellant with imprisonment for life. Being aggrieved by the above conviction, the appellant preferred the instant appeal. At the hearing of the appeal, the learned Counsel for the appellant urged the following two grounds of appeal.

- I. The learned High Court Judge has failed to consider the contradictions in the evidence of the prosecution witnesses.
- II. The learned High Court Judge has failed to consider the version of the defence.

2. Facts in brief

As per the evidence of the victim *Gayani Fernando* (PW1), the appellant is her brother-in-law (sister's husband). The appellant and his wife have been living in PW1's mother's main house. On the day of the incident, the appellant has been moving his household items as he was to move to another house close by. On hearing the child of the appellant crying, the victim's mother (appellant's mother-in-law) has told the appellant's wife to first feed the baby and then move the household items. Upon hearing that, the appellant has got angry and tried to assault the mother-in-law with a *katty* knife where the knife has struck the roof. The appellant's mother and sister who live close by have then come and quarrelled with the sisters. The appellant has pushed the victim who then told that she is going to the Police. The victim has then heard a sound of a gun being cocked followed by the sound of a gun being fired, immediately she has felt her arm turning cold and experienced bleeding. She has seen the appellant holding the gun shortly before she fell unconscious.

3. The evidence of the appellant was that he had a fight with his wife and he assaulted her once with his hand. Thereafter, he had thrown a club outside and that club has hit the victim. He has denied using a gun.

4. **Ground of appeal No.1**

The learned Counsel for the appellant submitted that although the PW1 has heard the sound of firing a weapon, PW2, who is the mother of the PW1 has not heard the sound. PW1 in her evidence clearly said that she heard the sound of a gun being cocked, and with the sound of firing she felt her arm turning cold. Further, she has seen the appellant holding the gun. The evidence of the PW2 was that she saw the quarrel but did not see the appellant firing the gun. However, she has seen the appellant holding the gun. On answering the question whether she heard the gun shot, she replied (page 90-91 of the brief);

ප්‍ර : “වෙඩි තියන සද්දේ ඔබට ඇහුනාද?”

උ : “ගානක් නැහැ. ස්වාමීනි, එහෙම සද්දයක් නම් ඇහුනේ නැහැ. ගොඩක් ලේ ගැලුවා.”

ප්‍ර : “දැන් වෙඩි තියනකොට සද්දයක් ඇහෙන්න එපාය ඩෝ ගාලා. එහෙම සද්දයක් ඇහුනාද?”

උ : “මට ගානක් නැහැ.”

5. The evidence of the Medical Officer confirmed that the victim has received a gunshot injury. PW4 Dr. *Dissanayake* said that the injury is consistent with the short history related to her by the victim. The injury according to PW4 is a guttered laceration. The force has caused a fracture as well. PW4 has answered a question by the defence stating that a fracture of this kind could be caused by hitting with a club or a pole. However, her evidence was that the victim has received a gunshot that has caused the guttered laceration. The medical evidence does not support in any manner the position that the said guttered laceration could be caused by a club being thrown at or it being hit on the elbow. Hence, when the evidence is taken as a whole, the fact that PW2 said that she did not hear a gun being fired, has not created any doubt on the case for the prosecution that the injury was caused by a gunshot.

6. It has frequently been pointed out that, when the question turns on the manner and demeanour of witnesses, the Appellate Court should generally be guided by the impression made on the Judge who saw the witnesses. (*Montgomery & Company V. Wallace-James (1904 appeal Cases 73), Fradd V. Brown & Company, 20 NLR 282*). In the instant case, the same High Court Judge before

whom the witnesses testified has delivered the judgment, and this court will be slow in overruling her decision on the demeanour and the credibility of the witnesses, unless this Court finds that the judgment of the trial Judge is manifestly wrong where circumstances may warrant this Court differing from the judgment of the learned trial Judge.

7. In case of ***State of U.P. V. M.K. Anthony [1985] CRI.L.J. 493***, Indian Supreme Court held:

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view of the deficiencies, draw-backs 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 render 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 or there from the 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. ...”

8. The learned Counsel for the appellant also submitted that the evidence of the Deputy Government Analyst who was called by the defence was, that the weapon alleged to be recovered on the statement made by the appellant and was produced by the prosecution, was defective. However, the said witness clearly testified that irrespective of the technical defects, the weapon can be used to fire, and also that it has been used before.
9. Hence, I find that the evidence for the prosecution taken as a whole appears to have a ring of truth and the minor discrepancies would

not create any doubt on the prosecution story. Therefore, this ground of appeal is devoid of merit.

10. Ground of appeal No.2.

The learned Counsel for the appellant submitted that the version of the defence at the trial was that the injury sustained by the victim may have been caused by the club that was thrown by the appellant. The learned Counsel relied on the evidence of the Medical Officer where he said that the fracture may have been caused by being hit with a pole. (page 85-86 of the brief)

ප්‍ර : “පොල්ලකින් පහරදීමේදීන් එවැනි ආකාරයේ හත්තයක් සිදු විය හැකියි නේද?”

උ : “මොන යම් හෝ පීඩනයක් යෙදීමේදී අස්ථි හත්තයක් සිදු විය හැකියි.”

11. As mentioned in paragraph 5 of this judgment, the Medical Officer clearly testified that the guttered laceration has been caused by a gunshot. Even the fracture may have been caused by the said gunshot. The learned High Court Judge at pages 12 and 13 of her judgment (pages 196 and 197 of the brief) has given sufficient reasons for rejecting the defence version. Hence, this ground of appeal also fails.

12. For the aforementioned reasons, I find no reason to interfere with the judgment of the learned High Court Judge. The conviction and the sentence imposed on the appellant by the learned High Court Judge are affirmed.

Appeal dismissed.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL