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

In the matter of an Appeal made under  
Section 331(1) 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.

**Court of Appeal No:**

**CA/HCC/0376-379/2018**

**High Court of Colombo**

**Case No: HC/1283/2003**

1. Thanippuli Arachchige Pradeep Jayalal  
alias Chooty
2. Muhandiramge Padmasiri Alwis
3. Jayasekera Arachchige Jubi Sampath
4. Thanippulige Arachchige Anura  
Jayantha

**ACCUSED-APPELLANTS**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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**BEFORE** : **Sampath B. Abayakoon, J.**  
**P. Kumararatnam, J.**

**COUNSEL** : **Moditha T.B. Ekanayake for the 1<sup>st</sup>**  
**Accused-Appellant.**  
**Neranja Jayasinghe with Harshana**  
**Ananda and Dulshan Katugampola for the**  
**2<sup>nd</sup> Accused-Appellant.**  
**Saliya Pieris, PC with Pasindu**  
**Thilakaratne for the 3<sup>rd</sup> Accused-**  
**Appellant.**  
**Anil Silva, PC with J.Kalupahana for the**  
**4<sup>th</sup> Accused- Appellant.**  
**Dileepa Pieris, SDSG for the Respondent.**

**ARGUED ON** : **05/08/2022 and 09/08/2022**

**DECIDED ON** : **30/09/2022**

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### **JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted in the High Court of Colombo under Section 296 read with Section 32 of the Penal Code for committing the murder of Narayana Thanippuli Hewage Ranjith Fernando on or about 16<sup>th</sup> February 1996.

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The trial commenced before the Judge of the High Court of Colombo as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and all the Appellants had made dock statements and denied their charge. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them to death on 28/11/2018.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The learned Counsels for the Appellants informed this court that the Appellants have given consent for this matter to be argued in their absence due to the Covid 19 pandemic restrictions. Also, at the time of argument the Appellants were connected via Zoom platform from prison.

**Background of the Case.**

PW2 is a cousin sister of the deceased. On the day of the incident at about 8.30 p.m. while she was listening to the radio in the kitchen, the deceased had come running into her house and had hidden behind a cupboard. In a while a group of persons including 1<sup>st</sup> and the 4<sup>th</sup> Appellants had entered her house and had had a scuffle with the deceased there. As she started to scream due to fear, the group had forcibly carried the deceased out of her house. Thereafter, she had seen the deceased being carried into a land called “Palu Watta”. After some time, the group had left the place. Thereafter, the people of the area had brought the deceased out of the “Palu Watta” and taken him to hospital. She had seen bleeding injuries on the stomach of the deceased at that time.

PW4, a neighbor of PW2 had also witnessed the incident upon being vigilant hearing the cries raised by PW2. She too had seen a group of people carrying the deceased out of PW2’s house. She too had raised cries at that time.

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Among the group, she had identified the 1<sup>st</sup> Appellant. She too had witnessed the group carrying the deceased to “Palu Watta”. After the deceased was brought out from “Palu Watta”, she had seen serious injuries on the deceased’s body.

Hearing the cries of PW4, the brother of the deceased PW3, had stepped out from his house and had gone up to the fence and had witnessed all four Appellants with various weapons shouting in abusive language. Thereafter, he had seen the Appellants coming out from “Palu Watta” carrying the weapons. According to him the 1<sup>st</sup> Appellant carried a sword, 4<sup>th</sup> Appellant carried a Manna knife and others carried iron rods. After the departure of the Appellants, the crowd carried the deceased from “Palu Watta” towards the road and had taken him to the hospital. The deceased had suffered 13 external cut injuries on his body.

As animosity existed between the 1<sup>st</sup> and 4<sup>th</sup> Appellants and the deceased, the 1<sup>st</sup> and 4<sup>th</sup> Appellants had come to PW3’s house in search of the deceased once prior to the killing. As they could not find the deceased, they had left his house after assaulting the deceased’s father. PW3 was about 18 years old when he witnessed the incident pertaining to this case.

Having satisfied that the prosecution had made out a prima facie case against the Appellants, the learned Trial Judge had called for the defence and all the Appellants had made dock statements and closed their case.

The Appellants had separately canvassed their Appeal grounds through their Counsel.

The learned Senior Deputy Solicitor General at the very outset of his submission and keeping with the highest traditions of the Attorney General’s Department submitted that as no plausible evidence was led against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants during the trial by the prosecution, he is not contesting the Appeal grounds raised by the Counsels for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.

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Hence, I shall now proceed to consider the appeal grounds raised by the 1<sup>st</sup> and 4<sup>th</sup> Appellants only.

**The First Appellant had filed following grounds of appeal.**

1. Failure of the prosecution to prove the death of the person named in the indictment.
2. Identification of the 1<sup>st</sup> Appellant was not done beyond reasonable grounds.
3. Failure of the learned Trial Judge to make a judicial evaluation of the credibility of the prosecution witness by analyzing contradictions marked by the defence.
4. No observation notes prepared by the police officers regarding the incident during the investigation.

**The fourth Appellant had filed following grounds of appeal.**

1. Has the prosecution proved the case against 4<sup>th</sup> Appellant beyond reasonable grounds.
2. If the contradictions and commissions in the evidence of PW2 and PW3 were evaluated according to law would that have created a reasonable doubt about the presence of the 4<sup>th</sup> Appellant at the scene of crime.
3. If the evidence of Ranil Fernando cannot be considered against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants does that create a reasonable doubt as regards the 4<sup>th</sup> Appellant as well.
4. Can the discovery of a witness in consequence of a statement made by an accused be led under Section 27 of the Evidence Ordinance.

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Considering the grounds of appeal raised by the 1<sup>st</sup> and 4<sup>th</sup> Appellants, it becomes apparent that few of the grounds are interrelated. Hence, I will first consider such common grounds of appeal of both the 1<sup>st</sup> and 4<sup>th</sup> Appellants.

Both the 1<sup>st</sup> and 4<sup>th</sup> Appellants under number two of their respective grounds of appeal contended that the identification of 1<sup>st</sup> and 4<sup>th</sup> Appellants has not been proved beyond reasonable doubt due to the contradictory nature of the evidence given by PW2 and PW3.

Proper identification of the accused persons is a fundamental point that needs to be determined at the beginning of a criminal trial. In this case it is very important to discuss whether the prosecution has established the identity of the 1<sup>st</sup> and 4<sup>th</sup> Appellants beyond reasonable doubt. If the identification is compromised, the net result would be the acquittal of the accused persons from the case. Hence evidence of identification should be considered very seriously due to its delicate nature. In this case an identification parade had not been held in respect of the 1<sup>st</sup> and 4<sup>th</sup> Appellants.

The following judgments are very important as it elaborates the vitality of identification evidence and discusses how the fate of a case depends upon it.

In **Karunaratne Mudiyansege Madduma Bandara v. The Attorney General** CA/190-192/11 decided on 15/03/2013, the court acquitted the accused on the ground that the identification of the accused persons have not been proved beyond reasonable doubt because the prosecutrix failed to divulge the names of the accused persons to the police who was known to her prior to the incident.

**Gorle S. Naidu v. State of A.P.** [1997] Appeal (crl) 232-234. In this case the facts related to the murder of two individuals. In the FIR, the prosecution witness merely mentioned that the assailants were followers of one of the appellants, but none were specifically named. However, later in court, they

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stated the name of the assailants. The Court held that such omission was a vital omission.

In **R v. Turnbull** [1977] QB 224 the court held that:

*“Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused-which the defence alleges to be mistaken-the judge should be cautious before convicting the accused in reliance on the correctness of the identification(s). The judge should take into consideration that:*

- *Caution is required to avoid the risk of injustice;*
- *A witness who is honest may be wrong even if they are convinced, they are right;*
- *A witness who is convincing may still be wrong;*
- *More than one witness may be wrong;*
- *A witness who recognizes the defendant, even when the witness knows the defendant very well, may be wrong.*

In this case two identification parades were held in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. PW2 and PW4 had failed to identify the 2<sup>nd</sup> Appellant and PW2 had failed to identify the 3<sup>rd</sup> Appellant in their respective identification parades. But PW3 had identified the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants in the identification parades.

The learned State Counsel in his final submission before the High Court requested the court to specially convict 1<sup>st</sup> and 4<sup>th</sup> Appellants based on the evidence given by PW2. The relevant portion is reproduced below:

ඒ අනුව මම ගෞරවයෙන් සැල කර සිටින්නේ, විත්තිකරුවන්ගේ විත්තිවාචිකය ප්‍රතික්ෂේප කරන ලෙසත් මෙම නඩුවේ විශේෂයෙන්ම සාක්ෂි අංක 02 ගේ මනාව තහවුරු වෙන ලද සාක්ෂි පදනම් කරගෙන මේ නඩුවේ විශේෂයෙන්ම අංක 1 හා 4 චූදිතයන් මේ නඩුවට වරදකරු බවට තීන්දු කරන ලෙසත්ය.

(Page 657 of the brief.)

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PW2 in her evidence before the High Court stated that on the date of incident about seven persons had entered her house and dragged the deceased out of her house. Although she had said that she identified 1<sup>st</sup> and 4<sup>th</sup> Appellants at that time, she had given some evidence that was contradictory to the evidence given by her in the examination-in-chief.

In the non-summary inquiry PW2 had said that two persons entered her house and one had attacked the deceased with a sword. This contradiction was marked as 1V-13.

Further she had told the police that Chuti had attacked the deceased inside her house. This contradiction was marked as 1V-14.

In the contradiction marked as 1V-16, PW2 had told the police that she had clutched Chuti to prevent the deceased being attacked by Chuti.

At the inquest PW2 had said that Chuti had cut the deceased with the sword and whereby the sword had landed on the deceased. These contradictions were marked as 1V-17 and 18.

In the non-summary inquiry PW2 had stated that the 1<sup>st</sup> Appellant had attacked the deceased with a sword. This contradiction was marked as 1V-19.

But in the High Court PW2 had said that she did not see a sword in the hands of the 1<sup>st</sup> Appellant. Further her position in the trial was that the persons who entered her house dragged the deceased out and took him to the "Palu Watta". Nothing was mentioned about the deceased being attacked with a sword inside the house and PW2 trying to prevent the 1<sup>st</sup> Appellant attacking the deceased.

Two omissions in respect of the 4<sup>th</sup> Appellant had been brought to the notice of the court during the trial. In the first omission PW2 had not revealed the identity of the 4<sup>th</sup> Appellant to the police. Further she had not mentioned anything about the 4<sup>th</sup> Appellant during the inquest proceedings.



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PW4 in her evidence stated that she was not aware of the name of the 1<sup>st</sup> Appellant who was among the persons who dragged the deceased out of PW1's house. But she only came to know about the identity of 1<sup>st</sup> Appellant when she gave her statement to the police. The relevant portion is reproduced below:

ප්‍ර : සිද්ධිය වුණු දිනයේ රංජිත්ව එලියට ඇඳලා ගත්තේ වූටි කියන නම නමා දැන ගෙන සිටියාද?

උ : ඒ වෙලාවේ මම දැන ගෙන සිටියේ නැහැ. පොලිසියේ ඇවිත් සාක්ෂි සටහන් කරන විට නමයි මා හරියට දැන ගත්තේ.

ප්‍ර : නමා එයාව දන්නවා ?

උ : එහෙම දන්නේ නැහැ.

(Page 322-323 of the brief.)

PW4 further said that that she only came to know the name of the 1<sup>st</sup> and 4<sup>th</sup> Appellants through PW2. The relevant portion is reproduced below:

ප්‍ර : සාක්ෂිකාරිය නමා මේ ප්‍රකාශය දෙනකොට වූටි සහ ජයන්ත නම් කරලා හඳුන්වලා දන්නා ?

උ : හඳුන්වලා දන්නා නොවේ එදා සිද්ධිය වෙත වෙලාවේ කුසුමාවතී කිව්වා වූටි, ජයන්තයි කියලා. මම වූටි කියන්නවත් දන්නේ නැහැ. මම පස්සේ කිව්වාම නමයි දැනගත්තේ.

(Page 334 of the brief.)

She also said that she has not identified the 4<sup>th</sup> Appellant at the time of the incident. The relevant portion is reproduced below:

ප්‍ර : ඒ ප්‍රකාශයේ ඊට පස්සේ නමා වූටි සහ ජයන්ත කියලා ප්‍රකාශයේ නමින් කියලා තිබෙනවා ?

උ : මම කිව්වා මෙහෙම දෙයක් වුණා කියලා. රංජිට එදා ගහන්න ආවම දැක්කේ ජයන්ත රංජිව මරණ වෙලාවේ දැක්කේ නැහැ ජයන්ත මම හඳුනා ගත්තේ නැහැ ස්වාමිනි. වූටි නමයි හොඳටම දැක්කේ.

(Page 337 of the brief)

According to PW3, he had only seen the Appellants running away from the “Palu Watta” with weapons in their hands. Further he had admitted that he

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stated during the inquest that he suspects Chuti and two other persons regarding the murder of the deceased. He further admitted during cross examination that he had not mentioned the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants to the police.

Considering the evidence given by PW2, PW3 and PW4 with regard to the identity of the 1<sup>st</sup> Appellant and the 4<sup>th</sup> Appellant, there are contradictions and omissions which certainly affect the outcome of the decision.

The proof of contradiction is vital to destroy the credibility of the case of the prosecution. Proved contradictions and omissions which can affect the case of the prosecution plays a vital role in a criminal case.

PW2 is the most important witness in this case. The contradictions marked in her evidence are vital and certainly affects her credibility. They also raise doubts about the probability of the incident as described by the PW2. What she told to the police and at the inquest needs to be considered carefully as PW2 had fresh memory regarding the incident when she gave her statement and evidence during the inquest. Failing to mention important facts which result in the failure to accurately identify the accused certainly affect the prosecution case.

Further PW2's omission in mentioning the 4<sup>th</sup> Appellant's name to the police and at the inquest affects her credibility in this case. These omissions should not be considered lightly, as it certainly affects the conviction of the 4<sup>th</sup> Appellant.

The contradictions and omissions marked on PW2's evidence certainly have a negative impact on the evidence given by PW4 as she had said that the identity of the 1<sup>st</sup> Appellant was revealed by PW2 when she gave her statement to the police.

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In the case of **AG v. Sandanam Pitchai Mary Theresa** (2011) 2 Sri L.R. 292 the court held that:

*“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and should consider whether they are material to the fact in issue”.*

In the case of **K. Padmathilaka alias Sergeant Elpitiya v. The Director General of Commission to Investigate Allegation of Bribery and Corruption** [2010] BLR 67 the court held that:

*“Credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge. When witness makes an inconsistent statement in their evidence either at one stage or two stages, the testimony of such witness is unreliable.....It is a cardinal principle that unreliable evidence cannot be rendered credible, simply because there is some corroboration material”.*

The evidence of PW2 and PW4 as to the incident creates serious doubt with regard to the identity of the 1<sup>st</sup> and 4<sup>th</sup> Appellants. The contradictory positions taken by witnesses are vital and certainly goes to the root of the case and is sufficient to create a reasonable doubt in the prosecution’s case. Hence, I am of the view that this ground of appeal has merit and certainly vitiates the conviction.

As the ground of appeal considered above which was jointly raised by both the Counsels for the 1<sup>st</sup> and 4<sup>th</sup> Appellants is sufficient to affect the credibility of prosecution case and certainly disturbs the judgment of the learned High Court Judge, it is not necessary to address the remaining grounds raised by 1<sup>st</sup> and 4<sup>th</sup> Appellants in this appeal.

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Further, as the Learned Senior Deputy Solicitor General had not contested the conviction and sentence imposed against 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, I set aside their conviction and sentence imposed on 28/11/2018.

Due to the aforesaid reasons, I set aside the conviction and the sentence dated 28/11/2018 imposed on the 1<sup>st</sup> and 4<sup>th</sup> Appellants by the learned High Court Judge of Colombo too. Therefore, all the Appellants are acquitted from the charge.

The Registrar of this Court is directed to send a copy of this judgement to the High Court of Colombo along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**Sampath B. Abayakoon, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**